

OPINION 2012-1

SYNOPSIS: A lawyer may enter into a marketing agreement with a nonlawyer professional to share the cost of advertising, but the lawyer must ensure that the content of the advertising materials complies with the Rules, and all payments to the nonlawyer must be for actual marketing costs and services rendered. The advertisements must not state or imply that the lawyer is in business or partnership with the nonlawyer. Should the MSA result in an informal referral arrangement with the nonlawyer, the lawyer shall comply with the Rules regarding reciprocal referral agreements and shall disclose potential conflicts of interest to the client.

QUESTION PRESENTED: Whether an attorney or law firm may enter into a marketing agreement with non-lawyer professionals in order to share the cost of marketing and advertising expenses.

FACTS: Attorney has been approached by realtor to enter into a marketing agreement with realtor and lender. The agreement would include a mix of print and on-line marketing geared to buyers and sellers of real estate, and would advertise the services of the attorney, the realtor and a lender. All advertising materials would be posted, printed or sent by the realtor. The parties would split the cost of the advertising campaign three ways on a month to month basis. The payment of the attorney's share of the marketing costs would not depend on whether any new clients or business came from the advertising, and payment for the advertising would not derive from the proceeds of any particular real estate transaction but would rather come from the attorney's general office account.

ANALYSIS:

A lawyer may advertise his or her services through written, recorded or electronic communication, including public media. *See* Rule 7.2(a). However, the Rules set forth various restrictions on a lawyer's marketing activities. Under Rule 7.1, for instance, a lawyer's advertising materials shall not include any false or misleading information about the lawyer or the lawyer's services (e.g. an indication that the attorney is an expert or specializes in a certain area of law unless permitted under Rule 7.4). Further, Rule 7.2(c) requires all advertisements to include the name and office address of at least one lawyer or law firm responsible for their content.

A lawyer may pay the reasonable costs for advertisement and marketing materials without running afoul of the prohibition in Rule 7.2 that a lawyer shall not give anything of value to a person for recommending the lawyer's services. *See* 7.2(b)(1). But if a lawyer contracts and pays a nonlawyer to prepare marketing materials for the lawyer, the lawyer has an obligation to ensure that the content of the advertisements conforms to the Rules. *See* Rule 5.3.

Under the facts provided, the lawyer's payments to the realtor would be permissible under the Rules, as the payments would be for actual costs of marketing services provided by the realtor, and would not be payments for specific or individual client referrals from the realtor. However, the lawyer must have access to and some control over the content of the advertising to ensure that it meets the requirements of Rules.

In addition to confirming compliance with Rules 7.1 and 7.2, the lawyer must ensure that the marketing materials do not state or imply that the lawyer is in business or partnership with the realtor or lender listed on the advertisement, or any other nonlawyers included in or on the materials. It must be made clear that the lawyer and nonlawyers are separate businesses or entities providing distinct services. *See* Rules 5.4 and 5.7; *also see* New York County Lawyers' Association Committee on Professional Ethics Formal Opinion No. 733, p. 6 ("the attorney must be circumspect about how the relationship with the non-legal professional is characterized in any communications with the public. . . In terms of public perception, both the law firm and the non-legal professionals must make clear to the public that the law firm and the non-legal professional service firm remain separate entities. . . With respect to mailing or dissemination of brochures or other literature . . . the attorney should review any brochures or advertising prepared by a non-legal professional to ensure that, insofar as they describe the relationship or refer to the attorney, their content is accurate and does not incorrectly characterize the relationship or the attorney's credentials.") The lawyer must at all times ensure his or her professional independence of judgment in accordance with Rule 5.4(c). The lawyer may not permit any person who recommends the lawyer to direct the lawyer's professional judgment in rendering legal services to clients.

Finally, under the facts provided, this scenario would not implicate Rule 7.2(b)(4) regarding reciprocal referral agreements because the marketing agreement is for advertising purposes and not reciprocal referral purposes, and the lawyer would have no opportunity, duty, or obligation to refer anyone to the realtor. Any person who responded to the advertisements put out by the realtor under the marketing agreement would presumably only contact the attorney *after* going through the realtor's office.

However, should any informal referral arrangement result from the business connection created by the marketing agreement, the lawyer must comply with Rules 7.2 (b)(1) and (4), 5.4 and 5.7. The lawyer must not give anything of value to the nonlawyer for referring potential clients to the lawyer, the informal referral arrangement must not be explicit, and the lawyer must disclose to the client the informal referral arrangement with the nonlawyer. The lawyer must protect his or her professional judgment at all times, must not enter into a business or partnership with the nonlawyer, and must be clear in all communications with the public about the separate and distinct nature of the lawyer's services and the nonlawyer's business. The lawyer should also disclose to the client that the business arrangement with the nonlawyer could potentially create a conflict of interest (e.g. if a real estate transaction in which the realtor referred the client to lawyer resulted in a dispute over the purchase and sale agreement drafted by the realtor, with potential claims against the realtor).

This advisory opinion does not opine whether the marketing agreement would comply with the current federal Real Estate Settlement Procedures Act, or other applicable state or federal laws. The lawyer should be aware that there may be such laws, apart from the ethical Rules, which could prohibit arrangements such as the marketing agreement.