Legal Entrepreneur Series:
Marketing and Growing Your Law Practice
(EYL220509)

Monday, May 9, 2022

6:00 p.m. to 8:00 p.m.

Webinar

CT Bar Institute, Inc.
CT: 2.0 CLE Credits (1.75 General /0.25 Ethics)

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Christopher DeMatteo

Chris DeMatteo is the 2021-22 chair of the YLS Solo and Small Firm section. He served as co-chair of the YLS Criminal Law section from 2019 to 2021. Admitted to the Connecticut bar in 2010, he opened his own law practice, DeMatteo Legal Solutions, in 2012, in which he focused on criminal defense and child protection/DCF matters. In March 2022, he joined the New Haven law firm Pattis & Smith as an associate. A native of Connecticut, Chris earned his bachelor's degree from Boston College and his law degree from Marquette University Law School. In addition to practicing law, Chris writes fiction and legal and political commentary. He has had opinion pieces published in the New Haven Register, Connecticut Mirror and Hartford Business Journal.

Cliff Ennico

Attorney, author, syndicated columnist, speaker, television personality and humorist, Cliff Ennico (www.cliffennico.com) is a sole practitioner in Fairfield, CT who focuses on the legal and tax issues affecting entrepreneurs and tech/e-commerce startups. A former Wall Street lawyer and host of the 1990s PBS television series *MoneyHunt*®, Cliff is a nationally syndicated legal columnist and the author of 6 legal treatises published by Thomson West, including *Advising Small Businesses, Advising eBusinesses, Forms for Small Business Entities,* and *Closely-Held Corporations: Forms and Checklists.* His "general interest" books for entrepreneurs and business owners include *The Crowdfunding Handbook*, *The eBay Seller's Tax and Legal Answer Book*, and *Small Business Survival Guide*. His YouTube channel (www.youtube.com, search for "Cliff Ennico") features over 50 hourlong videos on business and legal issues affecting startups in Connecticut and elsewhere.

Benjamin I. Schimelman

Benjamin Schimelman is in-house privacy counsel for UnitedHealthcare's Privacy Office. Prior to joining UnitedHealthcare, Benjamin was an associate with Gfeller Laurie LLP and Rogin Nassau LLC where he practiced in civil litigation and commercial transactions. He has served on the CBA's Standing Committee for Professional Ethics since 2019. Benjamin is also an active member of the CBA's Young Lawyers Section where he currently serves as the Executive Committee Chair of Professional Responsibility and Ethics.

Agenda

Marketing and Growing Your Law Practice
June 9, 2022
6:00 p.m. to 8:00 p.m.

6:00 – 6:45 p.m.	**Effective and Ethical Client Generation: The Do's and (Especially) Don'ts of Marketing Your Solo Practice** • The five pillars of a solo practice marketing plan • Identifying the "right" clients for your practice • Your firm name, business cards and marketing materials • Your Website – what should be on it, what should be left off ▪ Networking, (virtual) public speaking and social media (esp. YouTube®) • Participating in online legal referral networks
Speaker:	Cliff Ennico, Esq., Law Offices of Clifford R. Ennico, Fairfield, CT
6:45 – 7:30 p.m.	**Ethics**
Speaker:	Ben Schimelman, United Healthcare, Hartford
7:30 – 8:00 p.m.	**Time Management for the Solo Lawyer Who Has No Time to Manage His/Her Time** • How to prioritize your daily workload • How to separate the "urgent" from the "important" • How to manage client expectations without losing business • How to tame your e-mail Inbox and cellphone • How to develop and use "interruption protocols" • How most common "time vampires," and how to deal with them
Speaker:	Cliff Ennico, Esq., Law Offices of Clifford R. Ennico, Fairfield, CT

Creating a “Launch Plan” for Your Solo Practice

Cliff Ennico, Esq.

Law Office of Clifford R. Ennico

Fairfield, CT

STARTING OUT: THE SIX BIG QUESTIONS

- What will I practice?
- Home office or “real” office?
    - Will you see clients in the home?
- Corporation, LLC or Sole Proprietor?
- How Will I Manage My Practice So I Make Money?
- How Much Will I Charge My Clients?
- How will I get the word out*?

* -- will be addressed in other segments of today’s program

WHAT WILL I PRACTICE?

FOUR BASIC STRATEGIES FOR YOUR *"PRACTICE MIX"*

- Stick with what you know and don't venture outside "the box"
- Take on "anything and everything that walks in the door and has a pulse"
- Build a reputation for two or three highly desirable practice areas and let the market tell you what you should be
- Specialize in a certain type of client and become a "generalist" for that client

STAYING *“INSIDE THE BOX”*

- Advantages
  - Your malpractice insurer will adore you
  - Easier to describe what you do at cocktail parties and social occasions
  - You will keep al of your hair well into old age
- Disadvantages
  - May prevent you from growing unless your specialty is in great demand
  - You will end up making other attorneys wealthy (losing clients to them) by referring out work you are not comfortable doing
  - May leave you vulnerable to sudden market changes and economic swings that render certain practice areas obsolete or undesirable
  - When you’re starting out, you may not have a “box” to stay into ☺

TAKING ON *"EVERYTHING THAT MOVES"*

- Advantages
  - Guarantees that you will have at least some business
  - May be the only practice alternative when you're just starting out and have little experience with particular specialties
- Disadvantages
  - Serious malpractice risk: no one can stay on top of all developments in 5-6 practice areas
  - Your malpractice insurance may not cover everything you want to do
  - By spreading yourself too thin, you may have trouble developing a reputation for expertise in a certain field

LETTING THE MARKET DECIDE

- Advantages
  - More likely you will get work on a regular basis
  - Probably will be less competition, meaning you can charge more for your services
  - You may get referrals from other lawyers who are staying in their “boxes”
  - Can develop a reputation for “cutting edge” legal work before other lawyers do
- Disadvantages
  - Can be stressful as you will be constantly in “learning mode”
  - May be a good reason why local attorneys avoid certain specialties even if they are in demand
  - If you are developing more than one specialty, there may not be “synergy” between them

LETTING THE MARKET DECIDE

- Look for practice areas:
  - That are in demand
  - That are “cutting edge” or otherwise haven’t saturated the market
  - That can generate a decent profit margin; and
  - That you can easily market to without great expense

SPECIALIZING IN *“TARGET”* CLIENTS

- Advantages
  - Allows you to be more of a generalist
  - Easier to stay on top of developments in multiple practice areas
  - If client community is organized, easier to generate referral business
- Disadvantages
  - If there are not enough “target clients” in your area, may have to relocate tor engage in multijurisdictional practice
  - May be vulnerable to market, technology and economic swings that disproportionately impact your clients (book publishers, anyone?)

SPECIALIZING IN *"TARGET"* CLIENTS

- Identify a client that is common in your area, and provide a wide range of services for that client with one or two specific exceptions
- For example, "a Wall Street lawyer for your small or growing business" (Cliff's approach)
  - Cliff does just about everything for small business clients except litigation and patent/trademark work
- Just don't specialize in "clients who don't know what they're doing and have no money . . ."
  - They are easy to find, but you won't make a living ☺

OTHER *"CLIENT CENTRIC"* STRATEGIES

- Business type: software, Internet, and early-stage technology companies
- Specific industry: construction, publishing
- Underserved ethnic or religious groups: Hispanics, Muslims, immigrant communities
- Economic status: high net worth individuals who need sophisticated tax and estate planning
- Clients who themselves specialize in "target" clients: residential vs. commercial real estate investors

SHOULD YOU TAKE ON CLIENTS IN OTHER STATES?

- “Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.” –ABA Formal Opinion 495 (12-16 -2020).
- “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” NY Model Rule 5.5(a).
- You will be held to the same standard for malpractice liability as an attorney admitted to practice in the other jurisdiction, so confirm that your multijurisdictional activities will be covered under your malpractice policy.

HOME OFFICE VS. “REAL” OFFICE

HOME OFFICE VS. *“REAL”* OFFICE?

- For certain types of practice, a “real” office is unavoidable
  - Litigation
  - Trusts and estates

- If you reside out of state, you must maintain a physical office within the State of New York [Jud.L. § 470; Schoenefeld v. Schneiderman, 821 F.3d 273 (2d Cir. 2016).

- Some other reasons you may not be able to work from home:
  - Your Local Zoning Regulations May Not Let You
  - Your Nosy Neighbors May Not Let You
  - Your Spouse or “Significant Other” May Not Let You
  - You Are Not Disciplined Enough to Work from Home

THE BIG QUESTION

SHOULD YOU SEE CLIENTS
AND CUSTOMERS IN
YOUR HOME OFFICE?

THE ANSWER TO THE BIG QUESTION

NO!!!!!

AW, GEE . . . WHY?

- Will make you more visible to your neighbors and community, thereby inviting legal hassles
- Increased risk of “slip and fall” and “dog bite” type liability
- Not all clients/customers are nice people . . . household items may go missing
- Your spouse/significant other will not want people traipsing through your home
- Do you really want your clients/customers to see how you live? Or know where you live?

THE KEY TO HOME OFFICE SUCCESS

- In a single word, “invisibility”
- How do you achieve “invisibility”?
  - Don’t use your home address for business purposes (rent a UPS Store private mailbox and use that address instead)
    - It will also get you out of the house at least twice a day . . . ☺
    - Use this address when registering your trade name or DBA
  - Rent conference room space from local professional firms (many won’t charge you if you agree to refer business to them)
  - See clients at their offices whenever possible, or in a neutral location (diners, libraries) consistent with your brand image
  - Avoid noise (esp. at night), lots of cars in your driveway or street, or “noxious odors” that will give you away

LLC, PC, OR NEITHER?

P.C., LLC OR *"SOLE PROPRIETOR?"*

- Can form a professional corporation or limited liability company (LLC) in New York State to engage in the practice of law, BUT:
- "Each shareholder, employee or agent of a professional service corporation . . . shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or any person under this direct supervision and control while rendering professional services on behalf of such corporation." [BCL § 1505(a); cf. LLCL § 1205(b)]
- So why bother?
- May be a good idea if . . .
  - You are engaged in other (non-practice-of-law) activities and want to keep a clear separation between them;
  - You plan to bring on partners within the next year to two years; or
  - For "optical" (marketing) reasons because it makes you look bigger than you actually are.

