

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
LEGAL ETHICS OPINION 1885**

PETITION OF THE VIRGINIA STATE BAR

Doris Henderson Causey, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Emily F. Hedrick, Asst. Ethics Counsel
Virginia State Bar
1111 East Main Street
Suite 700
Richmond, VA 23219-0026
Phone (804) 775-0500
Fax (804) 775-0501

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

The Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, requests review and approval of proposed Legal Ethics Opinion 1885, as set forth below. The proposed opinion was approved by a vote of 59 to 6 by the Council of the Virginia State Bar on October 27, 2017 (Appendix, Page 5).

I. Overview of the Issues

In this proposed opinion, the Committee considered a scenario posed by a member of the bar involving a lawyer's participation in an online attorney-client matching service (ACMS) operated by a for-profit lay entity in which the lawyer:

a) provides a client with limited scope legal services advertised to the public by the ACMS for a legal fee set by the ACMS;

b) allows the ACMS to collect the full, prepaid legal fee from the client, and to make no payment to the lawyer until the legal service has been completed;

c) authorizes the ACMS to electronically deposit the legal fee to the lawyer's operating account when she completes the legal service; and

d) authorizes the ACMS to electronically withdraw from the lawyer's bank account a "marketing fee" which, by prior agreement between the ACMS and the lawyer, is set by the ACMS and based upon the dollar amount of the legal fee paid by the client.

The proposed opinion discusses the application of Rules of Professional Conduct regarding scope of representation, reasonableness of fees, and exercise of independent judgment. It reaches two primary conclusions: (1) that a lawyer's participation in the program violates Rules 1.15 and 1.16 because it does not permit the lawyer to fulfill her duties to safeguard her client's funds and to refund unearned fees at the conclusion of the representation, and (2) that participation in the program violates Rules 5.4(a) and 7.3(d) because it involves sharing legal fees with a nonlawyer and giving something of value (the "marketing fee") in exchange for a recommendation of the lawyer's services. The opinion concludes that a lawyer's participation in such a program is prohibited for both of these reasons.

As to Rule 1.15, the problem arises because the client's advanced payment for legal services is held by the ACMS pending completion of the legal work by the lawyer, and the ACMS is not a lawyer, not subject to regulation by the Virginia State Bar, and does not hold the funds in a regulated trust account. This means that

the client's funds may not be available to the client in the event of the ACMS entity's cash-flow problems, insolvency, or bankruptcy, and the client is therefore deprived of an important protection against the loss or conversion of his or her funds. Further, this arrangement impermissibly places the ACMS in control of whether a refund is made to the client in the event that the representation is terminated, when that is an obligation that belongs to the lawyer under Rule 1.16(d).

As to the "marketing fee," there are two Rules of Professional Conduct that prohibit the lawyer from participating in this arrangement. First, Rule 5.4(a) prohibits a lawyer or law firm from paying a nonlawyer a portion of the legal fees generated by any particular matter. In the hypothetical presented in proposed LEO 1885, a legal fee is impermissibly shared with a nonlawyer because a portion of the fee is given by the lawyer to the ACMS. Labeling the online service's entitlement a "marketing fee" does not alter the fact that a lawyer is sharing her legal fee with a lay business, which is prohibited by Rule 5.4(a).

Secondly, Rule 7.3(d) prohibits a lawyer from giving anything of value in exchange for a recommendation, except that a lawyer may pay the reasonable costs of advertising or the usual charges of a legal service plan or a not-for-profit lawyer referral service. The ACMS in this scenario is neither a legal service plan nor a not-for-profit lawyer referral service; it is a for-profit business that collects fees

based upon the legal fees generated by lawyers who match with clients via the ACMS's platform. The marketing fee is not the "reasonable costs of advertisements" because it is tied to the legal fees actually paid by the client, whereas the costs of advertising do not directly depend on the amount of legal fees paid or collected. The "reasonable costs of advertisements or communications" may be based on any number of factors such as quality of presentation, market exposure, demography, and measurable levels of interest evoked (such as pay-per-click payments). However, a Virginia lawyer violates Rule 7.3(d) when she pays another—including an internet marketer—a sum tethered directly to her receipt, and the amount, of a legal fee paid by a client.

Organizations in five other states have issued opinions concluding that lawyers may not permissibly participate in similar ACMS programs. Those include: New York State Bar Association Opinion 1132 (Appendix, Page 50); Ohio Opinion 2016-3 (Appendix, Page 57); Pennsylvania Bar Association Formal Opinion 2016-200 (Appendix, Page 64); and South Carolina Ethics Advisory Opinion 16-06 (Appendix, Page 79); as well as a joint opinion of three New Jersey committees (ACPE Opinion 732, CAA Opinion 44, UPL Opinion 54) (Appendix, Page 82).

