

MODEL SUPREME COURT RULES

GOVERNING

LAWYER REFERRAL AND INFORMATION SERVICES

Lawyer referral services have been in operation in this country for more than 50 years, and were first established in response to requests by middle income persons for assistance in obtaining appropriate legal counsel. Lawyer Referral and Information Services are designed to assist persons who are able to pay normal attorney fees but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer. Lawyer referral programs offer two important services to the public. First, they help the client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important, function of a lawyer referral service is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs. The public has come to equate the function of lawyer referral programs with consumer-oriented assistance, and expects that the loyalty of the program will lie with the consumer, and only secondarily with the participating attorney.

In 1989, following a long review process by state and local bar association and lawyer referral experts from both the public and private sector, the American Bar Association adopted model Rules for the operation of public service lawyer referral programs. The overriding concern of the model Rules is consumer protection.

The aspirational standards used previously at the state and local level were simply not sufficient to ensure the public service orientation of some private, for-profit services; strong and enforceable regulations were needed to achieve minimal standards for all lawyer referral services. However, while the Rules must be strong to be effective, we have been mindful of the need to allow legitimate public service-oriented attorneys and providers to operate without undue interference. In draft the model Rules, we have done our best to balance these considerations. These Rules are designed to provide a level playing field for all programs, whether private or bar-sponsored. Each state is urged to examine its rules, decisions and opinions in order to utilize the model Rules in a manner consistent with its own law.

These model rules have also been drafted in legislative form, for states where lawyers are regulated by the Legislature.

**SUMMARY OF REQUIREMENTS FOR
LAWYER REFERRAL SERVICES BASED UPON
•MODEL SUPREME COURT RULES
GOVERNING LAWYER REFERRAL SERVICES•
ADOPTED BY ABA HOUSE OF DELEGATES 8/93**

1. A qualified service shall be operated in the public interest and shall provide information regarding government and consumer agencies which may assist the client, as well as provide referrals to lawyers, pro bono programs and other legal service providers. The service may be privately owned so long as the primary purpose is public service.
2. Membership in the service should be open to all licensed attorneys in the geographical area served who meet the requirements of the service outline below. Charges for membership in the service must be reasonable. Membership may not be restricted by the particular geographical areas or subject areas.
3. The service must require its members to maintain malpractice insurance or to provide proof of financial responsibility.
4. The combined fees and expenses charged to a client by a service and the lawyer to whom the client is referred shall not exceed the combined fees and expenses the client would have incurred if no referral service were employed.
5. No fee generating referral may be made to any lawyer who has an ownership in, who operates, or who is employed by the service, or to their law firm. Referrals may be made to lawyers who are members of the board or governing committee of the service so long as they do not receive any preferential treatment.
6. The service must periodically survey client satisfaction with its operations and shall investigate and take appropriate action regarding any complaints against panelists, the service or its employees. The survey may be by mail or by phone and need not involve every client.
7. The service must establish procedures for the admission, suspension or removal of a lawyer from any panel. The procedures must be clearly articulated in the service's materials. The procedure may include peer review, but other procedures are permissible. The procedure must include an appeal process.
8. Subject to the rules of the service's jurisdiction, the service may, in addition to a referral fee, receive a percentage of the fee earned by the lawyer to whom a referral is made. Any such fees received may be used only for the reasonable operating expenses of the service or the fund public service activities of the service or its sponsoring organization.
9. The service must establish subject matter panels and establish minimum requirements for eligibility. The number of subject panels necessary will vary from service to service depending upon the needs of the community served. Requirements for eligibility should include sufficient experience to ensure that the lawyer is qualified in the field of practice. The service should require proof of compliance with the requirements so established, which may include certification in affidavit or affirmation form.

MODEL SUPREME COURT RULES GOVERNING LAWYER REFERRAL AND INFORMATION SERVICES

Rule I -- Lawyers eligible to practice in this state may participate in a service which refers them to prospective clients, but only if the service conforms to these Rules ("a qualified service").

COMMENTARY

The lawyer referral mechanism was originally created to help the public identify the best method, whether legal or non-legal, for resolving disputes and protecting important rights. Special programs provided much needed assistance specifically for the poor, and the wealthy had the means and ability to secure appropriate counsel. It was harder for middle income persons, fearful about the cost and quality of available legal services, to know where and how to find the most appropriate assistance for legal problems.