PART IV

MANAGING YOUR SOLO PRACTICE

YOUR BUSINESS PLAN

- See handout for a useful “business plan” checklist
- Budgeting
  - Big business is about earnings and profits; small business is about cash flow
  - Know your fixed and variable costs cold
    - Keep overhead to an absolute minimum
  - Project revenue on a monthly basis
  - How much ODI (owner’s discretionary income) do you need?
  - Don’t forget about taxes!
  - Consider a line of credit to cover revenue shortfalls

YOUR MARKETING PLAN

- Buy every single book Carol Schiro Greenwald has ever written . . . ☺
- The Five Pillars of a Solo Practice Marketing Plan
  - Your firm name, address, business cards, stationery;
  - Your involvement in organizations and community activities;
  - Your personal interaction with potential clients and referral sources and your "elevator pitch";
  - Your public speaking strategy;
  - Your law firm Website, LinkedIn® profile, and directory listings
- Rules 7.1-7.5 of the NYS Model Rules of Professional Conduct

THE FIVE THINGS EVERY SOLO PRACTICE NEEDS TO BE SUCCESSFUL

- At least one client . . . ☺
- A virtual library
  - “A lawbook without forms and checklists is worthless” – Cliff Ennico
  - Bookmark www.lawcatalog.com, www.wolterskluwer.com, and https://legal.thomsonreuters.com/en/products/law-books
  - Subscribe to www.uslegalforms.com
- The best malpractice insurance you can afford
- A dedicated computer with multiple backups
  - At least one online backup and an external hard drive
  - Read ABA Formal Opinion 498, “Virtual Practice of Law” (03-10-2021)
- A network of other attorneys you can bounce questions off of

GROWING YOUR PRACTICE

- Hiring an associate
  - Is there enough work to cover 3x associate’s base salary?
- Outsourcing
  - Do’s and Don’ts of Outsourcing a Particular Assignment
  - Should you volunteer for outsourced opportunities?
- Creating a “Virtual Law Firm”
  - “A New York lawyer may enter into an ongoing business relationship with a law firm with nonlawyer owners, located in a jurisdiction that permits nonlawyer ownership of law firms, whereby the lawyer and the law firm agree to regularly co-counsel matters and share fees related to those matters.” – NYCBA Formal Opinion 2020-1
  - New York currently does not allow nonlawyer owners of a law practice, or partnering with nonlawyers
- Watch out for Rule 8.4(g) [soon to be expanded]:
  - Cannot discriminate in hiring
  - Cannot engage in harassment

YOUR EXIT STRATEGY

- What happens to your clients and pending matters if you die or become suddenly disabled?
- Selling your law practice [Rule 1.17 of the New York Model Rules]
  - Obtaining "royalty payments" from the buyer: is this an impermissible "fee sharing"?
  - Must give notice to your clients and advise them of their right to seek other counsel
- Buy a "tail" malpractice policy
  - But can't practice law after that
  - You can write books, participate in bar activities, and (maybe) teach

PART V

BILLING AND COLLECTION

BILLING AND COLLECTION

- Bill early, and often ☺. Clients are more likely to pay frequent small bills than a single massive one.
- Always, always, always get some money upfront.
- NEVER, EVER, EVER SEND A CLIENT A BILL THEY ARE NOT EXPECTING!!!!!!!!!!
- Always send detailed bills showing the client how much hard work you did for them.
- If you did spend too much time on a project, give the client a “courtesy” reduction and show it on the invoice.
- Bill the most amount of time on the activity(ies) clients find most distasteful.

BILLING AND COLLECTION

- Don’t be afraid to suggest alternative fee arrangements.
    - Flat fees
        - Should be at least 120% of anticipated hourly rate
        - Need to state “carveouts” clearly in engagement letter
    - Performance fees
- If you are charging contingency fees, must comply with Rule 1.5 of NY’s Rules of Professional Conduct (www.nysba.org/DownloadAsset.aspx?id=50671)
    - Contingency fees in medical malpractice cases must also be within the limits set by Jud.L. §§ 474-a.
- Watch my YouTube video on client management (www.youtube.com, search for “Cliff Ennico Client Handling”)

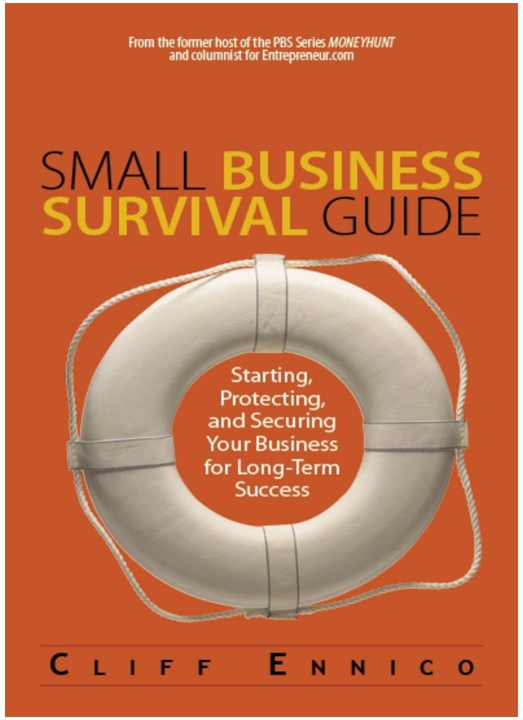
BILLING AND COLLECTION

- The six steps of collecting overdue bills:
- 1) stop working the MINUTE a bill is past due – big receivables almost always start out as small ones that get out of control
- 2) contact the client immediately and ask "what's up"
- 3) try to negotiate a solution (either a payment schedule or a fee reduction) and GET IT IN WRITING with "time is of the essence"
- 4) if the client stonewalls, have your attorney send a formal "demand letter"
- 5) don't let it go – keep up the pressure and make a nuisance of yourself if necessary
- 6) consider filing a claim in small claims court
- Watch my YouTube video on "Dealing with Deadbeats" (www.youtube.com, search for "Cliff Ennico")

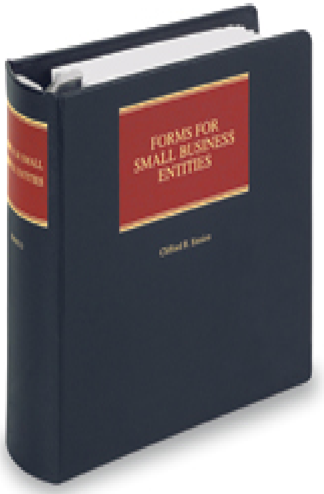
FINAL THOUGHTS

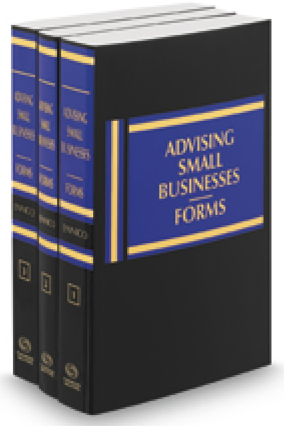
- When you create a new law firm, you are starting a new business. It pays to start managing it like a business from the get-go.
- One hopes that you goal is to create an institution that will continue to live and thrive for successive generations of partners. If not, why bother?
  - A business plan is essential.
    - Compensation plan
    - Admission, death, disability, withdrawal and retirement provisions
    - Dissolution/termination plan
  - Where possible strive for consensus; try not to take votes.
- Don’t build something you can’t or won’t manage. You can’t delegate you responsibility as an owner of the business. Too many others depend on you.
- Plan to spend around 3,000 hours a year for five years to get a firm off the ground.
- Keep your clients satisfied and well served AND have a good time doing it.

Good Luck to You All!



For those of you interested in my "Advising eBusinesses" book or any of my other legal treatises for Thomson West, go to https://legal.thomsonreuters.com/en/products/law-books and search for "Ennico".





Q&A

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Ethics of Legal Advertising / Marketing

Benjamin I. Schimelman

Disclaimer

- The views expressed are solely those of the presenter.
- This presentation does not constitute a solicitation for an attorney-client relationship, and no confidential or attorney-client relationship exists without express written agreement.
- This presentation is not meant to be construed as legal advice.
- Please do not send unsolicited confidential information to the presenter.

The Rules of Professional Conduct

- The Rules of Professional Conduct (the "Rules") are set forth in the Connecticut Practice Book.
- "The Rules of Professional Conduct are rules of reason."
- Bar discipline is the exclusive jurisdiction of the Judicial Branch.
  - Statewide Grievance Committee
  - Statewide Bar Counsel
- The Rules are largely based off the American Bar Association's ("ABA") model rules, but they are not identical.

Note: Lawyers admitted in multiple state should be aware that the rules governing their practice in other states may differ.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)

- *Bates* established a blanket prohibition on professional advertising violated lawyers' First Amendment right to commercial speech. *Id.* at 383.
- The Court in *Bates* was clear that "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint." *Id.*
- "As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising." *Id.* at 384.

Other Supreme Court Decisions

- Overturning discipline of lawyers who engaged in direct mail marketing or print advertising
  - *In re R.M.J.*, 455 U.S. 191 (1982).
  - *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985).
  - *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).
- However, the Supreme Court did uphold restrictions on direct mail advertising to accident victims. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

  The Court upheld the Florida Bar's rule prohibiting targeted direct-to-mail solicitations victims and their relatives within thirty (30) days of the incident.

NOTE: In Connecticut, Rule 7.3(c)(4) prohibits targeted written solicitations within forty (40) days.

Rules

- 7.1 – Communications Concerning a Lawyer’s Services
- 7.2 – Advertising
- 7.3 – Personal Contact with Prospective Clients

Rule 7.1 – Communications Concerning a Lawyer's Services

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

- Rule 7.1 encompasses advertising permitted by Rule 7.2.[1]
- Advertisements regarding a lawyer's achievements though truthful may still be misleading if they lead a reasonable person to have an "unjustified expectation that the same results could be obtained for other clients I similar matters without reference to the specific factual and legal circumstances of each client's case."[1]
- An appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or mislead a prospective client.[1]

[1] *See* Rule 7.1 commentary.

Inherently Misleading Marketing *Guaranteeing Outcomes*

- "A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and Rule 7.2(c)(1)(E) is not an unconstitutional restriction on commercial speech. *See In re R.M.J.*, 455 U.S. 191, 202 (1982)."

  Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 218-19 (5th Cir. 2011) (emphasis added).

Inherently Misleading Marketing
Experience

- *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 447 (M.D.N.C. 2001).

  A television ad featuring actor Robert Vaughn and depicting a fictional meeting among insurance adjusters, who upon hearing that the insured has retained the Attorneys' law firm, agree that they will settle the case.

  The attorneys had never tried a case, "with the exception of sitting as second chair in one trial in which the opposing part prevailed."

- *Matter of Shapiro*, 7 A.D.3d 120, 124 (N.Y. App. Div. 2004).

  Commercials depicting the attorney as an "experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients," but the attorney had "never tried a case to its conclusion and has conducted approximately 10 depositions."

Inherently Misleading Marketing
Recipient's Capacity to Exercise Reasonable Judgment

An attorney was grieved for several violations of rules related to marketing, including sending a letter to a comatose patient who had been involved in a collision with a train.

> The letter sent by respondent states, in pertinent part, "We are holding a letter containing valuable information regarding your legal rights . . . <u>When you are well enough to exercise such judgment, please call me</u>." We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel. <u>Despite language in the letter acknowledging the likelihood that the recipient was then unable to exercise reasonable judgment in retaining counsel, we are not persuaded by the explanation of respondent that he sent his letter to a stranger under these circumstances in order to educate her regarding her legal rights</u>.

See Matter of Shapiro, 7 A.D.3d 120, 122 (N.Y. App. Div. 2004) (emphasis added).

Online Reviews

- A lawyer cannot induce a client to provide a false review or reward a client for a good review.[1]
- A lawyer may reward a client for providing a review provided that the review is not contingent upon the content of the review.[2]
- A lawyer cannot short-circuit the prohibition on “false and misleading” statements by using an online review in its own advertising or communications.
  - The analysis turns on whether the attorney had the ability to draft or edit.
    - “[T]he client review portion of a lawyer's or law firm's Martindale.com listing is not advertising by the lawyer and is not subject to the requirements of Rules 7.1 and 7.2 unless the lawyer plays a role in shaping the content of a client review or posts a comment about a review.”[1]
    - "The Committee does not view it as the lawyer's responsibility to scour the internet to ensure that all client comments comply with Rules 7.1 and 7.2 or to take action to ensure that comments that do not comply with those rules are removed or edited. If the lawyer does shape the content of a client review or publishes a response to a client review, the lawyer would be responsible to ensure that whatever content he or she shaped or wrote complies with Rules 7.1 and 7.2.”[1]

[1] *See* Conn. Informal Op. 2012-03 (Apr. 25, 2012).

[2] *See* N.Y. Ethics Op. 1052 (Mar. 25, 2015).

Search Engine Marketing

May an attorney or law firm use a competitor's name as a key word in a search engine's advertising program?

Answer: Maybe

Permitted	Prohibited
▪ New Jersey[1]	▪ North Carolina[4]
▪ Texas[2]	▪ South Carolina[5]
▪ Wisconsin[3]	

[1] N.J. Advisory Comm. on Prof'l Ethics, Op. 735 (June 25, 2019).
[2] Texas Op. No. 661 (July 2016).
[3] *Habush v. Cannon*, 828 N.W.2d 876, 876-77 (Wis. Ct. App. 2013).
[4] N.C. 2010 Formal Ethics Op. 14 (April 27, 2012).
[5] *In re Naert*, 777 S.E.2d 823, 824 (S.C. 2015).