The proposed opinion is included below in Section III.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed LEO at its meeting on March 15, 2017 (Appendix, Page 8). The Virginia State Bar issued a publication release dated March 22, 2017, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 9). Notice of the proposed opinion was also published in the *Virginia Lawyer Register*, Vol. 65, No. 6 at page 55 in the April 2017 issue (Appendix, Page 11); on the bar's website on the "NEWS AND INFORMATION" page (Appendix, Page 12); and in the bar's E-News in April and May 2017 (Appendix, Pages 14 and 16).

A total of eight comments were received. Six comments were submitted to the Virginia State Bar from the following: Thomas Domonoske (Appendix, Page 18); August Bequai (Appendix, Page 19); Andrew Herrick on behalf of the Local Government Attorneys (Appendix, Page 20); Benjamin Glass (Appendix, Page 21), Tom Gordon (Appendix, Page 25); and Josh King (Appendix, Page 34). Josh King sent two additional comments directly to the members of Council on October 25, 2017 (Appendix, Page 43 and 46).

Access to Justice and Independent Professional Judgment

Three of the comments submitted to the Committee (Glass, Gordon, and King) raised concerns that the proposed opinion harms consumers and reduces access to justice by limiting the ways in which clients are able to locate and retain lawyers and limiting the ways in which lawyers are permitted to advertise their

services. The Committee considered these comments, and whether it would be appropriate to amend Rules 5.4 and 7.3 to permit lawyers to share legal fees with, and pay for referrals from, nonlawyer entities.

Ultimately, the Committee decided not to amend the rules and to decide the issue presented under the current rules. The policy under Rule 5.4 is to preserve a lawyer's independent professional judgment free from control or influence by nonlawyers. Comment 1, Va. Rule 5.4; ABA Formal Ethics Op. 01-423 (2001).

Under the facts set out in the proposed opinion, the ACMS exercises a great deal of control over the attorney-client relationship, including defining the scope of the representation via the menu item selected by the client, determining when the representation is complete and therefore the fee is earned by the lawyer, and determining when a fee should be refunded to the client in the event of a dispute between the lawyer and client.

Further, the lawyer may be concerned about preserving the business relationship with the ACMS at the expense of the client's interests, particularly in the event that the client is dissatisfied with the services provided by the lawyer or the ACMS. The lawyer's personal interest in the ongoing relationship with the ACMS might influence the lawyer to support the ACMS, rather than the lawyer's client, in any dispute.

The Committee gave serious consideration to the concerns raised about

access to justice and consumer choice, but determined that the risks to the lawyer's independent professional judgment were so significant as to outweigh the arguments made by those commenters. Access to justice, while an important goal, is not accomplished when a third party controls the representation and influences the lawyer's ability to provide diligent and competent representation.

At the Council meeting where the proposed opinion was approved by a vote of 59-6, much of the discussion on the opinion centered around a possible need for further study of Rules 5.4(a) and 7.3(d). Dan Lear, Avvo director of industry relations, urged Council to reject the opinion, asserting that the proposed opinion would prevent lawyers from exploring new methods of reaching the public with innovative legal services. A small number of members agreed that the proposed opinion is a correct application of those rules as they stand, but questioned whether those rules serve an important purpose in the absence of a threat to the lawyer's professional judgment. The chair of the Committee explained that the Committee did study these rules before issuing the proposed opinion, and as discussed above, continues to believe there is a real threat to the lawyer's independence under these circumstances.

First Amendment Implications

The comments from Josh King raise a First Amendment concern about the proposed opinion's conclusion that Rules 5.4(a) and 7.3(d) prohibit a lawyer from

engaging in the fee arrangement at issue. The Committee has concluded that there is no First Amendment concern because the proposed opinion does not restrict the public's access to information about legal services, nor does it restrict lawyers from advertising their services. Applying current Rules 5.4(a) and 7.3(d), the proposed opinion prohibits impermissible methods of paying for referrals; it does not restrict or prohibit commercial speech about the legal services themselves. The opinion addresses only lawyers' participation in Avvo Legal Services – the fixed-fee limited-legal-service program – and not other Avvo products such as its lawyer ratings and advertising functions.

To the extent that LEO 1885 is construed as regulation of speech, the regulation must be justified by a substantial state interest and a showing that the regulation directly advances and is in reasonable proportion to that interest.

Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985). In this case, the Committee has identified two state interests at stake: preventing consumer deception when accepting referral fees and maintaining lawyers' independent professional judgment by forbidding the sharing of fees with nonlawyers. LEO 1885's restrictions are in reasonable proportion to these interests because the opinion does not ban advertising on any platform, nor does it restrict the ability of an ACMS to engage in forms of legal marketing that do not involve fee-sharing with nonlawyers or accepting referral fees for matching clients with

lawyers.

Anticompetitive Effects of LEO

Some of the comments, as well as the discussion at the VSB Council meeting where the proposed opinion was approved, raise concerns about anticompetitive effects of the proposed opinion and whether state action immunity exists under *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015). The conclusion of the proposed opinion does have an anticompetitive effect, as it prohibits lawyers from participating in a new means of delivery of legal services and may restrict new entrants into the legal services market by limiting the types of fee payment and collection options available. Prohibiting attorney-client matching services (ACMS) as described in the proposed opinion may also increase lawyers' costs of advertising and providing legal services, since the fee paid to the ACMS by the lawyer includes administrative services, such as credit card fees, and is targeted to the number of clients and amount of fees generated through the service.