Public service lawyer referral programs helped to fill the information void in a responsible and unbiased manner, and at a reasonable cost. The public has come to rely on the objective nature of the assistance provided by lawyer referral programs. Recently, with the advent of private, for-profit referral services, the flow of information to the public has increased, but questions have been raised about whether this information continues to be objective and unbiased. It is for this reason, as well as those articulated elsewhere in these rules, that regulation is desirable.

Rule II -- A qualified service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems.

COMMENTARY

The intent of this rule is to articulate the public service requirement of lawyer referral programs. While it does not preclude private services from operating, this statement does establish the primacy of a public service intent. Section 1.6 of the American Bar Association's (ABA) Statement of Standards and Practices for a Lawyer Referral and Information Service, approved February, 1984, by the ABA House of Delegates, states "The Service should be operated for the benefit of the public. It should be readily accessible and its existence should be made known to the public to the greatest extent possible."

As vital as lawyer referral is, the information provided by programs - about, for example, lawyers, the legal system in general, the availability of legal services, and the availability of consumer, governmental and other agencies that can address the client's problem - is an equally important public service. Services should provide both lawyer referrals and this type of information.

Rule III -- Only a qualified service may call itself a lawyer referral service, or operate for a direct or indirect purpose of referring potential clients to particular lawyers, whether or not the term "referral service" is used.

COMMENTARY

These definitions are similar to the California statute and New York proposed court rules. While California currently regulates use of the term "referral service," this rule establishes more clearly that it encompasses any entity operating to make referrals.

Before the rules on lawyer advertising were relaxed, lawyer referral services were operated primarily as a public service to provide informed access to the legal system. With the onset of widespread advertising, and the exemption of lawyer referral services from the ordinary prohibitions against splitting fees with attorneys, it has become important to develop a broad definition of lawyer referral services for regulatory purposes.

Rule IV -- A qualified service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who: (1) meet reasonable objectively determinable experience requirements established by the service; (2) pay reasonable registration and membership fees not to exceed an amount established by the ___ (State Bar Standing Committee on Lawyer Referral and Information Services), hereinafter "the Committee", to encourage widespread lawyer participation; and (3) maintain in force a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee.

COMMENTARY

This rule is designed to limit panel membership to attorneys who are licensed and in good standing with the attorney regulatory entity in a given state. It also notably requires that panel membership be open to all attorneys who wish to join, provided that they are located in the geographic area served and satisfy those requirements set forth therein.

Under no circumstances should a service close a panel by selling or allocating designated geographical areas or areas of practice to a limited number of individuals based on their ability to pay a fee to the service. However, where it can be demonstrated to the Committee by objective criteria that unlimited panel membership undermines legitimate consumer interests because of numbers of lawyers leaving a panel due to historically limited referral potential, then a service may want to amend Rule IV by adding language which protects the service but does not open the door to the abuses noted above. Such language might read, "For good cause shown and within strict guidelines, _____ (the Committee) may approve a reasonable limitation on the number of lawyers to be enrolled on a panel at a service, provided such limitation is in the public interest."

The purpose of subsection (1) is to mandate that each service require lawyers who are referred cases in particular subject matter areas to have an appropriate level of experience in these areas. The criteria to be used in determining such requirements are more fully set forth in the Commentary to Rule X.

Subsection (2) should be used in those states which deem it appropriate, and where it is consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction.

ABA Model Rule of Professional Conduct 7.2 prohibits giving anything of value to one who recommends the lawyer's services except, among others, "the usual charges of a not-for-profit lawyer referral service...." Many states have interpreted this and other similar provisions in both court decisions and ethics opinions. Each state is urged to examine these rules, decisions and

opinions in order to utilize the model rule in a manner consistent with its own law. Note: Blanks followed by parenthetical material () identify places where insertions should be made to tailor these rules to each individual state.

The intent of subsection (3) is to ensure that, in the event errors are made by the participating attorney, the client has redress through the attorney's policy of insurance. The requirement is contained in the ABA's Minimum Quality Standards.

Only by requiring such insurance, or a showing of financial responsibility, can a client's needs best be satisfied. In states where referral services are not immune from lawsuits for negligent referral, this requirement will help protect the service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the attorney.

Rule V -- The combined fees and expenses charged a prospective client by a qualified service and a lawyer to whom the client is referred shall not exceed the total charges which the client would have incurred had no referral service been involved.

COMMENTARY

The intent of this rule is to ensure that the client shall not be economically disadvantaged in any respect because the client has decided to utilize a lawyer referral service. A very similar provision is contained in the California Minimum Standards for a Lawyer Referral Service.

