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L.E.O. 2018-01– DRAFT

Participation in Attorney-Client Matching Services

INTRODUCTION

This opinion provides guidance to a lawyer who is considering participating in an online program operated by for profit entity controlled by non-lawyers operating as an attorney-client matching service (hereinafter ACMS). There have been many jurisdictions that have issued legal ethics opinions regarding this issue. [*See e.g.* Alabama State Bar Ethics Opinion RO 2012-01; Arizona Opinion 10-01; Indiana State Bar Association Legal Ethics Committee Opinion 1 of 2012; Kentucky Bar Association Ethics Opinion E-429; New Jersey – ACPE Opinion 732, CAA Opinion 44, UPL Opinion 54; New York State Bar Association Committee on Professional Ethics Opinion 1132;Supreme Court of Ohio Board of Professional Conduct 2016-3; Oregon State Bar, Formal Op. 2005-168; Oregon State Bar Formal Op 2007-180; South Carolina Ethics Advisory Opinion 16-06; Pennsylvania Legal Ethics and Professional Responsibility Committee, Formal Opinion 2016-200; Rhode Island Supreme Court Ethics Advisory Panel Opinion 2005-01; South Carolina Ethics Advisory Opinion 93-09; South Carolina Bar Ethics Advisory Opinion 01-03; Virginia State Bar Legal Ethics Opinion 1885. *But see* North Carolina Ethics Op. 2004-1].

The ACMS model is that the lawyer pays a "marketing fee" for participation in an on-line, lay person owned and operated legal referral service where the service matches the prospective client with a lawyer for legal service. The lawyer lacks all control over the content of the advertising by the ACMS and the lawyer has no control over who is solicited as a potential client by ACMS. The prospective client chooses the lawyer, but the ACMS defines the types of legal services offered, the scope of representation, and the legal fees charged for the particular service. The prospective client selects the advertised legal service and chooses a lawyer identified on ACMS's website. The prospective client pays the full amount of the advertised legal

fee for the legal services to the ACMS. ACMS notifies the lawyer, and the lawyer contacts the prospective client. After speaking to the prospective client, and performing a conflicts check, the lawyer either accepts or declines the proposed representation. ACMS requires the lawyer to pay the "marketing fee" to the non-lawyer company based upon the fee general from each completed legal matter.

The Board opines that a lawyer utilizing this model of service would be in violation of the Rules of Professional Conduct because 1. it interferes with the lawyer's professional independence; 2. interferes with a lawyer's obligation to only limit the scope of legal services when it is reasonable under the circumstances and the client gives informed consent; 3. the lawyer relinquishes her obligation to charge set and charge only reasonable legal fees; 4. lawyer shares legal fees with a non-lawyer; 5. lawyer relinquishes control of the obligation to safeguard advanced legal fees in trust; 6. abrogates the lawyer's duty to return any unearned legal fees at the termination of representation to a lay person; and 7. lawyer pays another for recommending a lawyer's services.

APPLICABLE RULES

The relevant Rules examined by the Board were 1.1; 1.2(c); 1.5; 1.8(f); 1.15(a)(1) and (2); 1.16(d); 2.1; 5.4(a) and (c); and 7.2(b) of the Rules of Professional Conduct.

DISCUSSION

At the most fundamental level, the lawyer must ensure that he is competent to provide the representation and under this model, the ACMS controls nearly every aspect of the relationship between the client and the attorney and it is antithetical to the core concept that a lawyer shall exercise competent, independent legal professional judgment on behalf of the client.

Rule 5.4(c) of the Rules of Professional Conduct states "a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 1.8(f) of the Rules of Professional

Conduct states "a lawyer shall not accept compensation for representing a client from one other than the client unless the client gives informed consent; and there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and information relating to representation of a client is protected as required by Rule 1.6." These Rules ensure that the lawyer will abide by a client's decisions concerning the objectives of representation that best serve the interests of his client, not that of a third party, such as the ACMS. For example, the lawyer, not the ACMS, must determine whether he or she may competently pursue a case based upon his own area of competence and his relevant case load. *See* Rule 1.1 of the Rules of Professional Conduct. The lawyer, not the ACMS, is obligated in conjunction with the client's informed consent to determine if the scope of the legal representation can be limited. *See* Rule 1.2(c) of the Rules of Professional Conduct. Specifically, the lawyer is required to exercise independent professional, legal judgment which means the lawyer should not permit the ACMS to define the scope and description of the legal services required to complete the required legal task for the client. It is the lawyer's obligation to communicate an accurate and complete description of the services to the client. *See* Rule 2.1 of the Rules of Professional Conduct. Additionally, the Supreme Court of Appeals of West Virginia, stated in Barefield v. DPIC Companies, Inc., 215 W.Va. 544, 600 S.E.2d 256 (2004), amongst other things, that a defense attorney is ethically obligated to exercise independent professional judgment in the defense of a client. Moreover, the court stated that an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured and extending this logic out it would seem to reason that an ACMS should not be permitted to do so either.

Additionally, the Board had grave concerns about issues related to legal fees. From the outset, Rule 1.5(a) of the Rules of Professional Conduct provides that "a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The factors to be considered in determining the reasonableness of a fee are delineated in the Rule and lawyers are required to set their own fees in conjunction with those factors. However, under the ACMS model, the company presents a menu of legal services at predetermined fixed prices set by the company and there is no assurance that a

reasonableness analysis was conducted to determine that the fee is indeed reasonable. The fee is set at the ACMS's sole discretion and the fee may change without notice to the lawyer.