If this Court adopts the proposed legal ethics opinion, acting in its legislative capacity, its action is considered the equivalent of the state sovereign. *See Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). Therefore, there is *ipso facto* state action immunity from antitrust claims with no need to consider the two-part test at issue in the *Dental Examiners* case. *Id.* at 1110-11; *Hoover v. Ronwin*, 466 U.S. 558,

567-68 (1984). The “only requirement” for state action immunity is that the action be that of “ ‘the State acting as a sovereign.’ ” *Hoover, supra*, at 574 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 360, 360).

Further, the VSB believes the public interests served by the current rules that would disallow lawyers’ participation in the ACMS as described in the proposed opinion outweigh any competitive restrictions inherent in the opinion and therefore supports adopting the proposed opinion. In the opinion, the ACMS, not the lawyer: (1) sets the legal fee for each service offered; (2) defines and limits the scope of the representation; and (3) controls and holds the fee advanced by the client. This control, exercised by the ACMS before the client has had an opportunity to consult with the lawyer, is an interference with the lawyer’s independence and professional judgment that the current rules seek to prevent. The rules that proposed LEO 1885 applies are for client protection, ensuring that for-profit online companies do not interfere with the attorney-client relationship. The amount of the lawyer’s fee, the scope of the engagement and the holding of advanced fees should be the result of consultation with a lawyer and informed consent of the client without interference by a nonlawyer profit making entity.

Trust Accounting and Unearned Fees

Josh King argues in his May 5, 2017, comment that Rule 1.15 is not implicated because a client’s credit card is not charged until after the client has had

a substantive phone call with the lawyer. (Appendix, Page 34). According to him, the vast majority of clients receive the full scope of their Avvo Legal Services within that phone call. He believes the small percentage of services that require additional work by the lawyer can be treated as “fully-earned” after the initial call.

While it may be true that the majority of current users of Avvo Legal Services purchase services that can be completed within one phone call, the hypothetical scenario addressed by this proposed LEO includes a number of services that cannot be completed in one phone call, and there is no leeway for a lawyer to treat a flat fee as fully earned when the matter has not been completed. *See* LEO 1606 (approved by the Supreme Court of Virginia on November 2, 2016).¹

III. Proposed Legal Ethics Opinion

LEO 1885: ETHICAL CONSIDERATIONS REGARDING A LAWYER’S PARTICIPATION IN AN ONLINE ATTORNEY-CLIENT MATCHING SERVICE

This opinion provides guidance to a lawyer who is considering participating in an

¹ Because advanced legal fees do not belong to the lawyer until the services are rendered, it is the opinion of the Committee that they must be deposited in an identifiable account (trust account) and remain the property of the client until they are earned by the attorney. . . .

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination.

LEO 1606, *supra*.

online program conducted by a lay for-profit entity operating as an attorney-client matching service (ACMS). Under the hypothetical presented to the Committee, the lawyer

a) provides a client with limited scope legal services advertised to the public by the ACMS for a legal fee set by the ACMS;

b) allows the ACMS to collect the full, prepaid legal fee from the client, and to make no payment to the lawyer until the legal service has been completed;

c) authorizes the ACMS to electronically deposit the legal fee to the lawyer's operating account when she completes the legal service; and

d) authorizes the ACMS to electronically withdraw from the lawyer's bank account a "marketing fee" which, by prior agreement between the ACMS and the lawyer, is set by the ACMS and based upon the dollar amount of the legal fee paid by the client.

The prospective client selects the advertised legal service and chooses a lawyer identified on ACMS's website as willing to provide the selected service. The prospective client pays the full amount of the advertised legal fee to the ACMS. Thereafter, the ACMS notifies the selected lawyer of this action, and the lawyer must call the prospective client within a specified period. After speaking to the prospective client, and performing a conflicts check, the lawyer either accepts or declines the proposed representation.

QUESTION PRESENTED:

Would a lawyer's participation in the program described above violate any Virginia Rules of Professional Conduct?

ANSWER:

As discussed below, a lawyer who participates in an ACMS using the model identified herein violates Virginia Rules of Professional Conduct because she

a. cedes control of her client's or prospective client's advanced legal fees to a lay entity;

b. undertakes representation which will result in a violation of a Rule of Professional Conduct;

c. relinquishes control of her obligation to refund any unearned fees to a client at the termination of representation;

d. shares legal fees with a nonlawyer; and

e. pays another for recommending the lawyer's services.

A lawyer who participates in an ACMS does not violate Rules of Professional Conduct governing limited scope representation, reasonableness of legal fees, and the exercise of independent professional judgment, if she adheres to the Rules governing those aspects of every representation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT:

The analysis of the question presented involves the application of Virginia Rules of Professional Conduct 1.2(b)², 1.5(a)³, 1.15(a)(1) and (2)⁴, 1.16(a)(1) and (d)⁵,

2 RULE 1.2 Scope of Representation

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

3 RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

4 RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

5 RULE 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or

2.1⁶5.4(a)⁷, 7.3(d)⁸, and 8.4(a)⁹

ANALYSIS:

other law[.]