Rule 7.2 - Advertising

Retention: Copies or recordings of advertisements or communications shall be kept for three (3) years after their last dissemination along with a record of when and where they were used.[1]

[1] *See* Rule 7.2(b)(1).

Rule 7.2 - Advertising

<u>Mandatory Filing</u>: Attorneys advertising through *any* media shall file a copy of each advertisement or communication with the statewide grievance committee prior to or concurrently with the first dissemination.[1]

Sec. 2-28A Filing Requirements[2]

- **Translation** — If a submission is in a foreign language, include an accurate English translation.
- **Form** — Copies should be in the form in which they are to be disseminated (e.g., DVDs, compact disks, print media, photographs of outdoor advertising).
- **Transcript** — For video or audio, provide a transcript.
- **Domain Names** — A list of domain names shall be updated *quarterly.*
- **Sample Envelope** — For mailed communication, provide a sample envelope in which the advertisement or communication will be enclosed.
- **Statement** — Submit a statement with the following for each advertisement or communication:
  - Media in which it will appear;
  - Anticipated frequency of use; and
  - Anticipated time period it will be used.

[1] *See* Rule 7.2(b)(2); Practice Book Sec. 2-28A.
[2] *See* Practice Book Sec. 2-28A(a).

Rule 7.2 – Advertising (cont.)

Exceptions to the Sec. 2-28A Filing Requirements

- Public media advertisement containing some or all of the following:
  - Law Firm and Lawyer Name
  - Office Addresses, Phone Numbers, Fax Numbers, Website and Email Addresses
  - Designation as “attorney” or “law firm”
  - Date(s) of admission to the Connecticut bar and any other bars
  - Listing of federal courts and jurisdictions the lawyer is licensed to practice
  - Technical and professional licenses granted by the state or other recognized licensing authorities
  - Foreign language ability
  - Fields of law in which the lawyer practices or is designated, subject to Rule 7.4, or is certified pursuant to Rule 7.4A
  - Prepaid or group legal service plans in which the lawyer participates
  - Acceptance of credit cards
  - Fee for initial consultation and fee schedule
  - Listing the name and geographic location of a lawyer or law firm as a sponsor of public service announcement or charitable, civic or community program or event

See Practice Book Sec. 2-28A(b)(1); Rule 7.2(i).

Rule 7.2 – Advertising (cont.)
Exceptions to the Sec. 2-28A Filing Requirements

- Telephone Directory Advertisement
- Regularly Published Law List
- Announcement Card (e.g., new office, new associations)
- Communications to:
  - Existing or Former Clients
  - Other Attorneys or Professionals
  - Business Organizations
  - Not-for-Profit Organizations
  - Governmental Bodies
  - Members of Not-for-Profit Organizations*
- Communications Requested by a Prospective Client
- Contents of an Attorney’s Website (Appearing on a Listed Domain)

See Practice Book Sec. 2-28A(b)(2)–(7).

Sec. 2-28B - Advisory Opinions

- Attorneys may request an advance advisory opinion regarding an advertisement or communication
- To obtain such an opinion:
  - Submit a hard copy request (4 copies) to the Statewide Grievance Committee;
  - At least thirty (30) days prior to the date of first dissemination along with 5 hard copies of the materials filed pursuant to Sec. 2-28A(a); and
  - The fee (currently $100).
- Opinion is issued by the statewide grievance committee or an assigned reviewing committee consisting of at least three (3) members of the statewide grievance committee, one-third of whom are not attorneys
- Opinions are issued within thirty (30) days of the filing of the request (this period is tolled if the reviewing committee requests additional information)

Rule 7.3 – Solicitation of Clients
Prohibition on Solicitation and Exclusions

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain unless the contact is:

(1) With a lawyer or a person who has a family, close personal or prior business or professional relationship with the lawyer;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes are not limited to providing or recommending legal services, if the legal services are related to the principal purpose of the organization;

(4) With a person who routinely uses for business purposes the type of legal services offered by the lawyer or with a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services to the organization.

Rule 7.3 – Solicitation of Clients (cont.) Exceptions to the Exclusions

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by subsection (b) if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer;

(2) The target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;

(3) The solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or

(4) The solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than <u>forty days</u> prior to the mailing of the solicitation, or the recipient is a person or entity within the scope of subsection (b) of this Rule.

Rule 7.3 – Solicitation of Clients (cont.) Requirements for a Solicitation

(e) Every written solicitation, as well as any solicitation by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from anyone known to be in need of legal services in a particular matter, must be clearly and prominently labeled "**Advertising Material**" in red ink on the first page of any written solicitation and the lower left corner of the outside envelope or container, if any, and at the beginning and ending of any solicitation by audio or video recording or other electronic means. If the written solicitation is in the form of a self-mailing brochure or pamphlet, the label "**Advertising Material**" in red ink shall appear on the address panel of the brochure or pamphlet.

Communications solicited by clients or any other person, or if the recipient is a person or entity within the scope of subsection (b) of this Rule, need not contain such marks. No reference shall be made in the solicitation to the solicitation having any kind of approval from the Connecticut bar. Such written solicitations shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

Rule 7.3 – Solicitation of Clients (cont.)
Carveout for Prepaid or Group Legal Service Plans

(f) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Time Management for the Solo Lawyer Who Has No Time to Manage His/Her Time

Cliff Ennico, Esq.

Law Office of Clifford R. Ennico

Fairfield, CT

Everyone’s Biggest Challenge

- Time is your most valuable asset, BUT
- Everyone is “time starved” these days
- Technology can help with time management but can just as easily be your enemy:
  - A ringing smartphone, an incoming text message or email, or a “ping” on your portable device is a lunatic screaming “Me! Me! Now! Now! Now! I am more important than whatever you are doing at the moment! Me! Now!”
  - Even though we don’t want to focus on them right now. Even though we don’t even know who they are.
- “Time vampires” seem to be everywhere
- Trigger warning: some of this stuff is politically incorrect

Why People Lose Control of Their Time

- They cannot prioritize – everything seems to be of equal importance

- They try to do too much at once (i.e. “multitask”)

- They are too nice and cannot say no
  - To be successful at time management you have to be a bit ruthless – not everyone is worthy of your time
  - See my YouTube video on “Three Personality Traits All Successful Entrepreneurs and Small Business Owners Must Develop” (www.youtube.com, search for “Cliff Ennico”)

“Urgent” vs. “Important” Tasks

- Success in time management requires that you distinguish between “urgent” and “important” tasks
  - “urgent and important” tasks always seem to get done
  - “non-urgent and non-important” tasks almost never get done

- Frustration happens when you prioritize “urgent but not important” tasks over “important but not urgent” tasks

Source: “The Seven Habits of Highly Effective People” by Stephen Covey

Five Steps to Becoming a “Time Lord”

- Take Personal Responsibility for Your Time
- Understand That At Any Given Moment You Can Do Only One Thing
- Plan Each Day and Week
- Develop “Protocols” for Being Interrupted
- Understand That Perfect Time Management is Impossible (Build in Room for Error)

Step # 1: You Are In Control

- Believe it or not, YOU decide what's "urgent" or "important"

- Nobody can interrupt your flow without your consent – if you stop doing something to answer an e-mail, that's YOUR decision. You can always ignore the e-mail. Take personal responsibility for your time!

- Your daily mantra: "My clients are important, and I will get their work done, but my time is more important than anyone else's."
  - As an independent contractor, you MUST be allowed to control your time – otherwise you are an employee for legal and tax purposes.
  - "The client who wants 24/7 access in real time is a client not worth having." – Cliff Ennico
  - A cute line: "Would you rather I answer your e-mails, or get your work done?"

Step # 2: No One Can Multitask

- No one can multitask, especially people with Y chromosomes . . . ☺.
- Seriously, while you can work on multiple projects in a given day, at any given moment in time you can only be doing ONE thing. Are you doing the RIGHT thing RIGHT NOW?
- If you're typing right now, you just missed something important ☺.
- Being a Zen Master helps somewhat . . .
  - "Zen Flesh, Zen Bones" by Paul Reps
- Live your life in "day tight compartments" or, better yet, "hour tight compartments".

Step # 3: Plan Your Day and Week

- Use an hourly planner each day:
  - For Excel users and Android smartphones, http://download.cnet.com/Daily-Planner-for-Excel/3000-2056_4-75325272.html
  - For iPhones, http://www.businessnewsdaily.com/5776-iphone-apps-to-plan-your-workday.html
- For weekly planning, buy a DayMinder® calendar (about $20)
- Two key rules:
  - #1: budget time when you will do nothing but answer e-mails and phone calls, at least twice a day – outside of your time blocks, ignore them as best you can
  - #2: block out times when you will not look at your technology (I never answer emails or voice messages after 3 p.m. on Fridays, after noon on Saturdays, or anytime on Sundays unless I have a deal closing on Monday)
    - Include “office hours” in your e-mail “signature line” and voice message to manage people’s expectations
    - Consider charging a premium rate for being responsive on weekends

Step # 3: Plan Your Day and Week

- Here's a typical day plan for me:
  - 0630-0730: breakfast, bathroom, newspaper/blogs
  - 0730-0800: plan day
  - 0800-0900: work on current column/article/book project
  - 0900-1030: work on Client A matter
  - 1030-1130: answer e-mails and phone calls from previous night/early morning
  - 1130-1230: walk (if weather nice) or gym (if weather bad)
  - 1230-1300: lunch
  - 1300-1430: work on Client B matter
  - 1430-1530: work on Client C matter
  - 1530-1600: respond to journalist inquiry for small business article
  - 1600-1700: answer e-mails and phone calls from earlier in day
  - 1700-1730: go to UPS Store and send out documents, invoices and other mail
  - 1730-2030: travel to speaking engagement and deliver SCORE program
  - 2030: stop working, have dinner, review incoming mail

Step # 3: Prioritize Your e-Mail Inbox

- Perform “triage”: answer now/answer later/answer never
  - “How about never - is never good for you?” Robert Mankoff/The New Yorker (http://condenaststore.com/featured/no-thursdays-out-how-about-never-robert-mankoff.html)
- First, get rid of the obvious junk or send them to the “spam” folder – DO NOT READ before deleting!
- Second, scan quickly and answer e-mails that can be answered in 60 seconds or less (25 words or less).
- Third, read the more important e-mails, draft answers, and BILL FOR YOUR TIME!
- If there’s time left over, answer the remaining e-mails in chronological order
- For common e-mail inquiries, draft a “master” response, then cut and paste it whenever needed
- If you run out of time, send a short message saying “I’m backed up today but will get back to you later today/early tomorrow.” Most people can wait 24 hours for a response.

