

2012 Formal Ethics Opinion 10

January 25, 2013

Participation as a "Network" Lawyer for Company Providing Litigation or Administrative Support Services

Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

Introduction:

This opinion explores whether a lawyer may participate as a "network" lawyer for a company, usually offering its services via the Internet, that provides litigation or administrative support services to clients with a particular type of legal/business problem.

For example, ABC Services offers to assist mortgage holders and mortgage loan servicers (ABC clients) with the nationwide management of "mortgage defaults." ABC maintains a national network of lawyers who have entered into a "network agreement" with ABC to use administrative and litigation support services provided by ABC, including default management application software, and to accept referrals from ABC. The agreement establishes the legal fees that a network lawyer may charge to an ABC client as well as the "administrative fees" the lawyer must pay to ABC for the support services provided by ABC. An ABC client is considered the mutual client of both ABC and the network lawyer with ABC functioning as the agent of the ABC client while providing litigation and administrative support services to the network lawyer. When a mortgage holder or servicer becomes an ABC client, it is provided with a list of network lawyers. The ABC client may choose to retain one of the network lawyers to provide legal services in connection with a default, or it may ask ABC to invite a lawyer or firm of the client's choosing to become a network lawyer and subsequently to provide legal services to the client. The network lawyer invoices the client for the legal services provided by the lawyer. ABC separately invoices the network lawyer for the administrative services it provided in support of the representation of the ABC client.

Another example of this business model is an Internet-based company, XYZ Company, which offers "an online eviction processing system that connects landlords and property managers with real estate attorneys." The eviction services are provided using software accessed via XYZ's website and a network of lawyers who are licensed by XYZ to use the software. A lawyer who wishes to participate in XYZ's network signs a licensing agreement for the use of the eviction software. The licensing fee is determined by the size of the market in which the lawyer will be providing eviction services. The website states that its system provides lawyers "with the technology necessary to: [e]lectronically receive information necessary to file eviction requests from clients; [c]ommunicate with clients through a message center; [p]rint county-specific forms necessary for eviction filing with the court, completed with pre-populated information from the client; [p]rovide automated updates to client on the status of the case." A landlord who signs up for the service is given the names of network lawyers who have contracted with XYZ to handle eviction cases within the relevant jurisdiction. The selected or assigned lawyer (in the case of single-lawyer jurisdictions) prosecutes the eviction through the court system. The lawyer logs actions taken into XYZ's software, which creates periodic case status reports that are automatically emailed to the landlord. The website claims that these status reports virtually eliminate the need for direct communications between the landlord and the lawyer. The legal fee for each eviction is determined by the lawyer providing the service. The fee is billed and collected by XYZ and then forwarded to the lawyer.

Inquiry #1:

May a North Carolina lawyer or law firm enter into an agreement to participate in a "network" of lawyers for a company using this business model?

Opinion #1:

No, unless the following conditions are satisfied.

Unauthorized Practice of Law

N.C. Gen. Stat. §84-5 makes it unlawful for any corporation to practice law or "hold itself out in any manner as being entitled to do [so]...." Moreover, a lawyer is prohibited by Rule 5.5(d) from assisting another person in the unauthorized practice of law. Neither a lawyer nor a law firm may become a member of a "network" for a company using this business model if the company is providing legal services or holding itself out as a provider of legal services as opposed to a provider of support services to lawyers and clients and a method for identifying lawyers who will use those services to represent the client.

Lawyer Referral Service

A lawyer may not participate in the network if payments are made to the company for referrals or if the company is a for-profit lawyer referral service. Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Rule 7.2(d) prohibits participation in a lawyer referral service unless the service is not operated for profit and the service satisfies other conditions not relevant here. Comment [6] to Rule 7.2 defines a lawyer referral service as "any organization that holds itself out to the public as a lawyer

referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation....”

Despite the prohibition on participation in a for-profit referral service, 2004 FEO 1 holds that a lawyer may participate in an on-line service that is similar to both a lawyer referral service and a legal directory, provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful. In 2004 FEO 1, the online service solicited lawyers to participate and then charged participating lawyers a registration fee and an annual fee for administrative, system, and advertising expenses. The amount of the annual fee varied by lawyer based upon a number of factors including the lawyer’s current rates, areas of practice, geographic location, and number of years in practice. The opinion noted that the online service had aspects of both a lawyer referral service and a legal directory:

[o]n the one hand, the online service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers’ qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation.