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

6 RULE 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

7 RULE 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.

8 RULE 7.3 Direct Contact With Potential Clients

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;

(2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

9 RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

Ethical Considerations Regarding Limited Scope Representation

It is ethically permissible for a lawyer to limit the scope of her representation of a client, provided the limitation does not impair the lawyer's ability to provide competent representation and is otherwise consistent with the Rules of Professional Conduct. The client must consent "after consultation" to the limited scope representation. *See*, Rule 1.2(b). The Rules of Professional Conduct do not prohibit a lawyer's representing a client on a matter appearing on the ACMS's online menu of available services *provided* the lawyer explains the nature and scope of the service to be rendered to the prospective client *before* the attorney-client relationship is established. A lawyer does not violate Rule 1.2(b) merely because her contact with a prospective client flows from a proposed limited scope legal representation advertised by a non-lawyer business firm. Indeed, there are several contexts in which a third-party nonlawyer defines the scope of a lawyer's representation of a client. In pertinent part, Comments [6] and [7] to Rule 1.2 state that

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or **by the terms under which the lawyer's services are made available to the client**. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. ***.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. **Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence]*****. [Emphasis supplied throughout.]

Regardless, the lawyer and client must have agreed to the scope of representation, with an understanding of the scope of services being provided for the fixed fee. Moreover, Rule 2.1 requires the lawyer to "exercise independent professional judgment," which means that she cannot permit the ACMS's description of the legal services to be provided to the client to control if the client's legal matter requires services which differ in nature or scope from the description. The

lawyer's obligation is to ensure that the description of the legal services to be provided to a client is complete and accurate.

The Lawyer Must Consider Whether the Advertised Fixed Legal Fees Are Reasonable

The ACMS presents an online menu of limited scope legal services available to the public at fixed legal fees from lawyers who are willing to provide those services. Virginia Legal Ethics Opinion 1606 defines “fixed fee” and states that the use of fixed fees is to be encouraged:

Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

Notwithstanding the foregoing considerations, fixed fees, like every other type of legal fee, must be reasonable. The eight factors set forth in Rule 1.5(a) must be considered when determining the reasonableness of legal fees. Factor (3) calls for a consideration of “the fee customarily charged in the locality for similar legal services”. Factor (7) refers to “the experience, reputation, and ability of the lawyer or lawyers performing the services”.

Lawyers traditionally set their own fees—including fixed fees—whether set forth in their advertising, or after conferring with clients who are seeking representation. Lawyers know the “going rates” for particular services in their localities, and every lawyer certainly knows her level of “experience, reputation, and ability.”

A lay business firm which dictates to lawyers what they must charge clients as fixed fees as a condition of participation in the online program may not have conducted the reasonableness-of-fee analysis required of lawyers by Rule 1.5(a). It is therefore incumbent upon the participating lawyer that she agrees to represent a client only if the fixed fee set by the ACMS is reasonable for the contemplated legal service. Indeed, if the fee identified for each menu item of limited scope services is the same for all participating lawyers—*irrespective of their experience, and irrespective of the locality in which the services are to be performed*—then the matter of reasonableness of fee is a subject which the lawyer must very carefully consider before agreeing to a proposed representation.

The client's actual needs are an important consideration in setting a fixed fee and limiting the scope of legal services, regardless of the rubric given the legal service identified on the ACMS's online menu of services. For example, in determining whether a fixed fee is reasonable the lawyer and the prospective client must understand what is involved regarding a menu item such as "Document review: Residential purchase and sale agreement \$495."

A fixed fee of \$495 might be perfectly reasonable were the prospective client, either as purchaser or seller, to require review of a proposed contract custom-tailored to a transaction and prepared by the other party's lawyer. The same fee might be unreasonable if the lawyer is being asked to review a standard form contract in universal use by real estate agents and brokers in the community where the home is being sold. There may be very little value the reviewing lawyer adds to the transaction. In the latter instance, the lawyer may determine that she is exposed to virtually no risk that the task will consume more than a minimal amount of her professional time.

In addressing a menu item such as "File for uncontested divorce \$995," a lawyer must determine whether \$995 is a reasonable fee if her colleagues with like experience customarily charge \$500 for such a service in the locality in which she is practicing. Charging almost twice the customary fixed fee for a like service in the lawyer's locality might be unreasonable under the factors set forth in Rule 1.5(a). The Committee notes that the fixed fee of \$995 appears only for filing for the divorce, and not completing the representation by obtaining a final decree. Further, this limited scope representation may not include a property settlement agreement that may be necessary for obtaining an uncontested divorce. The "reasonableness" of the \$995 fee should be considered in light of these limitations.

