

LAWYERS ONLINE: ONLINE LAWYER REFERRAL SERVICES AND

DEALING WITH ONLINE LAWYER DISPARAGEMENT

Federal Bar Association – San Diego Chapter

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I. California State Bar Regulation of Lawyer Referral Services.

Any individual or organization that refers prospective clients to attorneys must comply with minimum standards and be certified by the State Bar of California as a lawyer referral service, unless exempt. Information regarding regulations, certification and listings of lawyer referral services registered by the California State Bar.

<https://www.calbar.ca.gov/Public/Need-Legal-Help/Lawyer-Referral-Service>

II. What is a lawyer referral service?

Business & Professions Code § 6155 requires that an entity shall not operate for the purpose of referring potential clients to attorneys unless the entity was registered with the State Bar or Supreme Court and met minimum standards. Certifiable referral activity involves some person or entity other than the consumer and advertising attorney of la firms which, in person, or electronically, or otherwise, refers the consumer to an attorney or law firm not identified in the advertising.

III. Lawyer referral or group advertising?

Section 6155 does not limit attorneys from jointly advertising their services. Permissible advertising identifies by name the advertising attorneys or law firms whom the consumer of legal services may select and initiate contact with. Traditional legal directories and websites that list lawyer and law firms, including contact information are permissible.

IV. Jackson v. Legal Match, 42 Cal.App.5th 760 (2019).

LegalMatch engages in certifiable referral activity, not mere advertising, under Business & Professions Code § 6155, because a referral occurs when LegalMatch receives information from consumers and sends that information to lawyers. LegalMatch invites consumers to submit information about their legal issue, along with geographic location and legal category. LegalMatch may request additional information. Legal Match sends

information to lawyers who can reach out to the individual. Lawyers purchase annual subscriptions. The number of lawyers in any geographic location and area of legal expertise is limited. "Solicitation robs the bar of dignity ... [and] creates an atmosphere of commercialization rather than professionalism."

Remanded for consideration of unclean hands defense.

First Amendment? Free speech considerations under the US and California constitutions. Not fully briefed in the case, however commercial speech has limited First Amendment protection and may be regulated if narrowly drawn and directly supportive of a substantial state purpose, such as protection of consumers from unscrupulous lawyer solicitation activity

V. San Diego County Bar Association Ethics Opinion No. 2019-2 (2019).

Hypothetical Service Provider: Internet-based marketing for-profit company is not certified as an approved lawyer referral service with the California State Bar. Company operates an online legal directory with publicly available reviews and ratings. Company offers a matching service for potential clients to obtain discrete legal services. Company matches lawyers and clients through either "instant connection mode" or "consumer chooses" mode. Instant connection: consumer select an option to connect with a participating lawyer who is not identified by name. Consumer may provide information to lawyer. Lawyer may contact consumer for a 15 minute call at a fixed cost. Consumer chooses: consumer selects lawyer from profiles on Company's website. Consumer can provide information the lawyer and upload documents for lawyer's review. Lawyer selected by consumer must contact consumer within one business day. Lawyers provide services for a fixed fee Company determines. Consumers pay fee to Company, company retains a "marketing fee" of 20 to 30% and remits the rest to the lawyer.

Conclusions: Company's business model involves unethical compensation for securing legal services. Violation of Rule 7.2(b) prohibiting a lawyer from compensating another for recommending or securing legal services. Violation of Rule 5.4 prohibiting attorneys from sharing fees with non-lawyers. Company's "instant connection" mode is an unauthorized lawyer referral service. Company has not complied with Business & Profession Code § 6155, et seq. Lawyers participating in such services violate the Rules of Professional Conduct.

VI. Negative Reviews

Alara Chilton, *Ethical Considerations When Responding to Negative Attorney Reviews*
<https://www.sdcbabar.org/index.cfm?pg=EthicsinBrief20191202>

Includes discussion of San Francisco Bar Association's Op. 2014-1 as well as ABA Form. Opn. No. 480, discussing the disclosure exceptions under Rule 1.6(b) of the ABA Model Rules, and

indicating “it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a lawyer’s public commentary....”

VII. Networking Groups

Alara Chilton, *Ethics in Brief: Ethical Considerations in Joining a Networking Organization* <https://www.sdcba.org/index.cfm?pg=Ethics-in-Brief-2019-04-22>

Referral Fees: Rule 7.2 of the Rules of Professional Conduct prohibits compensating another for the purpose of recommending or securing the services of the lawyer or lawyer’s firm.

Competence: Rule 1.1 requires that you not accept a case you are not competent to handle.