Step # 4: Develop “Interruption Protocols”

- Interruptions are sometimes necessary, but you can control them by developing rules or “protocols” for when you will accept them.
- “Is there blood? . . . “
- Here are some of my protocols. My daily plan can be interrupted for:
  - Messages regarding an acquisition or other “deal” closing within the next 48 hours
  - Projects under extreme time pressure that can be done in 1 hour or less (such as consulting agreements, employment agreements)
  - Calls from prospective clients looking for a lawyer
  - Messages from “key” clients generating $5,000 or more in revenue each month
  - Queries from journalists looking for content for a magazine article

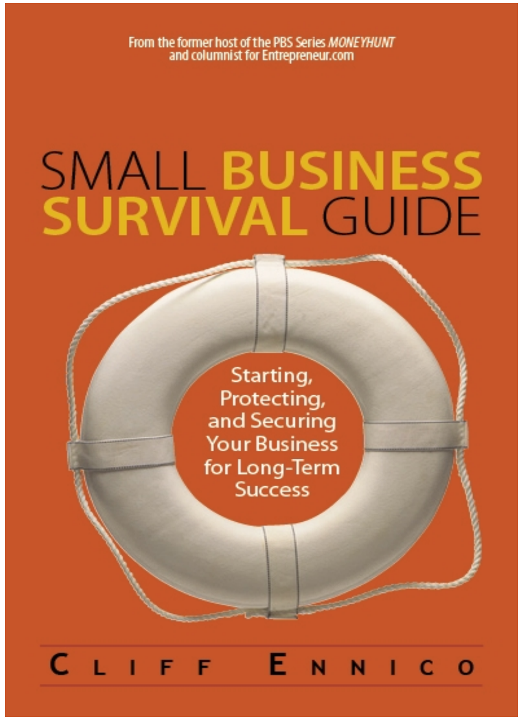
Step # 5: Perfect Time Management is Impossible

- You will never manage your time perfectly all of the time
- Never schedule your time so tightly that there is no “breathing room”
- If you must disappoint a client:
    - Send them a message saying “Don’t worry: you’re not being ignored, only prioritized . . . ☺” (most will understand and see the humor);
    - Give them a time when you will respond, and PUT IT in your daily/weekly planner;
    - Meet the deadline you yourself imposed.
- If there never seems to be enough time to get things done, consider:
    - Raising your fees and eliminating “high maintenance/low revenue” clients (aka “time vampires”)
    - Hiring people to do “nonessential” tasks
    - Changing your business model entirely

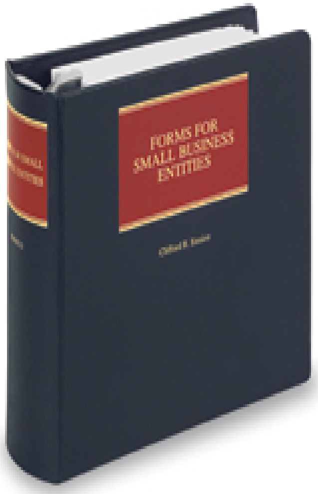
Suggestions for Further Reading

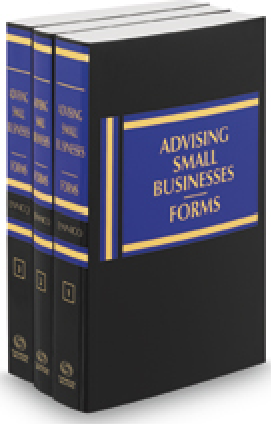
- “The 7 Habits of Highly Effective People: Powerful Lessons in Personal Change” by Stephen Covey
- “How to Stop Worrying and Start Living” by Dale Carnegie
- “Time Management from the Inside Out, 2d ed.” by Julie Morgenstern
- “Never Check e-Mail in the Morning” by Julie Morgenstern
- “Time Management Hacks” by Thomas Westover
- “Managing Your Time” and “The Time Trap” by R. Alec Mackenzie

Good Luck to You All!



For those of you interested in my "Advising eBusinesses" book or any of my other legal treatises for Thomson West, go to https://legal.thomsonreuters.com/en/products/law-books and search for "Ennico".





Questions and Answers

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SUCCEEDING IN YOUR BUSINESS
BY CLIFF ENNICO
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BUILDING YOUR BUSINESS, ONE SQUARE AT A TIME

"I was laid off from a corporate management job last year. Having decided not to return to corporate America, I have decided to take what little remains of my severance package and buy a franchise. I've found a perfect franchise I can operate from my home office. I've visited the franchise's corporate offices, and I love the people. I've spoken to lots of the franchise's franchisees, and they all seem to love what they do. The upfront franchise fee is affordable, and they are actually willing to let me pay it in installments, which I understand franchises don't normally do.

My problem is a more personal one. I've had the franchise agreement in my hands for several weeks now, but I can't seem to bring myself to sign the bloody thing. It's not that I'm nervous about the franchise, but I'm questioning whether I have what it takes to succeed in running my own business. How can I get over this and move forward with my life?"

The fact that this franchise is bending over backwards to bring you on board is both a good thing and a bad thing. It's a good thing that the franchise sees you as such a perfect fit that it's willing to bend the rules in your favor. It's a bad thing in that established, successful franchises generally don't have to be flexible to attract new franchisees. My suspicion is that this is an early-stage franchise with relatively few franchisees that hasn't fully tested out its model nationwide and does not have coast-to-coast name recognition.

Even though the franchise will give you lots of support, education and hand-holding, you will not be able to rely upon the franchise's name or reputation -- it will be up to you to make the franchise successful in your assigned territory. And that is clearly what's frightening you.

Here are two little words you should write down and copy onto several Post-it Notes®. Put them up on your personal computer, your refrigerator door, the bathroom mirror, inside your briefcase cover, and every other place where you are guaranteed to see them at least several times a day:

"Every Day".

Success in your own business does not come overnight. It takes months, if not years, to build a reputation and get your name out there. But if you are not doing something each and every day to reach your goals, it will take much, much longer than necessary – sooner or later, you will get disgruntled and give up trying.

Close your eyes. Picture a sheet of graph paper – the one with all the squares. Now, in your mind's eye, start filling in each box with the letter "X", but don't do it in any particular order – do it randomly.

Now, visualize that lightning is striking the boxes on your sheet of graph paper, also in random sequence.

You can easily see that if you have only a few boxes filled in with the letter "X", it is highly unlikely that a bolt of lightning will strike one of your marked boxes. As you fill in more and more boxes, though, the odds improve dramatically, until at the very end of the exercise – with all of the boxes filled in – it is virtually a certainty that lightning will strike one of your marked boxes.

Marketing your own business is a lot like that "graph paper" exercise. Each day you make a contact, talk to someone on the phone, speak at a local organization meeting, write an article for a local newspaper, and so forth, you put an "X" in a box. Lightning, in the form of business opportunities and referrals, will be striking in your community, and you want to be sure it strikes someone you have marked with an "X" – someone who will think of you and point the lightning in your direction.

Once you have lots of "X's" in boxes, you will not have to worry about leads and referrals. I had someone call me only last week who said "Cliff, I think I'm going to have to hire you as my attorney – I asked three people, none of whom know each other, to recommend a good small business attorney, and all three of them said you were the 'go to' guy for this type of work." Needless to say, over the past 20 years, I have put X's in just about every box on the sheet of graph paper entitled "small business and entrepreneur support community, southern New England".

If you do buy this franchise, commit yourself to making one marketing contact a day, no matter how busy you are, and no matter how distracted you may be by non-business concerns.

Success in your own business is a matter of doing something . . . every day . . . to build that business.

Cliff Ennico (crennico@gmail.com) is a syndicated columnist, author and former host of the PBS television series "Money Hunt." This column is no substitute for legal, tax or financial advice, which can be furnished only by a qualified professional licensed in your state. To find out more about Cliff Ennico and other Creators Syndicate writers and cartoonists, visit our Web page at www.creators.com.

MARKETING A SOLO OR SMALL OFFICE LAW PRACTICE: SOME REAL WORLD TIPS AND STRATEGIES

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I. THE IMPORTANCE OF MARKETING YOUR PRACTICE

A. You are a professional, but you are also a small business.
B. The key to success in any small business is marketing yourself and the services you offer.
C. If you do not learn how to market yourself and your services, you will fail – it's as simple as that.
D. If you are not spending at least 20% to 25% of your total working hours on marketing activities, you are not giving your marketing program the attention it deserves.
E. Never stop marketing – even when you have more clients than you can handle J.
F. If you are an associate in a law firm, there are only two ways you will ever make partner:
   1. Develop an unusual practice specialty that your firm's clients need but that isn't done by any of the other lawyers in the firm.
   2. Build a "book" of clients that look to you – not your firm – as their lawyer, and that account for more than 5% of your firm's total billings each year.
   3. For more information, see my new book *Partner Track: How to Go from Associate to Partner in Any Law Firm* (Kaplan Publishing, $12.95).

II. WHAT YOUR CLIENTS LOOK FOR IN A LAWYER

A. People don't hire lawyers, they hire people who can help them with certain types of problems.
B. Your personality and ability to empathize with a client's situation are your two biggest marketing tools.
C. People do not want your legal services – they want YOU. If they don't buy you, it doesn't matter how great your credentials are.
D. People are frightened of lawyers, and (sometimes) a little ashamed that they're in a situation where they have to hire one – after all, people don't call their lawyers when they're having a nice day J.

E. Anything you can do to humanize yourself and demonstrate that clients can trust you and communicate with you with help you attract and keep clients over the long term.

F. Don’t overlook your ethnic background, sex, and other personal characteristics – people feel comfortable working with people whom they perceive as being “like them”. I don’t think of myself as Italian-American, and wasn’t brought up in that culture, but I sure have lots of clients with vowels at the end of their names . . . know what I’m sayin’? J

III. THE FOUR PILLARS OF YOUR LAW FIRM MARKETING PROGRAM

A. Your involvement in organizations and community activities.

B. Your personal interaction with potential clients and referral sources and your “elevator pitch”.

C. Your public speaking strategy.

D. Your law firm Website

IV. PILLAR # 1: YOUR INVOLVEMENT IN ORGANIZATIONS

A. Bar associations and other professional groups are great, but you rarely get business from them unless other lawyers are a major referral source for your type of practice (e.g. specialized litigation, patent and trademark law, international trade).

B. It is better to join and get involved in organizations where lots of potential clients and referral sources are hanging out.

C. Some rules for choosing the right organizations and community activities:

1. Make sure there are lots of potential clients and referral sources in the membership.
2. Make sure there are as few other lawyers as possible in the membership who are going after the same markets you are targeting (for example, I join organizations of franchisors because while the other lawyers are looking to represent them, I’m looking to represent their franchisees).
3. Make sure you believe in the organization’s mission – nonprofits, especially, can be “time vampires” and you don’t want to spend lots of time working on projects that don’t mean anything to you. Also, if people see that you are only interested in getting business from the membership, they will isolate you sooner or later.
4. Look for organizations that have a low “flake ratio” – number of flaky people as a percentage of the total population J.
5. If you join an organization, roll up your sleeves and get involved.
6. Look for organizations that will help get your name and/or photo in local newspapers or otherwise generate positive publicity for you and your practice.

V. PILLAR # 2: YOUR PERSONAL NETWORKING AND "ELEVATOR PITCH"

A. Be sure to sell "benefits," not "features" – don't tell people what you do, tell them how you can solve particular problems or otherwise improve their quality of life.

B. Get people talking about their "fears" – the things that keep them awake at night – and their "passions" – the things that turn them on or get them excited. People love to talk about these two things more than anything else in the World, and showing a sincere interest in people's fears and passions make them much more likely to like you.

C. When giving an "elevator pitch," here's what you should say:

1. Describe the customers or clients you "serve" in your practice.
2. Describe the problems you solve, or otherwise say how you make your clients' lives better by what you do for them.
3. Describe what distinguishes you from your competition.
4. Tell a story, a humorous anecdote, or a weird fact that will stick in the person's head and make them remember you weeks and months from today (for example, the fact that I once wrote a book that, according to yearly surveys, is the book "most frequently stolen from law libraries around the country".

VI. PILLAR # 3: YOUR PUBLIC SPEAKING STRATEGY

A. Probably the best way to market your practice is to get up on some podiums and start giving talks, teaching classes, or hosting webinars on your law firm's Website (you do have one, don't you?)

B. Get hold of lists and schedules of local organization meetings – call the "program director" of each organization and volunteer to speak for free at an upcoming meeting. Most "program directors" are always on the lookout for interesting, free speakers, and you will rarely be turned down. You will also eat extremely well at least once a week without paying J.

