

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

I am a mid-level associate at a small general practice litigation firm where I am routinely tasked with helping clients fight traffic violations. While I enjoy representing clients before the Traffic Violation Bureau because it allows me to hone my litigation skills, my firm has recently encouraged me to generate business and expand my practice, but I have no idea how to do that.

A colleague told me about a lawyer-matching service called Legal Lynk, which matches potential clients facing traffic violations with attorneys willing to represent them. The way the Legal Lynk platform works is that the potential client uploads his or her traffic ticket and pertinent information relating to the violation. Then, Legal Lynk's proprietary algorithm matches the potential client with the "best local traffic lawyer" for that case based on a variety of factors such as geographic location, fee schedules, success rates, local competition, and customer service. In addition, Legal Lynk quotes a legal fee that is determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who has 24 hours to accept the case or the client is referred to another lawyer determined by the algorithm. If the lawyer accepts the case, the legal fee is transferred by Legal Lynk to the lawyer minus a service charge, which is retained by Legal Lynk for providing the service.

When I mentioned the idea to my mentor she recommended that I review the Rules of Professional Conduct to make sure that such a service is ethically permissible. Specifically, she expressed concern with respect to the service charge retained by the company. Is there any ethical rule that would prohibit me from using Legal Lynk's service?

*Sincerely,
Ann E. Bitious*

DEAR ANN:

We have experienced significant developments in legal technology in recent years which often create many interesting issues with respect to an attorney's compliance with various ethical obligations. Your question invites a discussion about your ethical responsibilities, the most significant of which is whether the service charge payable to Legal Lynk constitutes an impermissible referral fee under the Rules of Professional Conduct (RPC).

RPC 7.2(a) explicitly reminds us 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 . . ." Comment [1] to RPC 7.2 states that paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules" and, insofar as is relevant, that a lawyer "may pay others for generating client leads such as Internet-based client leads, as long as . . . the lead generator does not recommend the lawyers." Comment [1] to RPC 7.2 elaborates on the prohibition regarding recommendations by noting that in order to comply with RPC 7.1, which prohibits false, deceptive, or misleading lawyer advertising, "a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, . . . or has analyzed a person's legal problems when determining which lawyer should receive the referral."

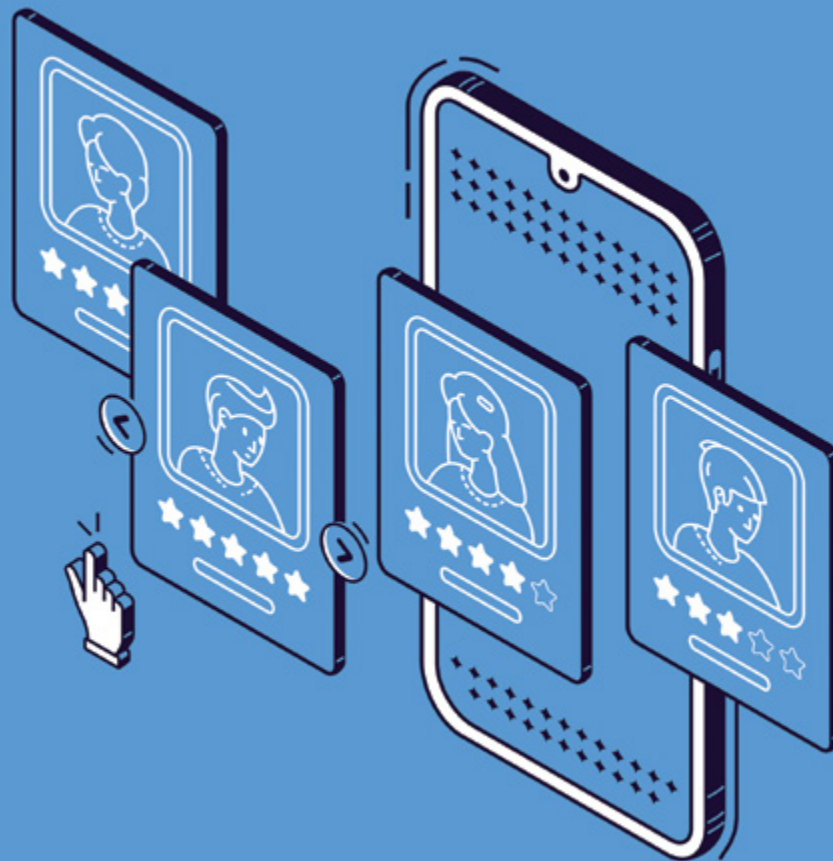
From our reading of your question, it appears that Legal Lynk acts as a "lead generator" wherein participating lawyers pay Legal Lynk a fee to generate leads and connect them with clients. The question then becomes whether Legal Lynk is receiving such fee for "recommending" lawyers to prospective clients. As the New York State Bar Association Committee on Professional Ethics (the "Ethics Committee") observed in a 2013 ethics opinion, this analysis generally turns on whether the lawyer is paying a fee for the advertisement of its services or whether the

fee is paid for a referral. *See* New York State Bar Association Prof'l Ethics Comm. Op. 979 (2013). If the latter, the RPC explicitly prohibits lawyers from paying fees for client referrals. *Id.* We addressed the prohibition on payment of fees for referrals at length in a prior *Forum*. *See* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelman, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2018, Vol. 90, No. 3. However, as noted in the Ethics Committee opinion, the prohibition on payments for referrals is not meant to keep "a lawyer from paying for advertising and communications permitted by the RPC." *Id.*

