

## **VBA OPINION 2014-3**

### **SYNOPSIS**

A law firm may participate in a specific marketing program which provides drivers with a smart phone application (the “App”) which collects and facilitates information (such as insurance data and photos), provides a live operator for assistance, and delivers information on law firms, towing, medical and other services targeted to the zip code/local area where a potential client has an accident, provided the actual contact complies with the advertising and solicitation parameters of the Vermont Rules of Professional Conduct (the “VRPC”). As presented, this arrangement does not trigger the VRPC 7.2(b)(2) legal service referral considerations.

### **FACTS**

The App is intended to be used if the phone owner is involved in an auto accident. It uses a smart phone's location and motion detection capabilities to determine when and where an accident has occurred. It provides a method of collecting information that would normally be exchanged by the drivers involved in the accident, as well as a live operator to assist the phone owner. It allows use of the phone's camera to record damage to vehicles and other relevant information. The App also provides contact information for a variety of accident-

related services near the scene of the accident, such as towing and medical providers, as well as legal services. It does not recommend or refer the phone owner/App user to any particular service provider.

The App's website describes the App's function to potential users by saying that it "pinpoints your exact location then creates a list of all nearby service providers," including roadside assistance, auto repair shops, health care providers, and more. The website states that the App will put "nearby injury attorneys" at the user's fingertips. It makes no representations to users about the quality or suitability of participating attorneys. Neither the website nor the App promises to provide contact information on the basis of any evaluation other than location and type of service.

The App is owned by a for-profit entity. To potential advertisers, the App's website offers the opportunity to "join our best-of-breed network of service providers." Attorneys who wish to be listed must purchase the listing by geographical area. The number of listings available in each zip code are limited. Some relatively populous zip codes allow multiple listings.

The fee for the listing is a set amount per year no matter how many

referrals are received. However, an addendum to the firm's agreement provides, "In the event that member does not retain a minimum of six clients during the agreement period of one year, member shall be left on line at no additional cost until the minimum is met."

Public users who download the App must check a box to agree to an End User Licensing Agreement ("EULA"). Paragraph 15 of the EULA includes the following text: "[This App] is not a referral service, however, information about lawyers, doctors, tow companies and other service providers may be made available to you within the App, in case of an accident. Downloading the App creates no relationship with of [sic] these service providers and creates no attorney-client responsibilities or duties on the part of [the for-profit entity] to you, including without limitation, duties relating to conflicts of interest or confidentiality." Paragraph 45 of the EULA includes the following text: "The attorney listings on the Mobile App are paid attorney advertisements and do not in any way constitute a referral or endorsement by [the for-profit entity] or any approved or authorized lawyer referral service."

## **QUESTIONS PRESENTED**

The requesting firm has asked: (A) whether its participation with the App is regulated as lawyer advertising (generally implicating VRPCs 7.1-7.4) or as joining a referral service (specifically covered by VRPC 7.2(b)(2)); (B) if it is considered a referral service whether it is permissible; and (C) if it is considered lawyer advertising whether it is in compliance with the applicable rules.

## **ANALYSIS**

VRPC 7.2 “Advertising” provides:

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may
  - (1) pay the reasonable costs of advertisements or communications permitted by this rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by any regulatory authority designated by the Supreme Court;
  - (3) pay for a law practice in accordance with Rule 1.17; and
  - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if
    - (i) the reciprocal referral agreement is not exclusive, and
    - (ii) the client is informed of the existence and nature of the agreement.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

This Committee has issued several opinions involving lawyer referral services as well as prepaid legal service plans prior to the most recent amendments to the VRPC. The comments to the current Rule clarify that:

A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients.

In the facts presented by the firm, the sponsors of the App are operating on a for profit basis, not pretending to be a consumer oriented non-profit, and they are not claiming approval by a regulatory body authorized by the Vermont Supreme Court. If the App were a lawyer referral service or group plan, the firm's participation would violate VRPC 7.2. The firm's listing in the App, however, is clearly marked as "advertising," a user's participation in the App does not entitle him or her to any pre-paid legal services, and the firm's contact information is simply listed based on zip code proximity to an accident and field of practice.

There is no representation about a lawyer's quality of service, and the

website explicitly gives notice that the App is not a referral service. There is no extra payment for a lawyer referral and a user has access to other resources to find other lawyers besides the firm advertising on the App. The commercial terms between the firm and the for-profit owners do not change our conclusion concerning the inapplicability of the lawyer referral or group plan rules. The flat fee is consistent with an advertising arrangement similar to listing a firm's name on a television advertisement or other limited space site. Whether the firm derives any actual business from the App and how its listing may be extended at no charge until it retains six clients from the App is also consistent with many advertising arrangements, especially internet based advertising. Accordingly, we believe that the firm's participation in the App does not trigger VRPC 7.2(b)(2) considerations.

At the same time, the firm's participation in the App must conform with the regulation of lawyer advertising and solicitation. VRPC 7.2 is prefaced with references to Rules 7.1 and 7.3 which provide in relevant part:

**Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

### **Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

While we do not consider the firm's participation in the App as falling under the solicitation rules since the users have elected to purchase the App as a contingency in the event of an accident while travelling, if those facts or the actual practice with the App changes, the firm should be mindful of these requirements.

In addition, the Committee would call the firm's specific attention to VRPC 7.4 concerning communication of fields of practice and specialization, since there appears to a heightened cause for concern that a user of the App may consider the

firm's listing as an advertiser on this special resource to establish a level of expertise or specialization. On the facts, presented, however, the firm has shown that it has those considerations in mind and nothing in the proposed arrangement indicates that the advertising is misleading or outside the Rules.