C. Do not talk about what you do – talk about problems and issues members of the organization are facing and how they can be solved. Be sure to use lots of stories, illustrations and examples, as people tend to remember these longer than they will your information points. The more colorful, the better (but avoid off-color or politically incorrect stuff that may alienate your audience).

D. If you have a sense of humor, don't be afraid to use it – people cannot dislike someone who makes them laugh.

E. Remember that you are in "show business" whenever you speak – people today have shorter attention spans than they used to, and expect to be entertained as well as informed. As a mentor of mine once put it, "if you can't keep them awake, you can't teach them nothing".

F. Whenever you speak on a legal or law-related topic, be sure to include a disclaimer that "this is legal information only, not legal advice."

VII. PILLAR #4: YOUR LAW FIRM WEBSITE

A. What should be on your Website:
1. What you do – in layperson's terms
2. How much you charge
3. Free information

B. What should not be on your Website:
1. Your photo
2. Your biography
3. Any other information your clients don't care about

C. Remember to include "attorney advertising" on the home page

D. If you practice in Connecticut, you must submit copies of all advertising to the Statewide Grievance Committee in Hartford on a quarterly basis

VIII. SOME ETHICAL CONSIDERATIONS

A. Familiarize yourself with Rules 7.1 through 7.4 of the Model Rules of Professional Conduct (note that the New York and Connecticut versions of these are slightly different, if you practice in both states).

B. If you have a page on LinkedIn, Facebook or another social networking website that is focused on your law practice, note that the Grievance Committees in NY may view that as a "website" that you must register and update quarterly with them.

C. Never make claims about your practice that cannot be backed up by hard facts or data. For example, I never say I am a "leading authority on small business law". Instead, I say "I am the author of 16 books on small business law, management and marketing" – that gets the message across just as well and can easily be supported by fact if anyone ever questions it (I will gladly send the Grievance Committees copies of each of my books if they request to see them, and will even autograph them without charge J).

VIII. THE BOTTOM LINE ON MARKETING YOUR LAW PRACTICE

A. Whether you like it or not, "ya gotta do it".

B. Do it ethically and professionally, but do it.

C. Yes, it takes up valuable time that you cannot bill, but do it.

D. Find a way to market your practice that fits your personality, the amount of time you have available, and your practice specialty . . . but do it.

E. Set aside an hour or two each day that you devote exclusively to marketing related activities . . . and do it.

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YOUR SOLO PRACTICE BUSINESS PLAN:
A HANDY CHECKLIST

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OVERVIEW

- A spreadsheet is not a business plan.
    - While forecasts and metrics are useful, they should be viewed as emanating from carefully thought-out choices and action steps.
- A business plan needs to focus on steps needed to:
    - Develop business (Sales)
    - Staff and manage work-flow (Production and distribution)
    - Provide cash to run the business (Finance)
    - Manage infrastructure and support (Administration)
- The goal is to maximize the value of the enterprise for the benefit of its owners.
    - Value depends upon an ability to demonstrate a revenue stream that is:
        - Reasonably predictable
        - Based upon repeat business from diverse sources
    - Value also depends upon an ability to manage costs.
        - Overhead is necessary, but needs to be controlled.
        - The most expensive (and valuable) asset you have is your time, so use it wisely.
        - "What bad things happen to my clients if I don't spend this money?"

PRACTICE BASICS

- What types of law do you practice?
- Who are your primary clients?
- Who are your primary referral sources?
- Who are your primary competitors?
    - What makes you a better choice? How are you different?
- How do you want clients/prospects to view your practice?
    - High-value specialty provider?
    - Low-cost provider?
    - Most responsive?

- Practice Resources
    - Who are the lawyers in your firm and what type of law do they practice?
    - Who is responsible for:
        - Generating business?
        - Assigning and supervising work?
        - Client communications/relations?
        - Office management?
    - Who are your other employees and what do they do?
    - Any strategic partnerships/referral relationships?

REVENUE PLAN

- How will I price my services?

        - Hourly?
        - Flat fees?
        - Contingency?
        - Percentage of assets or of "the deal"?
        - Retainer?
        - Commission?
    - What cases/matters/files do I have already in hand; what will they produce in fees and when?
        - Files from prior firm
        - Files pending from prior client relationships
    - How will I develop new cases/matters/files?
        - Call ***on*** your "A List" prospects/referral sources
        - Call your "B List" prospects/referral sources
    - What is my best estimate as to what I can produce by way of fee revenue each month for the next 24 months?
    - What is my marketing plan and budget?

PRODUCTION PLAN

- Besides myself, how many other people do I need to be able to handle cases/matters in a timely fashion?
    - Other partners?
    - Associate(s)?
    - Paralegal(s)?
    - Secretaries?
    - Support staff?
    - Part-timers?
    - Contract lawyers?
- How will I compensate them; how much should I pay?
    - 1099 or W-2?
    - Hourly wage, plus overtime?
    - Base salary?
    - Benefits?
        - Payroll taxes
        - Health insurance
        - Paid-time-off
        - IRA/401(k)

Other

- What accommodations/facilities do I need to have in place to support these people; how much should I pay?
    - Office space
        - Will clients be coming to my office?
        - Layout?
        - Conference/reception space?
        - Traffic flow?
        - File space?
    - Furniture, fixtures and equipment
    - Telecommunications
    - Software
    - Filing system/records retention
    - Library/research capability
    - Other
- Who is going to manage all this? How do I budget my time?

        - Client intake
        - Work-flow and assignments
        - Supervision
        - Office management

FINANCE PLAN

- MOST IMPORTANT QUESTION – How am I going to pay my personal expenses while I am starting up my practice?
    - Guideline – enough income from savings or other sources to pay personal expenses for a year
- Where is the capital going to come from to finance my business start-up?
    - Personal savings?
    - Personal borrowing?
    - Firm borrowing?
- If I plan (need?) to grow to support new business, where will I get the capital to finance the growth?
    - Reduction in earnings/draw?
    - Capital contributed by new partner(s)?
    - Borrowing?

ADMINISTRATION/MANAGEMENT PLAN

- What tasks do I need to plan for when I budget my time?
    - Serving clients
    - Quality assurance
    - Delegating and supervising; scheduling
    - Business development
    - “Business hygiene”
    - Family time
    - Personal time
- What do I need to pay attention to if my business is to be well managed?
    - Balance client development with ability to serve clients
        - Quality control
        - Work allocation and matter management
    - People/HR/internal communication
        - Morale
        - Retention of key players
        - Reviews and performance evaluation
        - Training and career development, including your own
    - Relations with key “stakeholders”, starting with you and your family
    - Physical appearance of the office
    - Firm finances

OPERATING BUDGET

- First, hire a good bookkeeper/accountant to handle:
    - Setting up time, billing and general accounting systems and procedures
    - Preparing a draft budget
    - Paying bills, remitting taxes, etc.
    - Keeping the books up-to-date and reporting actual vs. budget
    - Preparing compliance reports

        - Tax returns
        - 1099s
        - Reports to banks, etc.
    - Advising you as to how to control costs
- Budget Guidelines
    - Space costs s/b about 7% of revenue
    - Marketing expense, especially for a small firm s/b 2.0% to 3.5% of revenue
        - Web-site, brochure and external communications
        - Face-to-face client/prospect meetings
    - For most hourly-billing firms, work-to-collection cycle s/b no more than 4 months

Expect to realize about 92% of your standard hourly rate

- Cost-saving techniques include:
    - Consider outsourcing capacity-sensitive office services
        - Photocopy/facsimile
        - Technology
    - Lease equipment that incurs a lot of wear-and-tear
    - Network with other small firms for research/library needs
    - Use a payroll service
    - Try not to advance costs for clients, or ask for advances to cover costs
        - Filing fees
        - Travel
    - Consider using contract lawyers/paralegals to handle demand peaks
    - Whenever possible, use e-mail, rather than couriers or the USPS
    - Use a single carrier for voice and data services
    - It’s really all about revenue; your costs are fixed in the short-run

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

ETHICS OPINION 1131

New York State Bar Association
Committee on Professional Ethics

Opinion 1131 (8/8/17)

Overrules N.Y. State 902 (2012) (as to payment of marketing fee)

Topic: Lead generation; lawyer paying for-profit company for leads

Digest: A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may ethically telephone that potential client if the potential client has invited the lawyer selected by the service to make contact by telephone.

Rules: 1.0 (a) & (f), 1.5(g), 5.4, 7.1(a), (f) & (h), 7.2(a), 7.3

FACTS

1. A lawyer wishes to pay a for-profit company that maintains an internet-based service (the "Service") directed at individuals or entities seeking a lawyer. Those who wish to be contacted by a lawyer submit their names and contact information (including the method the lawyer may use to contact them), their geographic locale, and the practice area in which they seek legal advice. The Service then searches its database of participating lawyers to identify all lawyers who state that they engage in the requested practice area in the requested locale. The Service selects a lawyer meeting the geographic and practice area criteria based on neutral (mechanical) criteria, such as the order in which the lawyers registered with the Service (the first lawyer to register gets the first lead; second lawyer gets the second lead, etc.). The selection method is clearly described to potential clients. The Service forwards the potential client's information to that lawyer.

2. The participating lawyer pays a fixed monthly fee to the Service or a fee for each such potential client, and the fee does not vary depending on whether the lead results in retention of the lawyer or the amount of the fee the lawyer charges the client if retained. If the potential client decides not to retain that lawyer or if the assigned lawyer has a conflict of interest and cannot represent the potential client, the potential client may request that the Service provide the client's information to another participating lawyer.

3. This opinion addresses the implications of this arrangement under the advertising, referral, and solicitation provisions in the New York Rules of Professional Conduct ("Rules").

QUESTIONS

4. Does the Service's website constitute an "advertisement" by or on behalf of the lawyer for which the lawyer is responsible under the Rules?

5. Does the lawyer's payment to the Service for the names of potential clients constitute an impermissible payment for obtaining employment by the lawyer?

6. If the lawyer may use the Service, does the lawyer's outreach to the potential client constitute an impermissible "solicitation" or "advertisement' within the meaning of the Rules?

OPINION

7. Because of the wide variation in the structure of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation that may exist. This opinion also does not address whether the Service would implicate § 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"), which is a question of law beyond our jurisdiction.

Prior Committee Opinions

8. In N.Y. State 779 (2004) a lawyer wished to pay a marketing organization a fee in return for a bundle of pre-screened potential clients that might need representation regarding their federal income taxes. Applying the New York Code of Professional Responsibility (the "Code"), the predecessor to the current Rules, we concluded that accepting leads in this fashion was impermissible under DR 2-103(B), which provided, in pertinent part: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client."

9. In N.Y. State 799 (2006), this Committee addressed whether a lawyer could ethically pay to participate in a website that forwarded inquiries from potential clients to lawyers who then contacted the prospect by telephone, where the service purported to analyze the prospective client's problem. N.Y. State 799 opined that, subject to the rules on attorney advertising, a lawyer may pay to be included in "an online 'directory' . . . that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area," and opined that such an on-line directory did not violate DR 2-103(B). The Committee stated, however, that the line between a permissible "directory" and an impermissible "recommendation" would be crossed when the service purports to analyze the prospective client's problem:

> We find that the line is crossed . . . when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more lawyers in that area, the website is 'recommending' those lawyers.

(Emphasis in original.) On that basis, Opinion 799 distinguished a searchable directory from the website service addressed in N.Y. State 779.

10. Finally, in N.Y. State 902 (2012) the Committee held that a lawyer could not pay a marketing company a fixed fee each time the marketer makes an introduction to a potential client.

11. The current inquiry implicates provisions whose language is in many respects identical to the provisions addressed in Opinions 779, 799 and 902, including Rule 7.2(a), which incorporates the above-quoted restriction of its predecessor, DR 2-103(B). The questions presented here are whether a New York lawyer who uses the Service runs afoul of the principles reflected in those opinions. We believe that such a lawyer would not violate the Rules if the lawyer abides by the conditions set forth in this opinion.