A lawyer abdicates her ethical obligation to exercise the independent professional judgment required by Rule 2.1 if she defers to the ACMS in determining the legal fees she will charge her clients.¹⁰ See also Rule 1.8(f) indicating that a lawyer may

¹⁰ In Opinion 2016-3, the Supreme Court of Ohio Board of Professional Conduct sharply observes, with respect to a proposed business model such as is under discussion here that

***the company, not the lawyer, controls nearly every aspect of the attorney-client relationship, from beginning to end. The company, not the lawyer, defines the type of services offered, the scope of the representation, and the fees charged. The model is antithetical to the core components of the client-lawyer relationship because the lawyer's exercise of independent

accept compensation from a person other than the client provided “there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.” Thus, the lawyer’s acceptance of payment from the on-line “matchmaking” company is subject to this requirement.

In sum, a lawyer participating in the ACMS’s program must conduct an independent assessment of whether the fee identified for the limited scope representation is reasonable, and exercise independent professional judgment in light of the nature of the legal service to be rendered and the prospective client’s needs.

A Lawyer’s Obligations Regarding Safekeeping Clients’ Advanced Legal Fees

Many lawyers routinely handle legal matters for clients whose legal fees are paid by third parties. Sources of payment may be insurance companies or legal services plans.¹¹ While the client may have paid premiums to an insurance company or a legal services plan which entitles him to legal representation funded by that third party, the premiums, themselves, are not advanced legal fees, and Rule 1.15 is not implicated.

The ACMS business model presented in this hypothetical, however, calls for the prospective client to advance full payment of the fixed legal fee for the selected menu item of legal service directly to the ACMS. The ACMS is an intermediary between the client and the lawyer, with no obligation to place the advanced legal fees in a trust or escrow account for safekeeping as required of a Virginia lawyer. The lawyer who accepts the client’s case is foreclosed from safekeeping the advanced fixed legal fee paid by the client as she receives payment from those advanced fees only when the representation has been completed.

In Virginia Legal Ethics Opinion 1606¹², the Committee opined that

A fixed fee is an advanced legal fee. It remains the

professional judgment on behalf of the client is eviscerated.

11 *See, e.g.*, Sec. 38.2-4400 of the 1950 Code of Virginia, as amended.

12 Legal Ethics Opinion 1606 was approved by the Supreme Court of Virginia on November 2, 2016, and has the dignity of a decision of the Court.

property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. *** [Emphasis supplied.]

A Virginia lawyer has the obligation to safeguard her client's advanced legal fees during the course of the representation. A Virginia lawyer cannot ethically "opt-out" of the obligations imposed by Rule 1.15 by consenting to a third-party lay ACMS's collection and retention of the client's advanced legal fees. The ACMS is not a law firm, cannot maintain an IOLTA account, and is not subject to professional regulation by the Virginia State Bar, nor a financial institution approved by the bar subject to overdraft reporting requirements and covered by FDIC protection. A client's advanced legal fees must remain intact and in trust in a financial institution approved by the Virginia State Bar until they are earned by the lawyer. Unearned fees must be returned to the client in the event the lawyer's services are terminated by the client or terminated by the lawyer for any reason, including her death, impairment, or license suspension or revocation. The duty to safekeep client funds and property contained in Rule 1.15 are intended, in part, to protect clients from the risk of having unearned legal fees become part of the lawyer's estate, and thus subject to the reach of the lawyer's other creditors via garnishment or as part of a bankruptcy or probate proceeding. Unearned legal fees must thus stand to the credit of the client by remaining on deposit, in trust, in a financial institution identified in Rule 1.15(a)(2) if the lawyer or law firm is located in Virginia. It should be noted, as well, that the business model under discussion calls for advancement of a *legal fee* to the lay business entity *before* any lawyer has agreed to represent the prospective client. A Virginia lawyer, whether or not she comes to represent a particular client obtained through the online service, must not promote, via her participation in, a program operated by a lay entity which solicits advanced legal fees from the public when the lawyer knows that those fees will not be protected as required by Rule 1.15. *See*, Rule 8.4(a).

The importance of a lawyer's keeping her client's advanced legal fees secured in a trust account cannot be overstated. The lawyer may not avoid this significant client protection requirement by delegating the handling of a client's legal fees to a lay third party. The ACMS collects advanced legal fees from a prospective client before the prospective client has had any contact with the lawyer whom she might

engage. Thus, the prospective client, in most instances, will not have been informed by a lawyer that her advanced legal fees will be handled by the ACMS in a manner that differs from how a lawyer would have been required to handle those fees. The ACMS is the recipient and custodian of the client's unearned legal fees under the program here presented. The approach is contrary to the requirements of Rule 1.15 and inconsistent with the purposes of the Rule. The firm is neither a financial institution nor a bonded trustee or other fiduciary regarding the legal fees collected from the prospective client. The client, pending completion of the legal services for which he has paid in advance, stands as a general creditor of the ACMS, and is not protected from risk of pecuniary loss occasioned by the firm's cash-flow problems, insolvency, bankruptcy, or mismanagement.