If a litigation support company provides a prospective client with the names and qualifications of the lawyers in its network who will provide representation in the jurisdiction where the client’s case is located but does not specify the employment of one particular lawyer, it is not a prohibited lawyer referral service. Similarly, if at the client’s request, a lawyer or law firm is invited to participate in the network, the company is not operating a for-profit lawyer referral service. As stated in 2004 FEO 1, “the potential harm to the consumer [of a for-profit referral service] is avoided because the company does not decide which lawyer is right for the client.”

Independent Professional Judgment and Communication with the Client

While a client is entitled to hire an agent to manage its legal affairs, Rule 5.4(c) specifically prohibits a lawyer from permitting a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services. See also Rule 1.8(f)(compensation from a third party is prohibited unless there is no interference in the client-lawyer relationship). A lawyer has a duty to communicate with the client about the objectives of the representation and to explain the law to the client to permit the client to make an informed decision about those objectives. Rules 1.2 and 1.4. There can be no interference with the lawyer’s communications with the client or with the lawyer’s independent professional judgment as to which legal services are required to achieve the client’s objectives. See Rule 1.2(a)(“a lawyer shall abide by a client’s decisions concerning the objectives of representation and...consult with the client as to the means by which they are to be pursued”). The interference in a network lawyer’s professional judgment is improper if the company dictates what legal services the lawyer is to provide to a client, the company is the sole source of information about the client and its legal needs, or access to the client is restricted by the company. A law firm or lawyer participating in a network must establish the professional relationship with the client and maintain control of the relationship through direct communications as needed to establish the objectives for the representation and to determine the means to achieve them. See Rule 1.2.

Competent Representation

Although a lawyer may use the company’s services or software, including the forms generated by that software, the lawyer remains professionally responsible for the competent representation of the client including the appropriate determination of the legal services needed to achieve the client’s objectives and the quality of any work product that is used in the representation of the client. Rule 1.1 and Rule 1.2. If the lawyer determines that a form or pleading generated by the company’s software is not appropriate for a particular client, the lawyer must competently prepare the appropriate form or pleading and, if additional information from the client is required, the lawyer must communicate with the client to obtain the information.

Confidential Information

The confidentiality of the communications between the client and the lawyer, including email communications using the company’s website or software, must be assured or, in the alternative, informed consent of the client to the sharing of its communications with the company must be obtained, in advance, after disclosure of the risks of such disclosure. Rule 1.6. The risk that the attorney-client privilege for those communications may be forfeited must be specifically disclosed to the client to obtain informed consent.

Fee Sharing with Nonlawyer

Independent, professional judgment is maintained, in part, by the prohibition on sharing legal fees with a nonlawyer found in Rule 5.4(a). The prohibition helps to avoid nonlawyer interference with the exercise of a lawyer’s professional judgment, ensures that the total fee paid by the client is not unreasonably high, and discourages the nonlawyer from engaging in improper solicitation of business for the lawyer. See 2010 FEO 4. If a network lawyer must pay the company an “administrative fee” for every legal service the lawyer provides to the client regardless of the administrative or litigation support services provided by the company, the arrangement violates the rule. Any payment to the company for administrative and litigation support services, including payment for access to the company’s litigation support software, must be reasonable in light of the services provided. See Rule 1.5(a).

Advertising and Solicitation

The information that a participating lawyer provides to the company for distribution to prospective clients must be accurate. Rule 7.1(a) (prohibiting false or misleading communications about the lawyer or the lawyer's services). If false or misleading statements about the lawyer or his services are subsequently made by the company on its website or in other advertising for the company's services, the lawyer must demand that the statements be corrected or deleted. See RPC 241 (lawyer who participates in a joint advertising venture or a legal directory is professionally responsible for content of the advertisement even if written or prepared by another). If this does not occur, the lawyer must withdraw from the network.

Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Therefore, participation as a network lawyer is prohibited if payments are made to the company for referrals. However, if the payments are for litigation support or administrative services provided to the client or to the lawyer to assist in the rendering of the legal services to the client, and the charge for those services is reasonable in light of the service received, the payments do not violate the rule.

Rule 7.3(a) prohibits a lawyer from engaging in in-person, telephone, or real-time electronic solicitation (collectively, in-person solicitation) for professional employment when a significant motive for such conduct is the lawyer's pecuniary gain unless the lawyer has a prior professional relationship with the potential client (there are other exceptions not relevant to this inquiry). A lawyer may not do through an agent that which he is prohibited from doing by the Rules of Professional Conduct. Rule 8.4(a). Therefore, if the company engages in in-person solicitation of potential clients that do not have a prior professional relationship with a network lawyer or law firm, and the company's motive for doing so is to solicit clients for legal services to be provided by a network lawyer or law firm, participation in the network arrangement is prohibited.