Advertising and Required Disclosures

12. Rule 7.1 governs lawyer advertisements. Rule 1.0(a) defines "advertisement" for purposes of the various advertising restrictions in the Rules. It provides:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or the law firm's services, the primary purpose of which is for the retention of the lawyer or law firm.

Here, the Service's website is a communication "on behalf of" a lawyer "about" the lawyer's services for the "primary purpose" of retention of the lawyer. It is therefore an "advertisement" within the meaning of Rule 1.0(a).

13. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1 also requires that certain advertisements contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading, or deceptive statements or claims, or otherwise violate the Rules.

14. Rule 7.1(h) requires that "[a]ll advertisements shall include the name, principal law office and telephone number of the lawyer or law firm whose services are being offered." We have previously concluded that lawyers may not engage in advertising on the internet, including "group advertising," without complying with this Rule. *See, e.g.*, N.Y. State 839 (2010) ("Group radio advertisement that does not broadcast the lawyer's name, principal law office address and telephone number, but instead directs listeners to contact an agent who provides that information, is prohibited under Rule 7.1(h).").

15. The question raised by N.Y. State 839 is how the Service's website may operate consistently with Rule 7.1(h). N.Y. State 597 (1989) provides one possible solution. In that opinion, each lawyer was assigned a specific geographical area – either a county or a zip code. Applying the Code, the Committee said that it was irrelevant that the operator of the service had no discretion in choosing lawyers for potential clients. If

the client was not choosing a *particular lawyer*, the referral was prohibited. Nevertheless, the Committee stated that the conclusion would be different if an advertisement not only contains an 800 number, but also "presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical areas assigned to them, so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent."

16. Here, the Service can comply with Rule 7.1(h) by providing a link to either (i) a list of all participating attorneys with the required contact information or (ii) a list of all participating attorneys who fall within the geographic and practice area parameters that may be set by the potential client, along with the required contact information. In this way, the potential client will know the names and addresses of the lawyers from which the Service may designate a lawyer who will contact the potential client.

Referrals and Referral Fees

17. Rule 7.2(a) states that a lawyer shall not "compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ." The Rule contains three exceptions that are not relevant to this inquiry: (1) referrals without monetary rewards permitted by Rule 5.8, (2) referrals to another lawyer permitted by Rule 1.5(g), and (3) referrals by a qualified legal assistance organization (defined in Rule 1.0(p) as one of the types of organizations listed in Rule 7.2(b)(1) – (4)). The Service here is not operated or sponsored by a bona fide non-profit community organization or operated, sponsored or approved by a bar association and therefore does not constitute a qualified legal assistance organization.

18. Since the Service here does not qualify for any of the exceptions in Rule 7.2(a), Rule 7.2(a) is a problem if the lawyer pays the Service to "recommend" the lawyer or if the lawyer pays the Service to obtain employment by a client. Nevertheless, Comment [1] to Rule 7.2 makes clear that a lawyer may pay for advertising permitted by the Rules without violating the prohibition against "paying to obtain employment" within the meaning of Rule 7.2(a). Consequently, if the Service complies with the advertising rules and the lawyer's payment is reasonable for that form of advertising, a lawyer's using the Service will not run afoul of Rule 7.2 unless the Service is deemed to "recommend" the lawyer.

19. Comment [1] to Rule 7.2 includes a definition of the term "recommendation":

> A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.

20. As we observed in Opinion 799, to "recommend" also includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem. We believe identifying "a right" or "the right" lawyer implies some qualitative, comparative assessment of the lawyers available to perform the services the potential client requires.

21. We believe that the Service would not constitute a "recommendation" as long as the Service's advertising does not state or imply that the Service is making a recommendation and makes clear that (i)

being included on its list of participating lawyers requires only a payment and the Service does not vet the qualifications of such lawyers, other than, for example, confirming the lawyer's good standing with the licensing authority, if that is the case, (ii) the Service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment, and (iii) when a lawyer is chosen by the Service, it does not mean the selected lawyer is the "best" or "right" lawyer for the client's needs or that the lawyer is otherwise preferred over other lawyers. If these three conditions are met, a lawyer's payment to the Service to participate in its matching service as a lawyer available to contact potential clients is permissible under Rule 7.2(a).

22. These three conditions are consistent with Comment [1] to Rule 7.2, which was amended in 2015 to provide guidance on how the prohibition on paying for referrals or employment applies to paying for client leads. Comment [1] says, in part:

> [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.3 (Lawyer's Responsibility for Conduct of Nonlawyers).

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), which recommended the amendment to Comment [1], explained the amendment as follows:

> The Internet and other technologies have made it possible for lawyers to find clients in ways that did not exist five or ten years ago, and have enabled nonlawyers to develop new ways to assist lawyers in finding new clients. COSAC recommends amending Comment [1] to Rule 7.2 to clarify the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere.

See New York State Bar Association, Committee on Standards of Attorney Conduct, Proposed Amendments to the New York Rules of Professional Conduct and Related Comments 3 (December 23, 2014).

23. The first condition in amended Comment [1] is that the lead generator not recommend (or imply or create a reasonable impression that it is recommending) the lawyers. Thus, a lawyer using the Service must assure that neither the Service nor the advertising for the Services states or implies that the Service is recommending any lawyer, because false, deceptive or misleading communications violate Rule 7.1(a)(1). This means that the Service must be transparent about the methodology it uses to select lawyers. To ensure that the Service does not suggest to potential clients that the Service is comparing the relative merits of lawyers in order to choose a specific lawyer to contact the potential client, the Service must

provide sufficient information to make clear that (i) lawyers pay to participate in the Service, (ii) the selection of a lawyer by the system is not based on an analysis of the potential client's legal problem, (iii) the selection is not a recommendation nor does it imply that the lawyer selected is the "right" or "best" or preferred lawyer to handle the problem, and (iv) the selection is not an evaluation of the quality of the selected lawyer's work. An element of the Service that is solely fact-based (for instance, that the Service accepts only participating lawyers who are in good standing in their jurisdiction of practice), unadorned by evaluative measures or ratings, likewise would not render the Service's selection of a lawyer a recommendation if the Service is indeed objective.

24. Another condition set out in the excerpt from Comment [1] quoted above is that any payment to the lead generator must be consistent with Rules 1.5(g) and 5.4. We see no issue under Rules 1.5(g) and 5.4 as long as the lawyer is paying the Service a fixed sum to participate, unrelated to the lawyer's retention or the amount the lawyer charges in legal fees. Paying a fixed fee to the Service is essentially paying a marketing fee. Our Opinion 902 (2012) is hereby overruled to the extent it prohibited payment of the marketing fee described in this opinion.

25. A final condition set out in Comment [1] to Rule 7.2 is that the lawyer must comply with Rule 1.8(f). Thus the lawyer must prevent interference with the lawyer's exercise of independent professional judgment. In our view, the Service's selection method and communication protocols described above raise no apparent risks in that regard.

26. Our conclusion that the Rules permit the type of arrangement at issue here also finds support in numerous ethics opinions issued by other ethics committees. *See* ABA/BNA Lawyers' Manual on Professional Conduct: Advertising and Solicitation 81:709; *Zelotes v. Rousseau*, N. 09-0412, 26 Law. Man. Prof. Conduct 134 (Conn. Statewide Grievance Comm. Feb. 8, 2010) (dismissing disciplinary complaints against Connecticut lawyers for participating in ClearBankruptcy.com and TotalBankruptcy.com, noting that the websites did not endorse participating lawyers but bore disclaimers to the contrary and required potential clients to initiate contact by visiting the websites and voluntarily providing information); Arizona Op. 11-02 (lawyer may join an internet group advertisement listing no more than one lawyer for each zip code if program does not imply endorsement, if it is labelled as advertising, and if lawyer has paid for exclusive zip code listing); District of Columbia Op. 302 (lawyers may pursue legal work through paying a fee to access web page where potential clients post requests for bids on legal work); Nassau County (N.Y.) Ethics Op. 01-4, 17 Law. Man. Prof. Conduct 123 (2001) (subject to the operational structure and content described in the opinion, a lawyer may affiliate with an online legal services website); Nebraska Op. 07-05 (lawyer may participate in internet lawyer directory which identifies itself as a directory, disclaims being a referral service and only lists basic information about lawyers without recommending specific lawyers and charges a reasonable, flat annual advertising fee); New Jersey Committee on Attorney Advertising Op. 36 (2006) (lawyer may pay flat fee to internet marketing company for exclusive website listing for particular county in specific practice area if listing includes prominent, unmistakable disclaimer stating the listings are paid advertisements and not endorsements or authorized referrals); North Carolina Op. 2004-1 (lawyer may participate in for-profit online service that is a hybrid referral service-legal directory, provided there is no fee-sharing with the service and communications are truthful); Oregon Op. 2007-180 (2007) (lawyer may pay nationwide internet referral service for listing if listing is not false or misleading and does not imply that the lawyer can represent clients outside jurisdictions of the lawyer's license, fee is not based on

number of referrals, retained clients or revenue generated by listing and the service does not exercise discretion in matching clients with lawyers); Rhode Island 2005-01 (permitting website that enables lawyers to post information about their services and respond to anonymous requests for legal services in exchange for flat annual membership fee if website exercises no discretion over which requests lawyers may access); South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Texas Op. 573 (2006) (lawyer may participate in for-profit internet service that matches potential clients and lawyers if selection process is fully automated and performed by computers without the exercise of human discretion); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers).

Solicitation and Permissible Contact

27. Finally, a lawyer who purchases leads must comply with applicable restrictions on the solicitation of potential clients. A solicitation, as defined by Rule 7.3(b), is an advertisement "initiated by or on behalf of a lawyer" that is targeted at a specific recipient or group of recipients and intended to secure the lawyer's retention for pecuniary gain. However, Rule 7.3(b) also contains an exception: a solicitation "does not include a proposal or other writing prepared and delivered in response to a specific request." If the potential client (the "lead") has specifically requested or consented to a phone call, then the lawyer's phone call is not a solicitation because it is not "initiated by or on behalf of" the lawyer. Rather the phone call is initiated in response to a specific "request" by the potential client. Although the exception in Rule 7.3(b) refers to a proposal or other "writing" delivered in response to a client's request, we think a writing is just one example and that the exception also applies to a request by a potential client to be contacted in any specified manner, including by telephone, text, email or otherwise. *See* N.Y. State 1049 (2015) (where a potential client posts a message on a website asking to be contacted by a lawyer about a legal problem, a lawyer may respond in the matter invited by the client); N.Y. State 1014 (2014) (where detainee communicates through another detainee that he desires to be contacted by a particular lawyer, the lawyer's response is not a solicitation, because the communication was initiated by the prospective client).

CONCLUSION

28. A lawyer may pay a for-profit service for leads to potential clients obtained via a website on which potential clients provide contact information and agree to be contacted by a participating lawyer, as long as (i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem; (ii) the service does not explicitly or implicitly recommend any lawyer, and (iii) the website of the service complies with the requirements of Rule 7.1. A lawyer who purchases such a lead to a potential client may telephone that potential client if the party has invited a telephonic communication by the lawyer selected by the service.

(9-17)

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ETHICS OPINION 1132

New York State Bar Association
Committee on Professional Ethics

Opinion 1132 (8/8/17)

Topic: Paying nonlawyers for a recommendation or referral

Digest: A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).

