

15-05

Opinion 15-05

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

October 6, 2015

ISSUE

1. May an attorney pay an internet service company a nominal fee to bid on potential legal work? May an attorney seek clients through an internet business that provides the attorney with limited client information in order to permit the attorney to bid to provide the needed legal services?

OPINION

2. Payment of a nominal fee to the internet forum service provider described herein, thereby enabling the attorney to offer a bid for legal services to a potential client, does not violate: (a) Rule 7.1, *Communications concerning a Lawyer's Services*; (b) Rule 7.2, *Advertising*, or (c) Rule 7.3, *Direct Contact with Prospective Clients*. Using such an internet business to seek new clients does not violate Rule 1.18 or other rules of professional conduct provided the attorney does not undertake representation for which he has a conflict of interest and the attorney protects the confidentiality of the information received from the prospective client.

BACKGROUND

3. A new internet service provider website has emerged for Utah business market consumers, including potential clients who need and/or seek legal services. The website is an internet forum designed to help all consumers, obtain bids or quotes on various professional services, including legal services, in the geographic area where the potential consumer or client lives or where the potential services are needed. Professionals, including attorneys, may create a profile on the service website (free of charge both to the consumer and to the professional). These professionals may respond in writing to consumer requests for bids or quotes on proposed services. Consumers, including potential legal clients, are allowed to review the professionals/potential attorneys' submissions, such as attorney biographies, other client analysis of such attorney services, and attorney case summaries. The consumer/potential client may then leave comments or recommendations on the website for separate

consumer access.

4. This internet forum service is akin to the popular *Angie's List* website, www.angieslist.com, which also allows consumers to find professional services the consumer either wants or requires in an identified geographic area. Yet a critical difference between *Angie's List* and the internet forum service provider described in this Opinion is that the *Angie's List* service charges consumers to become *Angie's List* "members" in order to take advantage of *Angie's List* services. In contrast, the internet service described in this Opinion is available cost-free to consumers. Instead, the internet service charges the professionals, including attorneys, for this internet service when the professionals submit bids to the consumer with respect to the consumer's requested service. In order for an attorney to submit a bid to the potential client for requested legal services, the attorney must pay a nominal fee of approximately \$3.00 - \$5.00 per bid to the internet service provider. The attorney must pay this fee for each bid, regardless of whether the bid actually results in any work for the consumer/client.

5. Any Utah lawyer can register on the internet forum service provider described herein and submit a resume and/or listing of attorney qualifications for designated legal services. The internet service confirms that the Utah State Bar has in fact licensed the bidding attorney. The attorney, who has registered with the internet service, selects a category of requests he/she would like to receive, such as tax litigation, contract law, criminal law, etc. The attorney also sets a travel geographic area to specify the maximum distance the professional would limit his/her services.

6. To secure an attorney service bid, the consumer/potential client first completes a form application on the internet, identifying the area of law and the type of service and providing a short narrative about the issue. The potential client is essentially requesting the internet service to provide via the internet the names of attorneys capable of providing the designated professional service, such as hypothetically "attorneys" who handle "taxation" matters. Potential clients' first names and requests for legal services are instantly transmitted by email to all attorneys who have registered with the internet service, and who match the requested service category and geographic area. The internet service then provides the consumer/potential client applicant the names and bids of the first five attorneys who have submitted bids. Each attorney's bid includes a price estimate, a business profile (possibly including links to the attorney's website), a personalized message, customer reviews and contact information. A customer/potential client's request is only active for twenty-four hours or until five professionals/attorneys have submitted bids, whichever

comes first.

7. The customer/potential client information is contractually deemed a confidential communication to the bidding professional/potential attorney. The customer/potential client information submitted to a professional/potential attorney *is not public information*, consistent with the internet service contract between the internet service and the potential client. Hence, such information cannot lawfully be shared with anyone but the professional/potential attorney applicant who is invited to submit a bid.

8. After the potential client receives the bids from up to five attorneys, it is up to the potential client to take the next step. The potential client may undertake communication with one or all of the bidding attorneys, and may at that point share his complete name, further confidential information about the matter, and additional contact information including a telephone number. Any use of this information by anyone, except for the intended recipient professional/potential attorney as the potential client deems appropriate, is contractually prohibited. The internet service provider informs the professional/potential attorney that if he/she has received the potential client transmission in error, the professional/potential attorney should immediately reply to the sender and delete such information from the professional/potential attorney internet system.

9. After the bid, there may be no further communication from the potential client to the professional/potential attorney bidding for the job. Alternatively, after the potential client initiates contact with an attorney, there may be back and forth communication until the client has decided to hire the attorney.

ANALYSIS

10. With respect to the internet forum service provider, and the potential attorney participation therein, the most relevant provisions of the Utah Rules of Professional Conduct ("URPC") are Rules 7.1, 7.2, 7.3 and 1.18. Rule 7.1, *Communications Concerning a Lawyer's Services*, prohibits "false or misleading communication" about a lawyer or a lawyer's services. Rule 7.2 (b), *Advertising*, prohibits giving "anything of value to a person for recommending the lawyer's services[,]" and Rule 7.3(a) *Direct Contact with Prospective Clients*, prohibits a lawyer "in-person" and by "real-time electronic contact, " from soliciting "professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, " unless the lawyer participates "with a [separately owned] prepaid legal services plan."