Also, the Board understands that there are many situations wherein legal fees are paid by someone other than a client, such as insurance companies, prepaid legal plans or relatives. One of the most important roles of an attorney is to safeguard a client's fees. Rule 1.15(a) and Rule 1.15(c) of the Rules of Professional Conduct requires that upon payment of a retainer fee or fees for services from a client that the lawyer must safekeep the fees in the lawyer's trust account and only receive payment from those advanced fees as the task is completed. The rule requires that unearned fees be kept in trust, not with a non lawyer owned for profit company that is neither bonded a bonded trustee or a financial institution. *See* Rule 1.15(c) of the Rules of Professional Conduct. In the ACMS model, the prospective client is required to pay the fixed fee in full directly to the ACMS, not the lawyer, and therefore the fee is not properly safeguarded in the lawyer's trust account. The ACMS is not a law firm, is not subject to the provisions of the IOLTA rules or subject to the jurisdiction of the Office of Disciplinary Counsel, and is not subject to the West Virginia State Bar's overdraft notification reporting requirements. Additionally, Rule 1.16(d) requires that a lawyer refund the unearned portion of a fee to a client at the termination of the relationship. Under the ACMS model, the lawyer was never the custodian entrusted to safeguard the advanced fee and is unable to fulfill this obligation under the rules. A lawyer can not accept a legal matter wherein the lawyer is required to delegate the function of safeguarding advanced legal fees and returning unearned legal fees to a non-lawyer entity.

Moreover, Rule 5.4(a) prohibits lawyers from sharing fees with non-lawyers[1] to protect and preserve the lawyer's professional independence of judgment. Under the ACMS model, a legal fee is shared with a non-lawyer after a portion of the fee is given to the non-lawyer and occurs after the lawyer has earned the legal fee. The Supreme Court of Appeals of West Virginia determined that a fee-splitting agreement between a lawyer and non-lawyer was void as against public policy and wholly unenforceable. *See* Rich v. Simoni,

[1]There are exceptions to this prohibition expressed in the Rule, but the ACMS companies do not fall within the exceptions.

– W.Va.– , 772 S.E.2d 327 W.Va. LEXIS 257 (2015). Moreover, while a lawyer may ethically pay a non-lawyer entity for advertising costs, Rule 5.4(c) of the Rules of Professional Conduct is violated when there is a direct connection between the marketing fees paid to the non-lawyer and the lawyer's earned fee in an individual case. Other states have reached the conclusion that marketing and referral fees calculated on the basis of matters received or legal fees generated violated Rule 5.4(a) of the Rules of Professional Conduct. *See* Arizona Opinion 10-01; Alabama State Bar Ethics Opinion RO 2012-01; Indiana State Bar Assoc. Legal Ethics Committee Opinion 1 of 2012; Kentucky Bar Association Ethics Opinion E-429; and South Carolina Ethics Advisory Opinion 93-09.

Finally, subject to express exceptions,[2] Rule 7.2(b) of the Rules of Professional Conduct expressly prohibit a lawyer from giving anything of value to a person for recommending the lawyer's services. The comment to Rule 7.2 expressly states "a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 5.4, and the lead generator's communications are consistent with Rule 7.1.[3]" As discussed supra, the fees paid to the ACMS are not in compliance with Rule 5.4 and thus the "marketing fees" are not reasonable costs of advertising because payment of the fee to the ACMS is contingent upon completion of the legal matter. The fee bears no relationship to the advertising. To be clear, the ACMS only financially benefits if the lawyer on the site is chosen by the prospective client and the lawyer successfully completes the legal service. Additionally, the ACMS providers boasts its ratings will help clients find "the right" lawyer; it will allow clients to "work with highly rated" lawyers; that prospective clients can "search

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[3] While the Board makes no assertion that the materials are false or misleading, the Board notes that the lawyer has no control in assuring the materials used on the ACMS website or the methods used to solicit potential clients is in compliance with Rule 7.1 and Rule 7.3 of the Rules of Professional Conduct. For example, some of the ACMS services maintain on online rating systems for lawyers and are representing to the public that it is recommending lawyers who been professionally vetted, including, but not limited to those that pay to participate in the referral service. The Board believes that the ACMS is representing to the public that the reviews, positive or negative, of the lawyers are true and accurate, but the lawyers have no means to determine the validity.

top-rated lawyers"; that the company only works "with highly qualified attorneys" and have a "satisfaction guarantee" all of which contributes to the impression that the ACMS is recommending the lawyers for payment. The "marketing fee" is both an impermissible referral fee and an impermissible endorsement fee.

CONCLUSION

A lawyer must ensure that the lawyer's participation in the referral service is consistent the lawyer's ethical obligations owed to clients.[4] The Lawyer Disciplinary Board cautions that the ACMS model is rife with ethical pitfalls for lawyers. These include, but are not limited to, interference with the lawyer's professional judgment, failing to properly safeguard legal fees, fee-splitting with non-lawyers, and improper payments to a business for recommending the lawyer's services. Lawyers have an affirmative obligation to ensure that their relationships with entities are conducted in accord with the Rules of Professional Conduct.

APPROVED by the Lawyer Disciplinary Board on the th day of, 2018, and **ENTERED** this _____ day of , 2018.

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Steven K. Nord, Chairperson
Lawyer Disciplinary Board

[4]The Board notes that in addition to the lawyer's obligations to current clients, the lawyer also has ethical obligations and duties to prospective clients (Rule 1.18 of the Rules of Professional Conduct) and former clients (Rule 1.9 of the Rules of Professional Conduct).