Rules: 1.0(a), 5.4(a), 7.1(a), 7.1(b)(1), 7.1(f). 7.1(h), 7.2(a)

FACTS

1. The inquirer is a lawyer who wishes to participate in Avvo Legal Services, which is a service of Avvo, Inc. Avvo, Inc. is a privately-owned corporation that describes itself as an online legal services marketplace. (Avvo, Inc. and Avvo Legal Services are sometimes each referred to in this opinion as "Avvo" and lawyers who offer Avvo Legal Services are referred to as "participating lawyers"). The inquirer would offer legal services through Avvo's website and pay the marketing fees that Avvo charges to lawyers who obtain clients via the Avvo website. The inquirer asks whether the New York Rules of Professional Conduct (the "Rules") permit New York lawyers to pay Avvo's marketing fees. Because Avvo's method of operation is crucial to our response, we will devote several paragraphs to describing the Avvo Legal Services product.

2. Avvo allows potential clients to choose participating lawyers in various practice areas for a fixed (*i.e.,* flat) fee. The Avvo website (*www.avvo.com*) says: "Experienced lawyers on demand. Hire yours" and "Work with highly rated, local lawyers near you," and it contains a guide called "How to find and hire a great lawyer."

Avvo Ratings

3. Avvo assigns every lawyer in a jurisdiction an "Avvo rating." The rating is calculated based on information Avvo collects from lawyer websites and other public sources (such as the type of work the lawyer does and the number of years the lawyer has been engaged in that work), as well as on information the lawyer has chosen to add to the lawyer's Avvo profile (such as publications, CLE presentations, speaking engagements and positions with bar associations and their committees). Avvo's website says that each attorney's rating "is calculated using a mathematical model, and all lawyers are evaluated on the same set of standards. ... At Avvo, all lawyers are treated equally." Avvo does not seek or accept any payment for an Avvo rating. However, lawyers who supply more information may receive higher ratings

than lawyers who supply less information. Avvo says it scores all information objectively, and does not use subjective data such as client reviews. Although Avvo assigns a rating to all lawyers in a jurisdiction, lawyers cannot offer their services through Avvo unless they meet Avvo's minimum criteria and sign up with Avvo to be listed on the site and agree to Avvo's pricing schedule and marketing fees. According to Avvo, the criteria for participation include a minimum Avvo Rating, a minimum client review score, and a clean disciplinary history.

How a Prospective Client Chooses a Lawyer and Service

3. A prospective client seeking legal services through Avvo first chooses an area of law practice and a state or city. (Avvo lists all 50 states and the District of Columbia, and separately lists about 50 major cities.) The Avvo site says: "Choose an area of law to find top-rated attorneys near you." The site lists numerous areas of law practice, such as Business, Family, Government, Immigration, Bankruptcy and Debt, Criminal Defense, Landlord & Tenant, Employment & Labor, Real Estate, and Estate Planning.

5. Next, the prospective client chooses a type of legal service or "package." The Avvo website says: "Packages include advice sessions, document reviews, and start-to-finish support." Advice sessions (called "Avvo Advisor") come in two varieties – the prospective client may either (i) click on a specific lawyer, who is required by Avvo to call back within one business day, or (ii) click on "have a lawyer call me now," in which case Avvo sends a text message to all lawyers in the selected practice area and locale, and the first available lawyer calls the prospective client. When using the first of these varieties of advice session, the client is free to choose from the entire list of lawyers who are licensed in the client's state and who offer the service the client seeks to purchase.

6. Avvo's website does not say, "We recommend that you choose this lawyer," or "This lawyer is the best fit for your situation." Rather, Avvo furnishes information about lawyers (including client reviews, peer reviews, and Avvo ratings) and allows clients to choose the lawyer. Avvo describes its service as simply "facilitating a marketplace" where consumers can choose from among all of Avvo's participating lawyers.

7. Once the prospective client has chosen a lawyer (or opted for "have a lawyer contact me now") and selected a specified legal service, the client clicks on a button that says "Buy now." The lawyer then contacts the client. (Phone calls from a participating lawyer to a client initially go through an automated Avvo "switchboard" so that Avvo can time the calls, but Avvo asserts that it cannot listen to the calls.) Once the lawyer and client have completed a phone call of at least eight minutes, Avvo charges the client's credit card for the full amount of the fee for the selected legal service.

Avvo's Satisfaction Guarantee

8. Part of the Avvo product is that Avvo gives a "satisfaction guarantee" and will refund the fee to the client (or allow the client to choose a different participating lawyer at no additional charge) if (a) the lawyer does not deliver the services for which the client has paid, or (b) the client is not satisfied with the lawyer's services. Avvo's website describes the satisfaction guarantee as follows:

RULE 1.1:
RULE 1.2: If you're not 100% happy with the service you purchased, we'll make it right.

We stand behind our services and expect our clients to be 100% satisfied with their experience. If you are unhappy with the service you purchased, we'll make it right. We will help you switch lawyers or services to make sure you get the legal help you need, at no cost to you. If you don't want to continue to solve your issue through Avvo Legal Services, we will fully refund your purchase.

(a) What if I don't get the results I expect?

We guarantee the services listed on our website, but we can't guarantee any specific outcome. Every legal case is unique. The success of your case depends on many different factors.

(b) How do I request a refund or file a complaint?

To file a complaint or seek a refund, contact customer care . . . . Depending on your situation, documentation may be needed. Your customer care rep will work with you to fix the situation to your satisfaction.

Avvo considers this satisfaction guarantee to be part of its marketing costs, reasoning that the satisfaction guarantee makes participating lawyers more attractive than lawyers who do not offer a satisfaction guarantee.

Avvo's Marketing Fee

9. At the beginning of each month, Avvo pays each participating attorney all of the legal fees generated through Avvo by that attorney in the previous month, and separately charges each attorney a "marketing fee" for each legal service the attorney has completed during the prior month (unless Avvo has refunded the client's payment). As an example, Avvo's website tells lawyers that "if a client purchases a $149 document review service with you, you will be paid the full $149 client payment into your deposits account. As a separate transaction, you will be charged a $40 marketing fee from your withdrawals account." *See* *http://bit.ly/2fIlOxM* ("Attorney FAQ for Avvo Legal Services").

10. The amount of Avvo's marketing fee depends on the service. For more expensive legal services, Avvo generally charges lawyers a higher marketing fee. An FAQ on Avvo's website explains the marketing fee as follows: "The amount depends on the service, and ranges from a $10 marketing fee for a $39 service, to $40 marketing fee for a $149 service, up to a $400 marketing fee for a $2,995 service." As these examples show, the marketing fee is not directly proportional to the price of the legal service – a $10 marketing fee is 25.6% of a $39 service and a $40 marketing fee is 26.8% of a $149 service, but a $400 marketing fee is only 13.4% of a $2995 service.[1] Thus, the marketing fee is not a fixed percentage of the legal fees, but it is generally greater for higher-priced services than for lower-priced services.

11. To understand Avvo's rationale in setting its marketing fees, this Committee posed various questions directly to Avvo. Avvo explained that the correlation between its marketing fees and the price of Avvo legal services reflects two interrelated concepts.

12. First, Avvo says that more expensive legal services cost more to market. For example, Avvo says that its ad placements on Google and on online advertising networks cost more for more expensive services, and cost more for more competitive keywords. Also, Avvo's marketing fee covers the credit card processing

fee, which is a fixed percentage of the total legal fee, so a higher legal fee necessarily entails a higher credit card processing fee.

13. Second, Avvo says that its customer service costs are higher for more expensive services. For example, Avvo says that its "platform usage" and "customer care" expenses are higher for more expensive services, because clients raise more questions about more expensive services. Avvo employs a team of live customer care representatives who handle client inquiries via phone, email, and electronic chat – see *https://support.avvo.com/hc/en-us/requests/new* . In addition, Avvo says that requests for refunds, voids, chargebacks, and other forms of what it calls "breakage" are higher for more expensive services. We have not verified any of Avvo's facts or claims regarding its marketing expenses, but we accept them as true for purposes of our analysis in this opinion.

QUESTION

14. May a New York lawyer pay Avvo's current marketing fee to participate in Avvo Legal Services?

OPINION

Issues Not Decided Here

15. Avvo's mode of operation raises many questions under the Rules in addition to the marketing fee issue. For example:

•Avvo markets the services of participating lawyers. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1(a) also requires that certain ads contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Rule 1.0(a) defines an "advertisement" to mean "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services the primary purpose of which is for the retention of the layer or law firm." As we said in N.Y. State 1131 (2017):

Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading or deceptive statements or claims, or otherwise violate the Rules.

•Under Rule 7.1(b)(1) and Comment [13] to Rule 7.1, lawyers may not use Avvo ratings (or any other ratings) in their advertising unless those ratings are "bona fide professional ratings." As noted in ¶ 19, the Avvo website constitutes advertising of lawyers who participate in Avvo Legal Services. Consequently, participating lawyers must determine whether the ratings provided by the service are bona fide. Comment [13] to Rule 7.1, headed "Bona Fide Professional Ratings," provides guidance, saying that ratings are not "bona fide" unless (among other things) the ratings "evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests," and are "not subject to improper influence by lawyers who are being evaluated." If the rating is not bona fide, it would be false and misleading in violation of Rule 7.1(a)(1). We lack sufficient facts to determine (and do not decide) whether Avvo's rating system meets the criteria for a bona fide professional rating.

•Many of the services under the Avvo Legal Services program involve limited services, such as a 15-minute advice session or review of a document and a 30-minute advice session but not revision of the document. Both the Rules and our opinions have approved limited scope representations under certain conditions that we do not repeat here. *See* Rule 1.2(c) and Cmts. [6] and [7], N.Y. State 856 (2011), N.Y. State 604 (1989).

•The fact that Avvo sets the amount of the legal fee for each service raises questions about whether a participating lawyer can deliver competent legal services for Avvo's chosen price and whether a lawyer is allowing Avvo to interfere in the lawyer's independent professional judgment regarding how much time to spend on a matter.

•The marketing fee raises questions about whether lawyers who participate in Avvo Legal Services are improperly sharing legal fees with a nonlawyer.[2]

•Avvo's satisfaction guarantee raises questions about confidentiality. If clients call Avvo to complain, does the "documentation" that Avvo asks for or receives include "confidential information" within the meaning of Rule 1.6(a)? How does Avvo avoid receiving confidential information when evaluating whether to refund the legal fee a client has paid through Avvo?

16. In this opinion, we do not address or answer any of those additional issues, because we believe our answer to the question posed by the inquirer is dispositive. Similarly, we express no opinion as to whether Avvo's operations implicate § 495(1)(d) of the Judiciary Law, which provides that "[n]o corporation . . . shall . . . furnish attorneys or counsel". That is a question of law beyond our jurisdiction. Instead, we focus in this opinion only on whether the marketing fee that Avvo charges to participating lawyers constitutes an improper payment for a recommendation (*i.e.,* an improper referral fee) within the meaning of Rule 7.2(a) of the Rules.

Does the marketing fee constitute an improper payment for a recommendation?

17. Rule 7.2(a) sets forth the following general rule:

A lawyer shall not compensate or give anything of value to a person or organization to *recommend* or obtain employment by a client, or as a reward for having made a *recommendation* resulting in employment by a client .... [Emphasis added.]

(Rule 7.2(a) also states two exceptions not relevant here.)

18. Whether paying Avvo's marketing fee complies with Rule 7.2(a) depends primarily on what a lawyer is purchasing when the lawyer pays Avvo's marketing fee. If the lawyer is paying the marketing fee solely to obtain advertising and marketing services from Avvo, then the lawyer is not giving Avvo something "of value" to recommend the lawyer, but is instead paying Avvo for marketing services, which does not violate Rule 7.2(a). If, however, the marketing fee also includes a payment to Avvo for recommending the lawyer, then the payment constitutes giving something "of value" for a recommendation, which does violate Rule

7.2(a).