Written Agreement

Although this opinion does not require a lawyer to have a written agreement with the company, a written agreement addressing the conditions set forth above is strongly recommended. The lawyer may not rely upon a written agreement alone, however, but must monitor the practices of the company on a continuing basis and discontinue the relationship if the lawyer cannot insure compliance with the conditions set forth above.

Inquiry #2:

A participating network lawyer enters into an exclusive arrangement with the company whereby no other network lawyer will provide legal services to participating clients in a designated territory or jurisdiction. This means that a prospective client with a legal matter in this territory or jurisdiction will be automatically referred to the lawyer with the exclusive arrangement.

May a lawyer enter into such an agreement?

Opinion #2:

No, this is essentially a for-profit lawyer referral service, which is prohibited by Rule 7.2(d). See also Opinion #1.

Inquiry #3:

After the company enters into a network agreement with a lawyer for a particular territory or jurisdiction, all lawyers who subsequently apply to become network lawyers for the same territory or jurisdiction are charged substantially higher fees. This has the effect of discouraging other lawyers from seeking to become network lawyers for the same territory or jurisdiction and will potentially create *de facto* exclusive territories or jurisdictions.

May a lawyer enter an agreement with the company under these circumstances?

Opinion #3:

No. See Opinion #2.

Inquiry #4:

The network agreement specifies that any information submitted by a client using the company's website shall become the exclusive property of the company.

May a lawyer enter into an agreement with such a provision?

Opinion #4:

No. A lawyer cannot agree that his or her confidential communications with a client will become the property of a third party. Such an agreement will interfere not only with the lawyer's duty to protect confidential client communications from unauthorized disclosure, but also with other duties including, but not limited to, the duty of competent representation, the recordkeeping duty for trust account funds, and the duty to avoid future conflicts of interest. See Rules 1.1, 1.6, 1.9, and 1.15-3.

Inquiry #5:

The network agreement contains a provision that restricts the lawyer from soliciting any "customer" of the company for the purpose of providing services that compete with the services of the company.

May a lawyer enter into a network agreement with such a provision?

Opinion #5:

No, unless the agreement specifies that the lawyer is not agreeing to restrict his or her right to practice law in violation of Rule 5.6. Presumably, the company does not provide legal services because it is prohibited by law from doing so. See Opinion #1 above. The provision in the licensing agreement must specify the non-legal services provided by the company to which the non-compete would apply.

Inquiry #6:

The network agreement requires the lawyer to provide the company with his or her client list.

May a lawyer enter into a network agreement with such a provision?

Opinion #6:

No. This would only be permissible if the lawyer obtained the informed consent of every client whose name will be disclosed to the company. Rule 1.6(a). To obtain informed consent, the lawyer must inform each client of the likelihood that the disclosure would result in a business solicitation from the company.

Inquiry #7:

In the past, lack of sufficient oversight of the ABC employees responsible for preparing affidavits for use by network firms in foreclosure proceedings lead to instances of "robo-signing" in which an ABC employee signed a foreclosure affidavit without conducting a review of the client's file on the matter or possessing the knowledge to which the employee attested in the affidavit. Such affidavits were executed in a manner contrary to the notary's acknowledgement and verification of the documents.¹ The affidavits were then forwarded to the lawyer for use in the foreclosure proceedings.

What is a network lawyer's duty relative to the documents and pleadings provided by ABC?

Opinion #7:

This inquiry demonstrates the potential problems that can result from interference in the autonomy and independent professional judgment of a lawyer by a third party. A lawyer should not participate in the network or a similar service that includes support from a third party if the lawyer's ability to communicate with the client is so restricted that the lawyer cannot determine whether the documents and information he receives via the third party are reliable.

If a network lawyer obtains a document, such as an affidavit, from ABC for use in the representation of a client and the lawyer knows or reasonably should know that ABC has engaged in preparation of erroneous, false, or seemingly false documents or affidavits in similar matters in the past, the lawyer may not use the documents until he has assured himself, through review of the client's own files or direct communication with the client, that the documents are reliable. See Rule 5.4 (c). Particularly with regard to sworn statements, a lawyer's duty of candor requires the lawyer to avoid offering false evidence. See Rule 3.3(a)(3). Nevertheless, if a client or an agent of the client is not otherwise known to be unreliable or to provide erroneous or false information, a lawyer may rely upon information provided to her to represent the client.

Endnote

1. Such conduct is the subject of the National Mortgage Settlement. nationalmortgagesettlement.com.

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