Simply put, clients should not have to pay more for services obtained through the lawyer referral service than they would if they obtained the services on their own. ABA Model Rule of Professional Conduct 7.2 states that a lawyer cannot pay more than the "usual charge of a not-for-profit lawyer referral service or other legal service organization" in exchange for a referral.

Rule VI -- No fee generating referral may be made to any lawyer who has an ownership interest in, or who operates or is employed by, a qualified service, or who is associated with a law firm which has an ownership interest in, or operates or is employed by, a qualified service.

COMMENTARY

The intent of this rule is to prevent the temptation of using the referral service to refer cases to oneself, rather than to serve the clients' needs. The important goal of unbiased referrals (see ABA Minimum Quality Standards for Lawyer Referral Services, approved August 1989, by the ABA House of Delegates) is thus maintained. See also the California statute, which sets self-referral levels.

Since the purpose of lawyer referral is to provide the client with the best option for a specific legal need, the referral service which makes referrals to its owners or operators is in constant danger of, intentionally or unintentionally, referring the most desirable cases in-house, without considering the client's needs first. This potential for a conflict of interest between the service and the client's needs must be avoided. The rule provides the most reliable method of maintaining unbiased referrals.

Membership on a Board or lawyer referral committee of a sponsoring bar association should not, in and of itself, exclude a lawyer from accepting referrals, provided the referral service maintains adequate safeguards against preferential treatment of these lawyers.

Rule VII -- A qualified service shall periodically survey client satisfaction with its operations and shall investigate and take appropriate action with respect to client complaints against panelists, the service, and its employees.

COMMENTARY

The intent of this rule is to help ensure that the referral service is truly meeting the needs of the public by requiring direct feedback from the users of the service. A similar requirement is found in the ABA's Minimum Quality Standards. However, this rule does not mean that every client must be included in a survey. It is recognized that in certain situations the direct mailing of a survey may not be in the best interest of the client, and that discretion should be used, for example with domestic violence or health and substance abuse issues.

Rule VIII -- A qualified service shall establish and publish a procedure for admitting, suspending or removing lawyers from its roll of panelists. Any lawyer adversely affected by the decision of the service may appeal to the Committee.

COMMENTARY

The intent of this rule is to require rules to ensure that, as a public service, providing qualified and quality representation must be a priority of any referral service. These provisions are similar to both the ABA Minimum Quality Standards and the California Minimum Standards currently in force.

Without rigidly defining what the procedures must be, this provision acknowledges the need for each referral service to establish procedures for admission, suspension and removal of panel attorneys. These procedures must be clearly articulated to: assure the public that a mechanism exists for responding to client complaints and potential instances of misconduct by panel attorneys; ensure due process for the parties involved; and protect the confidences and secrets of clients of those attorneys. This includes a duty to investigate client complaints against participating attorneys.

Rule IX -- A qualified service may, in addition to any referral fee, charge a fee calculated as a percentage of legal fees earned by any lawyer panelist to whom the service has referred a matter. The income from any such percentage fee shall be used only to pay the reasonable operating expenses of the service and to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono legal services.

COMMENTARY

This section should be used in those states which deem it appropriate, and where it is consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction.

ABA policy has long prohibited the division of fees for legal services. See ABA Canons of Professional Ethics No. 34 (1928). The policy against sharing a legal fee with a non-lawyer is embodied in the ABA's Model Code of Professional Responsibility DR 3-102 and Model Rules of Professional Conduct Rule 5.4(a).

Two ABA ethics opinions have approved financing of bar association sponsored lawyer referral

services by charging a reasonable percentage of fees. See Formal Opinion 291 (1956) and Informal Opinion 1076 (1968). Opinions in several states have adopted similar reasoning in permitting payment of percentage fees to either bar sponsored or general non-profit lawyer referral services.

ABA Model Rule of Professional Conduct 7.2• prohibits giving anything of value to one who recommends the lawyer's services except, among others, "the usual charges of a not-for-profit lawyer referral service...." Many states have interpreted this and other similar provisions in both court decisions and ethics opinions. Each state is urged to examine these rules, decisions and opinions in order to utilize the model statute in a manner consistent with its own law.

Each state is urged to examine its rules, decisions and opinions in order to utilize the model rule in a manner consistent with its own law. Some states may believe that this restriction on lawyer fee sharing is adequate to address the public interest involved. In other jurisdictions, where it is perceived that there is a need not only to regulate the practice of lawyers but also to regulate the business practices of lawyer referral services, additional regulation may be necessary.