1. *Is the marketing fee solely a payment for advertising and marketing services?*

19. A marketing fee is not *per se* prohibited by Rule 7.2(a). A lawyer may pay nonlawyers to advertise or market the lawyer's services. Comment [1] to Rule 7.2 says explicitly that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules," and that a lawyer "may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff, and web site designers." We believe Avvo's website is an "advertisement" within the meaning of Rule 1.0(a). The Avvo website is a public communication on behalf of each participating lawyer, about that lawyer, for the primary purpose of helping the participating lawyers obtain employment by potential clients who use the Avvo website. And the participating lawyers "use or . . . participate in use" of the advertisement within the meaning of Rule 7.1(a) because they must take action to participate in Avvo Legal Services.

20. We addressed payments to nonlawyers for advertising in N.Y. State 897 (2011), which addressed a "deal-of-the-day" service similar to Groupon or Living Social. There, the deal-of-the-day service negotiated with lawyers to obtain a discounted legal fee. Potential clients who wanted the lawyer's discounted services used a credit card on the deal-of-the-day website to purchase a voucher for the lawyer's services. The website then deducted "a percentage of the gross receipts as its compensation" and paid the balance to the lawyer. (Opinion 897 does not specify the percentage.) We asked "whether the money retained by the website is merely an appropriate payment for a novel form of advertising or is a compensation for the referral of a client." We concluded that the deal-of-the-day arrangement was an appropriate payment for advertising, and was not payment for a referral, and therefore did not violate Rule 7.2(a). To explain our rationale, we said (in ¶12):

We note that the website has no individual contact with the coupon buyers other than collecting the cost of the coupon. The website has not taken any action to refer a potential client to a particular lawyer – instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service.

21. Opinion 897 did not reach a categorical conclusion, however, because we were "not privy to the percentage amount retained by these various websites…." We said: "[A]ssuming that it is a reasonable payment for this form of advertising, we conclude that there is no violation of Rule 7.2." We then qualified our opinion by saying: "Different arrangements between the lawyer and the website could lead to the opposite conclusion, *i.e.,* that the lawyer is paying for a referral in violation of Rule 7.2."

22. Here, we again lack sufficient information to determine whether Avvo's marketing fee is "a reasonable payment for this form of advertising." We therefore do not decide this question.[3]

2. Is the marketing fee a payment for a recommendation?

23. Under Rule 7.2, although lawyers may ethically pay nonlawyers for advertising and marketing services, they may not pay for a "recommendation." Therefore, we must determine whether the marketing fee is or

includes a payment to Avvo to recommend the participating lawyers.

24. The term “recommendation” is not defined in the text of the Rules. However, in March 2015, after we issued N.Y. State 897 (2011), the New York State Bar Association amended Comment [1] to Rule 7.2 to address, among other things, whether a third party that connects lawyers with clients or potential clients is “recommending” the lawyer, and to define a “recommendation.” Comment [1] now states, in part:

[1] ... A communication contains a recommendation *if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.* [Emphasis added.]

See also N.Y. State 1131 ¶ 19 (2017), (to “recommend” includes identifying a particular lawyer or lawyers to a potential client as “a right” or “the right” lawyer for the client’s situation after an analysis of either the potential client’s legal problem or the lawyer’s qualifications to address that problem, which implies a qualitative, comparative assessment of the lawyers available to perform the services the potential client requires).

25. Comment [1] to Rule 7.2 adds that recommendations by so-called “lead generators” are improper:

... [A] lawyer may pay others for generating client leads, such as Internet-based client leads, as long as *(i) the lead generator does not recommend the lawyer*, (ii) any payment to the lead generator is consistent with Rule[] ... 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer’s independent professional judgment by a person who recommends the lawyer’s services), and (iv) the lead generator’s communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). ... [Emphasis added.]

Indeed, Comment [1] prohibits a lead generator not only from *stating* that it is recommending a lawyer, but also from *implying or creating a reasonable impression* that it is making such a recommendation:

... To comply with Rule 7.1, a lawyer must not pay a lead generator that *states, implies, or creates a reasonable impression that it is recommending the lawyer,* is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. *...* [Emphasis added.]

We must therefore determine whether Avvo is “recommending” a lawyer or “implying or creating a reasonable impression” that it is making a recommendation.

29. As noted earlier, Avvo allows clients to choose from among all of the lawyers in a geographic area who have listed themselves as practicing the field of law in which the client wants legal services. (Avvo says lawyers are displayed randomly and the list is reshuffled at least once every hour.) Avvo says that it does not analyze (or even inquire about) a client’s individual situation. No human being at Avvo talks directly to any prospective client to find out the facts or studies the prospective client’s documents and then picks out a particular lawyer who is “right” for that client. Nor does Avvo’s website suggest that a client hire any particular lawyer. Avvo is not “recommending” lawyers in that sense.

30. But Avvo does more than merely list lawyers, their profiles, and their contact information. Avvo also gives each lawyer an Avvo rating, on a scale from 1 to 10. As Avvo explains on its website, “It’s as simple

as counting to 10. Ratings fall on a scale of 1 (Extreme Caution) to 10 (Superb), helping you quickly assess a lawyer's background based on our rating." (Emphasis in original.) The Avvo ratings suggest mathematical precision – the rating for each lawyer is calculated to a decimal place (*e.g.,* a rating of 6.7 or 8.4).

31. Moreover, some Avvo ads expressly state that the Avvo Rating enables a potential client to find "the right" lawyer, and Avvo's website claims that its ratings enable potential clients to choose the right lawyer for their needs:

Why the Avvo Rating can help you find the right attorney:

The model used to calculate the rating was developed with input from hundreds of attorneys, thousands of consumers, and many other legal professionals who deeply understand the work attorneys do. We created the Avvo Rating to reflect the type of information people have identified as important when looking to hire an attorney.

32. Even if Avvo ratings are "bona fide," within the meaning of Rule 7.1(b)(1), we must determine whether (i) Avvo's inclusion of Avvo Ratings in Avvo's advertising on behalf of participating lawyers, or (ii) Avvo's description of its ratings in its advertising, is or implies a "recommendation," i.e. whether the rating "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

33. Avvo's website never describes a rating as a recommendation, and it contains several warnings about the limitations of its ratings. The website says:

•"A rating is not an endorsement of any particular lawyer, and is not a guarantee of a lawyer's quality, competency, or character. . . . Rather, the Avvo Rating is intended to be a starting point to gather information about lawyers who may be suitable for your legal needs."
•"Keep in mind that these ratings speak to a lawyer's background, but do not evaluate their knowledge of the law, past performance on individual cases, personality, or communication skills. These are elements that the Avvo Rating cannot evaluate, but can be better described in the client reviews and peer endorsements found on an attorney's profile."
•"[W]e don't recommend the Avvo Rating as the only piece of information you use to evaluate whether an attorney is right for you. The rating is a tool that provides a snapshot assessment of a lawyer's background, and should be considered alongside other information such as client reviews and peer endorsements."

34. Nevertheless, the Avvo website also extols the benefits of being able to work with highly-rated lawyers:

•"Work with highly rated, local lawyers near you."
•"Search top-rated lawyers near you."
•"We only work with highly qualified attorneys who are licensed to practice in your state."

Through these statements and through Avvo's description of its rating system, Avvo is giving potential clients the impression that a lawyer with a rating of "10" is "superb," and is thus a better lawyer for the client's matter than a lawyer with a lower rating. Avvo is also giving potential clients the impression that

Avvo's eligibility requirements for lawyers who participate in Avvo Legal Services assure that participating lawyers are "highly qualified."

35. We do not believe that a bona fide professional rating alone is a recommendation. But, even assuming that Avvo ratings are "bona fide professional ratings," we believe the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is "recommending" those lawyers.

36. In N.Y. State 799 (2011), in discussing the difference between an internet-based directory and a recommendation, we said that the line between the two was crossed when a website purports to recommend a *particular lawyer or lawyers* based on an analysis of the potential client's problem. Other jurisdictions also focus on the "particular lawyer" distinction. *See, e.g.*, South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers). We believe Avvo's advertising of its ratings, in combination with its statements about the high qualifications of lawyers who participate in Avvo Legal Services, constitutes a recommendation of all of the participating lawyers.

37. Our conclusion is bolstered by Avvo's satisfaction guarantee, by which the full amount of the client's payment (including Avvo's portion of the fee) is refunded if the client is not satisfied. This guarantee contributes to the impression that Avvo is "recommending" the lawyers on its service because it stands behind them to the extent of refunding payment if the client is not satisfied.

38. This opinion does not preclude a lawyer from advertising bona fide professional ratings generated by third parties in advertisements, and we recognize that a lawyer may pay another party (such as a magazine or website) to include those bona fide ratings in the lawyer's advertisements. But Avvo Legal Services is different. It is not a third party, but rather the very party that will benefit financially if potential clients hire the lawyers rated by Avvo. Avvo markets the lawyers participating in the service offered under the Avvo brand, generates Avvo ratings that it uses in the advertising for the lawyers who participate in Avvo Legal Services, and effectively "vouches for" each participating lawyer's credentials, abilities, and competence by offering a full refund if the client is not satisfied. As noted earlier, Avvo says: "We stand behind our services and expect our clients to be 100% satisfied with their experience." Accordingly, we conclude that lawyers who pay Avvo's marketing fee are paying for a recommendation, and are thus violating Rule 7.2(a).

39. The questions we have addressed here have generated vigorous debate both within and outside the legal profession. The numbers of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting. But it is not this Committee's job to decide policy issues regarding access to justice, affordability of legal fees, or lawyer quality. Our job is to interpret the New York Rules of Professional Conduct. Future changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions, but at this point we conclude that, under Avvo's current structure, lawyers may not pay Avvo's marketing fee for participating in Avvo Legal Services.

CONCLUSION

40. A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a).

(29-16)

[1]Avvo also provided this Committee with a list of many additional services, prices, and marketing fees. For example, marketing fees are generally $30 for a $99 service (33.3%); $50 for a $199 service (25.1%); $80 for a $295 service (27.1%); $125 for a $595 service (21%); and $150 for a $495 service (30.3%); and $200 for a $995 service (20%). Thus, while the marketing fee increases in absolute dollars as the price of the service increases, the marketing fee generally decreases in percentage terms as the price increases. But in a few instances, Avvo charges the same marketing fee for services of different prices – for example, filing for an uncontested divorce is $995, and creating an estate plan bundle for an individual is $795, but Avvo charges a $200 marketing fee for both. Also, Avvo charges a different marketing fee for some services of the same price – for example, Avvo charges $199 to review a non-compete agreement, to petition for an alien relative, or to create an employment offer letter, but Avvo charges $50, $55, and $60 respectively as a marketing fee for those services.

[2]Several ethics opinions from other jurisdictions have concluded that lawyers working with Avvo or similar entities are engaged in improper fee sharing or are violating other Rules of Professional Conduct. For example, NJ ACPE 732 (2017) concluded that New Jersey lawyers "may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer," and Pennsylvania 2016-200 (2016) concluded that a hypothetical program similar to Avvo was engaged in "impermissible fee sharing under RPC 5.4(a)." Noting that the "primary policy underlying RPC 5.4(a) is the preservation of the lawyer's professional independence," Opinion 2016-200 said: "[T]he assumption that the lawyer's payment to a non-lawyer of marketing fees amounting to 20% to 30% of legal fees earned does not interfere with the lawyer's professional independence is, at a minimum, of questionable validity." *See also* Ohio 2016-3 (2016) ("A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a 'marketing fee' to a nonlawyer for each service completed for a client, is unethical," citing Rule 5.4). We express no opinion on whether those opinions reach the correct conclusions. *Compare* N.Y. State 1131 (2017), in which we determined that a flat fee constituted a payment for advertising and not a sharing of legal fees.

[3]A deal-of-the-day service differs in at least one significant respect from Avvo Legal Services. A lawyer participating in a deal-of-the-day program negotiates a discounted fee, but the fee is ultimately set by the lawyer. A lawyer who participates in Avvo, in contrast, must agree to charge the fee set by Avvo for each particular service.

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