It is no answer to the problem of the client's potential risk of loss that the business model presented here is for "limited scope" representation, permitting the Virginia lawyer to side-step her ethical obligation to preserve an advanced legal fee by ceding complete control of that incident of the representation to a third-party lay business. Comment [7] to Rule 1.2, *supra*, states unambiguously that "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." Rule 1.15 is a Rule of Professional Conduct, and a lawyer's attempt to avoid its application through the acts of another itself violates Rule 8.4(a).

Rule 1.16(d) requires that a lawyer refund to a client at the termination of representation "any advance payment of fee that has not been earned." A Virginia lawyer who participates in the service rendered by the ACMS cannot comply with this Rule of Professional Conduct because she is not, and has never been, the custodian of the advanced fee. She has ceded control of that fee to the ACMS, which decides how to dispose of the client's fees, both earned and unearned. A lawyer must not accept a legal matter under an arrangement which requires that she delegate the function of holding and disposing of the client's advanced legal fees to a lay entity. In accepting such representation, the lawyer also violates Rule 1.16(a)(1), which prohibits any representation which would result in the lawyer's violation of the Rules of Professional Conduct.

Ethically Impermissible Sharing of Legal Fees with a Nonlawyer

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer. The Rule is violated by a lawyer when there is direct linkage between the amount of the lawyer's fee revenue derived from a marketing firm's operations, and the firm's

entitlement to compensation. Lawyers may, however, pay a lay business entity sums which represent the reasonable costs of advertising. *See*, Rule 7.3(d)(1). There are legal ethics opinions which differentiate between the reasonable costs of advertising and ethically impermissible fee-sharing.

The North Carolina State Bar has issued a legal ethics opinion which approves a lawyer's participation in an online for-profit service which has both the attributes of a lawyer referral service and a legal directory¹³. The business model under review in that opinion is described, in pertinent part, as follows:

A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity. The prospective client posts an explanation of his legal problem on the website and consents to contact from participating lawyers. There is no charge to the prospective client for the standard service but, for more individualized and faster service, there is a fee.

The company solicits lawyers to participate in its service. To participate, a lawyer must be licensed and in good standing with the regulatory agency of his state of licensure. A participating lawyer is charged a **one-time registration fee** that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An **annual fee** is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. **The amount of the annual fee varies by lawyer based on a number of components, including the lawyer's current rates, areas of practice, geographic location, and number of years in practice. *****

If a client-lawyer relationship is formed between a participating lawyer and a user of the service, it is done without the participation of the company. **The company does not get involved in the lawyer-client relationship or in related financial matters such as fees, retainers,**

13 North Carolina Ethics Op. 2004-1 (2004) "Participation in On-Line Legal Matching Service"
<http://www.ncbar.com/ethics/ethics.asp>

invoicing, or payment. [Emphasis supplied throughout.]

In answer to the question of whether a lawyer may ethically participate in such a program, the opinion states:

Yes, **provided there is no fee sharing with the company in violation of Rule 5.4(a)**, and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user. [Emphasis supplied.]

A Rhode Island legal ethics opinion¹⁴ specifically approved lawyers' participation in a program run by an Internet company called "Legal Match.com". In addressing whether the arrangement violated the prohibition on fee sharing, the opinion draws the important distinction between ethically permissible advertising costs and impermissible fees charged to a lawyer based upon legal fees generated:

The fee to LM.com is a flat fee which buys advertising and access to requests for legal services posted by consumers. **Unlike the fees in [Rhode Island] Ethics Advisory Opinion No. 2000-04, the annual fee is not a percentage of, or otherwise linked to, a participating attorney's legal fees.** [Emphasis is supplied.]

Rhode Island Ethics Advisory Opinion No. 2000-4, referred to above, found linkage between a consulting company's fee and the attorney's fee to be unethical fee-sharing with a nonlawyer *and* ethically impermissible payment for recommending a lawyer's services:

In the arrangement proposed by the inquiring attorney, **there is a direct relationship between the consulting fees paid to the consulting company and the attorney's fees earned through the website.** A participating attorney agrees to pay \$15,000 to the consulting company for every \$100,000 in gross fees he/she earns as a result of the site. In

14 Rhode Island Supreme Court Ethics Advisory Panel Opinion No. 2005-01
<https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2005-01.pdf>

essence, the fee paid to the consulting company is a fifteen percent commission of the gross attorney's fees. As such, **the consulting fee is payment for recommending the lawyer's services** and is violative of Rule 7.2(c).

The proposed arrangement is problematic in other respects. It runs afoul of Rule 5.4(a) **which prohibits attorneys from sharing fees with nonlawyers.***** [Emphasis supplied.]