Rule X-- A qualified service shall establish specific subject matter panels, and may establish moderate and no fee panels, foreign language panels, alternative dispute resolution panels and other special panels which respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria.

COMMENTARY

This requirement is similar to one contained in the ABA's Minimum Quality Standards.

The California legislation required the establishment of specific panels "representing different areas of law and limited to attorneys who meet reasonable participation requirements ..." (see Minimum Standards for a Lawyer Referral Service in California, Rule 7.2). The New York State Bar Association's Proposed Minimum Standards are similar to the California legislation. (See Proposed Minimum Standards, Section 6.2, contained in "Report of the Special Committee on Lawyer Referral Services Regulations," New York State Bar Association, June 1990.)

The importance of establishing meaningful experience requirements cannot be underestimated. It is inappropriate for a service to simply refer a caller to the next lawyer on the list without determining that the lawyer is qualified in the field of practice in which legal services are needed. Since the public relies on services to provide qualified legal representation which improves on what the consumer can obtain by lot, it is incumbent upon these services to ensure that their attorneys have substantially more qualifications than mere bar membership.

"Experience" is not intended to mean "expertise" or "specialization," nor should it be defined merely by length of time in practice. See ABA Statement of Standards section 5.2, Comment. Rather, the goal is to ensure, in the words of this Comment, that both the subject matter panels and the qualification standards shall "meet the needs and reasonable expectations of the community served." In meeting these needs, "consideration should also be given to the panel member's experience with particular kinds of cases," and to "requiring a certain amount of recent actual experience."

Rule XI -- The operation of these Rules and compliance with their provisions shall be supervised by a ____ (Standing Committee on Lawyer Referral and Information

Services) to be appointed by the ____ (State Bar). The ____ (Committee) shall develop and promulgate rules, regulations, procedures and forms to discharge its obligations not inconsistent with these Rules and subject to approval by the (State Bar Board of Governors). The ____ (Committee) may submit to the (State Bar Board of Governors) recommendations for changes in these Rules for transmission to the Court.

COMMENTARY

The intent of this rule is to establish the regulatory entity which is charged with overseeing qualified services, and to allow this regulatory entity to adopt its own rules and regulations for oversight purposes. This is similar to the legislative mandate which required the State Bar of California to adopt extensive Minimum Standards.

Each state will determine, based on its legislative, judicial or state bar regulatory authority over the practice of law, the composition of the regulatory entity which will oversee lawyer referral services.

Rule XII -- A qualified service shall (1) register with the ____ (Committee) and demonstrate its compliance with these Rules before commencing to operate; (2) update the materials filed with the ____ (Committee) within 30 days of any material change; and (3) ____ (annually) file with the ____ (Committee) a report of its operations and finances during the previous ____ (year) demonstrating its continued compliance with these Rules.

Rule XIII -- These Rules do not apply to (1) a group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, corporation, or other entity or person, which (a) provides unlimited or a specified amount of telephone advice or personal communication at no charge to the members or beneficiaries, other than a periodic membership or beneficiary fee, and (b) furnishes or pays for legal services to its members or beneficiaries; (2) a plan of prepaid legal services insurance authorized to operate in the state; (3) individual lawyer-to-lawyer referrals; (4) lawyers jointly advertising their own services in a manner which discloses that such advertising is solely to solicit clients for themselves; or (5) any pro bono legal assistance program which does not accept fees from lawyers or clients for referrals.

COMMENTARY

These exclusions are all for services which are, like lawyer referral services, designed to promote the accessibility of legal services to the public.

Individual referrals from one lawyer to another are part of the everyday practice of law. Many of these "referrals" are informal and involve no fee. If a referral fee is involved, the state's relevant rules of professional conduct should be applied.

Rule XIV -- A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.

COMMENTARY

Since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by

lawyer-client privilege.

Rule XV -- The _____ (Committee) or any aggrieved person may seek an injunction in the Circuit Court to enjoin violations of these Rules. In the event the injunction is granted, the petitioner shall be entitled to reasonable costs and attorney fees.

COMMENTARY

The intent of this rule is to provide that anyone, not merely the regulatory entity, may move to enjoin unlawful operations of an LRS. This intent is similar to that in the California law. The current provision is strengthened over present California law by providing specific authority for recovery of litigation costs and attorneys fees.

It is important to note that, while "any aggrieved person" may move to enjoin illegal activity, typically the responsibility for enforcement should fall primarily on the shoulders of the regulatory entity.

August 1993