

## NEW HAMPSHIRE BAR ASSOCIATION

### Ethics Regarding Business Networking

#### Ethics Committee Advisory Opinion #2005-06/06

#### ABSTRACT:

The participation by a lawyer in a networking organization whose members are required to engage in exclusive or quid pro quo referrals with other members (*e.g.*, distributing the lawyer's business cards or other literature to non-members with whom the lawyer likely has no prior relationship and who may be in need of legal services) implicates several Rules of Professional Conduct, including Rules related to competency, conflict of interests, advertising, and communications with prospective clients.

Rule 1.1's requirement of competency would be implicated if the lawyer feels obligated to take a case that the lawyer is not competent to handle. Conversely, the lawyer would create a conflict of interest under Rule 1.7 if the lawyer refers a client to a particular specialist, whom the lawyer is obligated to refer as a member of a networking organization, such as a real estate agent, rather than a more appropriate specialist. In these scenarios, the lawyer would not be exercising independent judgment, which is required by Rule 2.1.

The networking organization's requirements would also violate Rule 7.3(a) because it would result in other members, *i.e.*, third parties, soliciting business for the lawyer from individuals with whom the lawyer has no family or prior professional relationship. This solicitation also violates Rule 7.2(c), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. Finally, this solicitation implicates Rule 8.4(a) because a third-party agent of the lawyer would be contacting prospective clients in a manner that violates the Rules.

#### ANNOTATIONS:

Exclusive and mandatory cross-referrals constitutes paying value to a person for recommending the lawyer's services in violation of Rule 7.2(c), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. Rule 7.2(c) has two exceptions that are not applicable to the networking organization in question.

Exclusive or *quid pro quo* implicates Rule 1.1's competency requirement because a participating lawyer may feel obligated to accept a case the lawyer is not competent to handle.

Exclusive or *quid pro quo* implicates Rule 1.7 because the lawyer may feel obligated to refer a client to particular service providers, *e.g.* real estate agents, financial planning specialist, etc.,

when another such specialist may be more appropriate, thereby putting the client's interests at risk.

Participation in a networking organization, as described herein, challenges an essential quality in a good lawyer, *i.e.* independent judgment.

The networking arrangements would result in exclusive and mandatory referrals of the lawyer's services being directed to individuals with whom the lawyer does not have a prior family or professional relationship, thereby implicating Rule 7.3(a), which prohibits a lawyer from soliciting in-person or by live telephone contact or recorded telephone contact professional employment from a prospective client except under those two circumstances.

Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. Although the lawyer is not having a direct contact with potential client, a third-party, through an agency relationship, is having contact.

## **I. QUESTION**

Can a lawyer join a networking organization with the following characteristics: members are required to engage in exclusive or *quid pro quo* referrals with other members; and these exclusive or *quid pro quo* referrals include members distributing the lawyer's business cards or other literature to non-member individuals, with whom the lawyer likely has no prior relationship and who may be in need of legal services?

## **II. RESPONSE**

Under these specific circumstances, joining such an organization would be in violation of the Rules of Professional Conduct. Rules 7.2(c), 7.3(a), 8.4(a) are implicated.

With or without a fee, exclusive and mandatory cross-referrals constitutes paying value to a person for recommending the lawyer's services. Rule 7.2(c) states a lawyer shall not give anything of value to a person for recommending the lawyer's services. There are two exceptions: 1) the lawyer may pay the reasonable costs of advertisements or communications permitted by this rule; and 2) the lawyer may pay a fee charged by a not-for-profit lawyer referral service or organization, provided that the such service or organization may only use the revenues generated by referrals to defray its expenses or to provide delivery of civil legal services to the poor. The purpose behind the networking organization is to enlist other members to recommend the lawyer's services, in exchange for the lawyer recommending other members' services.

The rationale against permitting a lawyer to enter into exclusive or *quid pro quo* referrals is simple: a lawyer has a variety of obligations, not the least of which is competency in the practice of law and a fiduciary duty to his or her client. *See*, Rule 1.1 and 1.7. A lawyer who is beholden to a networking organization may feel obligated to accept a case he or she is not competent to handle, thereby putting a client's interests at risk. Conversely, lawyers often must refer clients to outside service providers, *e.g.* real estate agents, financial planning specialist, etc. Again, a

lawyer who is beholden to a networking organization may be obligated to refer a client to a particular specialist, when another such specialist may be more appropriate, thereby putting the client's interests at risk. This situation creates potential conflicts of interest, such as the pull to refer a client to a service provider so that the lawyer can continue to receive cross-referrals. While lawyers as part of their practice refer clients to other lawyers and service providers as part of their business, lawyers not associated with such a networking organization will be free to use their judgment, and refer their clients to the most appropriate service provider. Participation in a networking organization, as described herein, challenges an essential quality in a good lawyer, *i.e.* independent judgment.

Furthermore, a lawyer cannot use a third-party to solicit business that would otherwise be in violation of the Rules of Professional Conduct. Rule 7.3(a) prohibits a lawyer from soliciting in-person or by live telephone contact or recorded telephone contact professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Because the lawyer does not have a prior family or professional relationship with the individual being referred, 7.3(a) is applicable. Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. Although the lawyer is not having a direct contact with potential client, a third-party, through an agency relationship, is having contact.

The purpose of the networking organization is to use other members of the organization to distribute literature and/or provide direct referrals to individuals the attorney does not know, for the purpose of business development. The rationale for prohibiting a lawyer from soliciting clients who the lawyer knows needs a lawyer is to protect the client from being taken advantage of at a time when he or she is vulnerable. The same rationale follows for not allowing a third-party to distribute literature as the agent of that lawyer.

This same question has been addressed by the states of Oregon, Maryland and New York. *See*, Oregon Bar Association Formal Opinion No. 2005-175; Maryland State Bar Association Committee on Ethics Docket 2005-11; and New York State Bar Association Committee on Professional Ethics Opinion 741-5/25/2001. All come to the same conclusion: membership in such an organization compromises the lawyer's independence, potentially creates undisclosed conflicts of interest, and risks in-person solicitation.

*NOTE: At the time of publication, the Supreme Court was considering extensive proposed revisions to the Rules of Professional Conduct. This opinion is issued under the Rules as presently in effect.*

## **NH RULES OF PROFESSIONAL CONDUCT:**

NHRPC 7.2(c)  
NHRPC 7.3(a)  
NHRPC 8.4(a)  
NHRPC 1.1

NHRPC 1.7  
NHRPC 2.1

**SUBJECTS:**

Advertising  
Communications with Prospective Clients  
Competency  
Conflict of Interests

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- **By the NHBA Ethics Committee**  
*This opinion was submitted for publication to the NHBA Board of Governors at its October 19, 2006 meeting.*