Professional Independence: Rule 5.4 requires that you not permit another person to direct or regulate your independent professional judgment.

VIII. Dealing with Online Lawyer Disparagement

Los Angeles County Bar Ethics Op. No. 525 (2012) <https://www.lacba.org/docs/default-source/ethics-opinions/archived-ethics-opinions/ethics-opinion-525.pdf>

Issue: Whether and how can a lawyer respond to a (former) client’s adverse public comments about the attorney, assuming there is not litigation or arbitration pending between the attorney and former client such as allegations of malpractice or other disparaging public comments?

Duty of Loyalty: Cannot do anything to injuriously impact a former client in any matter in which the attorney formerly represented the client.

Duty of Confidentiality: Under Business & Professions Code section 6068(e)(1) and Rule 1.6, the attorney must maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of the client and cannot use information acquired by virtue of the representation against the client.

Attorney Client Privilege: absent waiver of privilege by client there is no statutory exception to the attorney client privilege.

Conclusions: Attorney may respond in a manner that is proportionate and restrained, without revealing confidential information, and without injuring client in a matter related to the prior representation.

Bar Assoc. of San Francisco, Legal Ethics Op. No. 2014-1. <https://www.sfbar.org/wp-content/uploads/2019/09/Ethics-Opinion-2014-01.pdf>

Hypothetical: Online posting by a former client makes statements indicating attorney mismanaged the client's case, did not communicate appropriately with the former client, provided sub-standard advice and was not competent.

Issue: Whether an attorney can respond to a negative online review 1) where the former client's matter is concluded and 2) where the matter is not concluded? May the attorney reveal confidential information in responding?

Duty of Loyalty: If the matter is concluded, responding without disclosing privileged or confidential information, for example by simply denying the merit of the former client's assertions would not likely harm the client, because attorney would not be attacking the work done for the former client, but supporting it.

If the matter the attorney handled for the client is not concluded, any response by attorney may be inappropriate depending on the specific facts, for example by influencing settlement or otherwise suggesting weakness in the client's legal position.

Duty of Confidentiality: Generally, an attorney cannot disclose confidential or privileged information without the client's informed consent. The duty of confidentiality survives the conclusion of the attorney-client relationship. Attorney's management of the former client's case falls within the duty of confidentiality and could have a detrimental impact to the client in the ongoing case, if disclosed.

Self-Defense Exception: Exception applies when a client or lawyer claims the other breached a duty arising out of the professional relationship. The rationale supporting the exception arguably has merit even outside of a formal legal claim or proceeding. But it is doubtful that Evidence Code section 958 would have any lawful application outside a formal legal or administrative proceeding between attorney and client although section 958 has been applied to a claim regarding ineffective assistance of counsel.

Conclusions: Absent consent or waiver, disclosure is not permitted unless there is a disciplinary inquiry in which case disclosure is permitted only in the context of a disciplinary proceeding, or a formal complaint, and in any case, any disclosure must be narrowly tailored. Depending upon the situation, any substantive response in an online forum, even a response that does not disclose confidential information, may be inappropriate.

IX. ***Abir Cohen Treyzon Salo, LLP v. Lahiji, 40 Cal.App.5th 882 (2019).***

Facts: Law firm sued former client's daughter for defamation. Former client's daughter filed a motion to dismiss under anti-SLAPP law. The firm represented the former client in a dispute with the insurer of her home. The former client became dissatisfied and terminated the firm, and the firm placed a lien on any further recovery from the insurer.

Online postings via YELP by AIL with a photo of the client's daughter asserted that the firm was underhanded, shady, unprofessional and unethical and used scare tactics, and withheld disbursements, ignored request for information, improperly deducted expenses and yelled when asked when checks would be cleared, and had an "awful moral compass." A similar "anonymous" review was posted on AVVO. Additional posting were made on Facebook, the Ripoff Report and on Google under a variety of names.

Who posted the comments? The firm sued the daughter for the postings. After the client explained to the firm that she made the postings, not her daughter. The firm proceeded to discovery without suing the mother, claiming the daughter routinely masqueraded as the mother in communication with the firm and online citing an email stating "please copy my mother and I" and the mother had requested an interpreter in the pending fee arbitration matter, and lacked command of the English language.

Defamation: to prove defamation, the plaintiff must establish that the publication is false, defamatory and unprivileged and that it has a natural tendency to injury or causes special damage. Plaintiff must establish that the person sued is the one responsible for the tort.

Conclusion: The court granted the motion to dismiss finding that the online reviews were protected activity, and that the law firm's defamation claim lacked minimal merit as to the daughter, because the firm did not have any evidence beyond speculation that the daughter was the author of the posts.