NYSBA Opinion 979 gives us further guidance on this issue by using an example which is akin to the facts posed in your question. In NYSBA Opinion 979, a group of lawyer mediators paid to have their biographies advertised on a website where potential clients could locate and contact attorneys. *Id.* The Ethics Committee concluded that such action constituted payment for joint advertis-

ing, rather than paying for prohibited referrals, because the format of the website was "reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral." *Id.* Essentially, because the consumer used the information provided on the website to make an informed decision regarding which lawyer would best suit their legal needs, the lawyers' payment of a fee to be featured on the website constituted advertising rather than a referral fee.

A recently issued ethics opinion provides a further illustration of the line between a lawyer ethically participating in internet marketing services and a lawyer unethically paying for a referral. For instance, the for-profit service at issue in NYSBA Op. 1131 charged lawyers participating in the service a fixed monthly fee, and those lawyers submitted their names, contact information, geographic locale and areas of practice to be included in the services database. Potential clients wishing to be contacted by a



lawyer sent the service their names and contact information, their geographic locale and the practice area in which they sought legal advice. *See* NYSBA Op. 1131 (2017). The service then searched its database of participating lawyers to identify all lawyers who stated that they engaged in the requested practice area in the requested geographic locale and selected a lawyer meeting those criteria in the order in which the lawyers had registered with the service, i.e., on a first come, first served basis. *Id.*

The Ethics Committee ultimately determined that this lawyer matching service did not violate the prohibition against paying for a recommendation because of the service's use of "neutral" and "mechanical" factors that connected potential clients with attorneys. *Id.* In making such determination, the committee noted:

[T]o "recommend also includes identifying a particular lawyer or lawyers to a potential client as 'a right' or 'the right' lawyer for the client 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." *Id.*

Following this interpretation, the service would not constitute a "recommendation" as long as its advertising does not state or imply that the service is making a recommendation and makes clear that: (1) 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; (2) the service's selection of a participating lawyer from that list is the result of a neutral process that involves no evaluative judgment; and (3) 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. As we see it, if these three conditions are met, a lawyer's payment for participation in its matching service as a lawyer available to contact potential clients would be permissible under RPC 7.2(a). *Id.*

Finally, in addition to RPC 7.2(a), there are two additional ethical concerns that are relevant to your question and should not be ignored. First, you must consider whether participating in Legal Lynk would result in improper fee sharing with a non-lawyer under RPC 5.4(a). As discussed in our prior *Forum*, RPC 5.4(a) prohibits attorneys from sharing legal fees with non-lawyers. *See* Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2017, Vol. 89, No. 3. Second, as

noted in Comment [1] to RPC 7.1(a), you must consider whether your use of Legal Lynk's services would violate your duty under RPC 7.1(a) not to participate in the use or dissemination of advertisements containing statements or claims that are false, deceptive or misleading. *See* RPC 7.2, Comment [1] (noting that a lead generator's communications must be "consistent with" RPC 7.1).

Adopting the rationale noted above, in our view, your use of Legal Lynk is more likely to be considered attorney advertisement rather than an impermissible fee for referral. However, it is important to ensure that Legal Lynk does not express an opinion as to your competence or ability to competently represent the client in the matter. There may be a fine line here, but crossing into impermissible referral territory is something that should be avoided.

Sincerely,
The Forum by
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(goldrich@thsh.com)
Tannenbaum Helpm Syracuse & Hirschtritt

QUESTION FOR THE NEXT FORUM

TO THE FORUM:

I am a commercial litigator who recently relocated from Georgia to New York. In my nearly 25 years of practice, I have counseled clients on a wide variety of matters related to business and personal needs. Recently, however, many clients have sought my counsel on issues related to recreational marijuana use and sales in an effort to comply with the recent improvements in state law. When practicing in Georgia, we were warned not to advise clients on this issue as it violated federal narcotics law.

A new and valuable client of mine in my New York practice recently sought my counsel on establishing a recreational marijuana business. In exchange for my advisement, the client offered me a 5% equity ownership interest in his cannabis business in lieu of payment for my legal fees. In addition, the client recommended that I sample the product prior to agreeing to the deal to ensure that I am fully informed and adequately invested. As I am new to this area of practice, I am hoping you can opine as to my ethical obligations with respect to this potential business venture to ensure that I do not run afoul of any of my obligations.

Sincerely,
Mary Jane Dazzled

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