11. The EOAC has frequently concluded in previously issued opinions that "[t]he U.S. Supreme Court has made it

clear that public communication concerning a lawyer's services (including any for advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading." Ethics Advisory Opinion No. 14-04 (also quoted in Ethics Advisory Opinion 00-02 and 09-01). Similarly, the Utah Supreme Court has found that "[t]he state obviously has a substantial and compelling interest in protecting the public from false, deceptive, or misleading advertising." *In re Utah State Bar Petition*, 6A1 P.2d 991, 993 (Utah 1982). Deceptive advertising in the legal profession poses a particular risk because "the public lacks sophistication concerning legal services, [and therefore] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates v. State of Arizona*, 433 U.S. 350, 383 (1977).

12. With respect to the internet forum service provider for attorneys, as described above in detail, Rule 7.1 has application to applicant attorneys, but not to the internet forum service provider. That is because the internet forum service provider itself makes no representations to the public or to the consumer/potential clients except that "interested and available professionals" will send "custom quotes." The internet forum service simply facilitates attorney bids (including price quotes, biographies, and customer reviews) being sent to potential clients. However, if the internet service provider includes any false or misleading statements about the bidding attorneys, then Rule 7.1 will be violated by the attorney.

13. The potential attorney bids to a client for legal representation are not publicly available, but rather are available only to the potential client. Although Rule 7.1 "governs all communications about a lawyer's services, including advertising permitted by Rule 7.2[,]" the Rule applies only to a "lawyer's communication" and/or "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients [that] may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." It is theoretically possible that a potential attorney's submission to the internet forum service provider could be misleading if the attorney's submitted resume or case summary were false or misleading. Similarly, it is possible that a customer review could be false or misleading if it were "presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters." URPC Rule 7.1 cmt. 3. When that

customer review is sent with the attorney's bid, the lawyer will be seen to be making that communication under Rule 7.1. Yet there is no violation of Rule 7.1 by lawyer submission of such documents, again assuming they include no attorney misrepresentation.

14. Rule 7.2(a) provides that "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." Comment 2 to Rule 7.2 explains:

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names and references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Accordingly, the attorney information the Utah lawyer submits to the internet forum service provider precisely complies with the "Advertising" permissible by Rule 7.2.

15. Rule 7.2 further prohibits giving "anything of value to a person for recommending the lawyers' services" except to "pay the reasonable costs of advertisements or communications permitted by this Rule" or to "pay the usual charges of... a lawyer referral service." URPC Rule 7.2(b)(1) & (b)(2). Thus, if the internet service provider "recommends" a bidding attorney in any manner or indicates that the bidding attorney has been vetted or approved, then the attorney will be in violation of Rule 7.2. Provided the internet service provider simply indicates the bidding attorney is "available" and "interested," Rule 7.2 is not violated.

16. Comment [5] to Rule 7.2, entitled *Paying Others to Recommend a Lawyer*, with respect to advertising, provides that "A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services], such as publicists, public-relations personnel, business-development staff and website designers." Similarly, Comment [6] to Rule 7.2 defines a "lawyer referral service" as "an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation." Hence, the minimum fee an attorney must pay the internet forum service provider, as described above, complies with ethically permissible advertising services or lawyer referral services available to attorneys.

17. Rule 7.3 (a) provides that "A lawyer shall not by in-person, live telephone or real-time electronic contact

solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted (a)(1) is a lawyer; or (a)(2) has a family, close personal, or prior professional relationship with the lawyer." This ethical prohibition against lawyer solicitation was upheld as constitutional in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978), where the Court stated:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response without providing an opportunity for comparison or reflection. . . There is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

Ohralikat. 534.

18. With respect to the Utah internet forum service provider described herein, the attorney application and bid for a potential client does not violate Rule 7.3 for these reasons. First, the attorney does not communicate with the client by "in-person live telephone or real-time electronic contact" but submits a bid and other written materials that are forwarded to the client. Second, it is the client, not the lawyer, who has solicited attorney representation. Third, it is the client who initiates further conversation about the representation, including possibly by telephone, after receiving the attorneys' bids. The one caution is that the client may include a telephone number in the initial written account of the situation that is distributed to all qualified attorneys. In such a case, the attorney bidding for the client's business may not initiate a telephone call to the client without running afoul of Rule 7.3's prohibition of "real time ... contact."

19. The attorney's relationship with this potential client is also governed by Rule 1.18 *Duties to Prospective Client*, Utah Rules of Professional Conduct. This rule defines a "prospective client" as "a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." This rule applies whether or not the prospective client ultimately retains the attorney. Because the consumer soliciting bids will be a "prospective client," the attorney bidder who learns information from that prospective client must not "use or reveal that information except as Rule 1.9 would permit with respect to a former client." URPC Rule 1.18(b).

Similarly, an attorney bidder may not represent another client "with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the

prospective client that could be significantly harmful to that person in the matter" with certain limited exceptions. URPC Rule 1.18(c). Consequently, it would be wise for the attorney submitting the bid to limit the information he receives from the prospective client.

20. At some point the prospective client must decide whether to retain the attorney. The attorney must also decide whether representation of this client will involve a "conflict of interest" in violation of Rule 1.7, Rule 1.9, Rule 1.10 or Rule 1.11. If there is no conflict of interest, the attorney could represent the client. Typically an attorney will screen for a conflict of interest using the names of the client and the opposing parties prior to any communication about the legal matter. Here, the attorney will learn something about the prospective client's legal matter before discovering the client's or the opposing party's names. In some cases the attorney who has submitted a winning bid will be unable to accept the representation once the attorney learns the identities of the parties, as there will be an impermissible conflict of interest.

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