The Committee believes that in contrast to the business models identified with approval in the North Carolina and first-cited Rhode Island legal ethics opinions, the model here under review calls for legal fee sharing which is ethically impermissible under Rule 5.4(a). A legal fee is shared with a nonlawyer when a fixed portion of it is given by the lawyer to her Internet advertiser, whose entitlement to the fee occurs only when the lawyer has earned her legal fee, and when the amount of the advertiser's fee is based on the amount of that legal fee. Calling the online service's entitlement a "marketing fee" does not alter the fact that a lawyer is sharing her legal fee with a lay business. As stated, the amount of the "marketing fee" is itself linked directly to the amount of the lawyer's fee earned on each legal matter obtained by the lawyer through the intermediary ACMS. The fact that the ACMS executes a separate electronic debit from the lawyer's bank account for its "marketing fee" following the firm's electronic deposit of the full legal fee to the lawyer's bank account does not change the ethically impermissible fee-sharing character of the transaction. If the ACMS were to withhold its "marketing" fee from the legal fee due the lawyer, the "fee sharing" element might appear more pronounced. However, the firm's debiting the lawyer's account following transmission of the full legal fee is but a technical nicety which does not change the substance of the transaction. The form of the transaction cannot mask the substance of it: the legal fees are shared with a nonlawyer in direct violation of Rule 5.4(a).

The Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee in Formal Opinion 2016-200 flatly declared that "[a] lawyer who participates in [a program such as is detailed here] in which the program operator collects "marketing fees" from that lawyer that vary based upon the legal fees collected by the lawyer, violates RPC 5.4(a)'s prohibition against sharing legal fees with a nonlawyer.

The Opinion identifies other jurisdictions' like conclusions on the subject of ethically impermissible fee-sharing with a nonlawyer, stating:

Ethics opinions that have considered similar compensation arrangements have concluded that marketing, advertising, or referral fees paid to for-profit enterprises that are based upon whether a lawyer received any matters, or how many matters were received, or how much revenue was generated by the matters, constitute impermissible fee sharing under RPC 5.4(a). For example, Ohio Opinion 2016-3, which addresses the same types of FFLS [acronym for "Flat Fee Limited Scope"] programs discussed in this Opinion, states that "a fee-splitting arrangement that is dependent upon the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct." S.C. Opinion 16-06, which also addressed a FFLS program, reached the same conclusion. Other ethics opinions which have, in various contexts, concluded that advertising, marketing, or referral fees calculated on the basis of matters received or legal fees generated violate Rule 5.4(a) include: Arizona Opinion 10-01; Alabama State Bar Ethics Opinion RO 2012-01 ("Alabama Opinion 2012-01"); Indiana State Bar Association Legal Ethics Committee Opinion 1 of 2012 ("Indiana Opinion 1 of 2012"); Kentucky Bar Association Ethics Opinion E-429 and South Carolina Ethics Advisory Opinion 93-09.

In addition, on June 21, 2017, three Committees of the New Jersey Supreme Court issued a Joint Opinion (ACPE Opinion 732, CAA Opinion 44, UPL Opinion 54) which addresses the ethical implications of a lawyer's participation in an ACMS such as is discussed herein. The Joint Opinion concluded that such a program is an impermissible lawyer referral service, in violation of New Jersey Rules of Professional Conduct 7.2(c) and 7.3(d), and comprises improper fee sharing with a nonlawyer in violation of New Jersey Rule of Professional Conduct 5.4(a).

**Ethical Restriction on Giving Anything of Value to
One Who Recommends the Lawyer's Services**

Subject to the exceptions set forth below, Rule 7.3(d) prohibits a lawyer from

giving “anything of value” to a person who recommends the lawyer’s services. Whether the referring person is a lawyer or nonlawyer is not relevant to an analysis of conduct covered by Rule 7.3(d)¹⁵. A lawyer may violate Rule 7.3(d) without at the same time violating the fee-sharing prohibition contained in Rule 5.4(a) because the source of the compensation given to the referring person need not be a legal fee.

Rule 7.3(d) lists only four specific exceptions under which a lawyer may give something of value to another (who is not an employee or lawyer in the same law firm) for recommending a lawyer’s services ,only two of which are applicable to a lawyer’s participation in the for-profit business firm’s operations here under review:

1. payment of “the reasonable costs of advertisements or communications”; and/or
2. payment of the “usual charges of a legal service plan or a not-for-profit qualified lawyer referral service”.

A “marketing fee” based upon a lawyer’s having been actually hired to perform legal services for which a fee has been earned, with the amount of the “marketing fee” based upon the amount of the lawyer’s fee is not a reasonable cost of advertisement. It is in form and function the payment of a referral fee to a nonlawyer. Payment of the so-called “marketing fee” is not required unless and until the lawyer finishes a legal matter for a client the lawyer has obtained as a result of the ACMS’s efforts. The ACMS which identifies available lawyers on its website is neither a “legal service plan” nor a “not-for-profit qualified lawyer referral service”. It is a for-profit lay entity with a business model whose revenue is derived by sharing the lawyers’ earnings derived specifically from clients and fees generated to the lawyers by the program.

In discussing a rule analogous to Virginia Rule 7.3(d), the South Carolina bar deemed it a violation of its rule to compensate an Internet service which advertises

¹⁵ There is one exception: Rule 1.5(e) permits a lawyer to share legal fees, under certain conditions, with *another lawyer* who has referred a case to her. A note to Virginia Legal Ethics Opinion 1130 states:

Legal Ethics Committee Notes. – This LEO was overruled by Rule 1.5(e), which does not require that a lawyer sharing in fees also share responsibility, thus allowing “referral fees” if the client consents after full disclosure.

lawyers' services by paying the Internet service based on fees obtained from clients whom the lawyer receives via participation in the service:

South Carolina Rule of Professional Conduct 7.2(c)¹⁶ prohibits lawyers from giving “anything of value to a person for recommending the lawyer's services” but includes an exception for the “reasonable cost of advertisements.” A lawyer may ethically make payments to an Internet service for advertising the lawyer’s services based either on a set monthly or yearly fee or based on the number of hits or referrals from the service to the lawyer. **Lawyers could not ethically pay the service any portion of the fees received from clients obtained through the service.** See S.C. Rule Prof. Cond. 5.4(a). This opinion deals only with services that are open to attorneys generally. Services that restrict or screen attorney participation may violate Rule 7.2(c). [Emphasis is supplied.]

See, South Carolina Bar Ethics Advisory Opinion 01-03.¹⁷

South Carolina Bar Ethics Advisory Opinion 16-06, issued in 2016, analyzed the ethical implications of a lawyer’s participation in a service precisely as described here. It concluded that the marketing fees charged are not the ethically permissible reasonable costs of advertising:

16 RULE 7.2: ADVERTISING

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and
- (3) pay for a law practice in accordance with Rule 1.17.

¹⁷ *See, also*, New York State Bar Association Committee on Professional Ethics Opinion 1132 (8/8/17), which concluded that a lawyer’s payment of a marketing fee charged by an ACMS as discussed herein would be an improper payment for a recommendation in violation of New York Rule 7.2(a).

The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or “click.” In essence, the service’s charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.

Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

PA Formal Opinion 2016-200, cited above, addresses the “reasonable cost of advertisements” issue from the perspective of the differing marketing fees charged, as tethered to the legal fees themselves:

*** The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter. One FFLS [Flat Fee Limited Scope] program charges participating lawyers “marketing fees” ranging from \$10 for a \$39 “Advice Session” to \$400 for a “Green Card Application,” which generates \$2,995 in legal fees. Clearly, there cannot be a 4000% variance in the operator’s advertising and administrative costs for these two services, particularly since the operator does not, and cannot, have any role in the actual delivery of legal services.***

There are a variety of forms in which lawyers may advertise, one being via Internet services which identify lawyers available to handle particular types of legal matters. Comment [4] to Rule 7.3 speaks approvingly of services available to lawyers:

[4] Lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. However, Paragraph (d)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the **costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising**. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as **publicists, public-relations personnel, business-development staff, and website designers[.]***** [Emphasis supplied.]

A Virginia lawyer may certainly participate in a for-profit lay business firm's Internet advertising platform from which members of the public are matched with Virginia lawyers who are identified as willing and available to handle particular matters for fixed legal fees *if the cost of doing so* complies with Rule 7.3(d)(1) and if the lawyer complies with the other Rules of Professional Conduct discussed above. The "reasonable costs of advertising or communications" may be based on any number of factors which the advertising lawyer may assess for herself: quality of presentation, market exposure, demography, and measurable levels of interest evoked (through Internet "clicks" or "hits"). However, a Virginia lawyer violates Rule 7.3(d) when she pays another—including an Internet marketer—a sum tethered directly to her receipt, and the amount, of a legal fee paid by a client.

CONCLUSION:

The Virginia Rules of Professional Conduct do not prohibit a lawyer from participating in an Internet program operated by a for-profit ACMS which identifies limited scope services available to the public for fixed fees. Before accepting a legal matter from a prospective client, the lawyer must consult with the client regarding the limited scope of the proposed legal services and be satisfied that the services can be competently performed consistent with the Rules of Professional Conduct.

Before accepting a prospective client's legal matter, the lawyer must exercise independent professional judgment and assure herself that the fee set by the ACMS is reasonable for the legal task to be undertaken for the client, taking into consideration the factors enumerated in Rule 1.5(a).

It would be ethically impermissible for a lawyer to participate in a program whereby a client's advanced legal fee is to be held by a lay business firm, contrary to the lawyer's obligations under Rule 1.15. A lawyer who permits a lay business entity to retain and dispose of a client's advanced legal fees surrenders her ethical obligation to refund unearned legal fees to the client at the termination of representation as required by Rule 1.16(d).

A lawyer must not participate in a program whereby the lawyer pays a for-profit business entity a portion of the legal fee charged to the client as compensation for the lawyer's having received the client from the firm which operates the program. The payment constitutes an impermissible sharing of fees with a nonlawyer, and violates the rule prohibiting a lawyer from giving anything of value to one who recommends the lawyer's services.

IV. CONCLUSION

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. Proposed LEO 1885 was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve proposed LEO 1885
for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

/s/

Doris Henderson Causey, President

/s/

Karen A. Gould, Executive Director

Dated this 17th day of November, 2017.