

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**IN RE: PETITION OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO ADOPT
PROPOSED SUPREME COURT RULE 44**

No. M2003-00394-SC-RL1-RL - Filed February 24, 2003

ORDER

The Board of Professional Responsibility has petitioned this Court to adopt Supreme Court Rule 44 which relates to regulations of lawyer intermediary organizations. Proposed Rule 44 is attached hereto as [Exhibit A](#).

In the interest of providing prompt and fair consideration of the issues raised by the petition, the Court hereby solicits written responses from the bench, bar, and public. Comments should be addressed to:

Janice Rawls, Chief Deputy Clerk
Appellate Court Clerk's Office
401 Seventh Avenue North
Nashville, TN 37219-1407

The deadline for written comments is May 27, 2003. The Clerk shall provide a copy of this order to the media and to the petitioner. It is so ORDERED.

PER CURIAM

PROPOSED RULE 44

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: ADOPTION OF TENNESSEE SUPREME COURT RULE 44
REGULATIONS OF LAWYER INTERMEDIARY ORGANIZATIONS**

ORDER

In accordance with this Court’s inherent power to establish ethical standards relating to the practice of law and to oversee the administration of law in the courts of this state, Rule 44 of the Rules of the Supreme Court is hereby adopted:

Rule 44 – Regulations of Lawyer Intermediary Organizations

The following rule shall constitute the regulations governing intermediary organizations, such as lawyer-advertising cooperatives, lawyer-referral services and groups or pre-paid legal service providers, relating to registration, reporting, advertising and qualifications of lawyers participating in such organizations.

Registration and Reporting Requirements

- A. Each intermediary organization shall file an initial registration statement and annual registration statements with the Board of Professional Responsibility which shall be certified by an officer or authorized representative.
 - (1) The initial registration statement shall set forth or be accompanied by the following:
 - (a) A copy of the organization’s basic organizational document, including the articles of incorporation, articles of association, partnership agreements, trust agreement, or other applicable documents and all amendments to such documents.
 - (b) A copy of all bylaws, rules and regulations, or similar documents, if any, regulating the conduct of the organization’s internal affairs.
 - (c) A list of names, addresses, official positions, and biographical information of the individuals who are responsible for conducting the organization’s affairs.
 - (d) A certificate describing the plan of legal services provided to its members or beneficiaries certifying that the plan complies with all the requirements of subsections B and C of this Rule

and the following specific requirements:

- (i) The members or beneficiaries to whom legal services are provided, and not the organization, are recognized as the client of the lawyer in the matter.
 - (ii) The organization will assert no influence and will not infringe upon the attorney-client relationship or the professional judgement of the lawyer providing service under the plan.
 - (iii) No participating lawyer providing services under the plan, or any associate, affiliate, agent or employee of the participating lawyer has any ownership interest or participation, directly or indirectly, in the operation of the intermediary organization.
 - (iv) No participating lawyer will be required to act in derogation of the Tennessee Rules of Professional Conduct.
 - (v) Members or beneficiaries of the plan are informed that they may file a complaint of unethical conduct by a participating lawyer with the Board of Professional Responsibility, 1101 Kermit Drive, Suite 730, Nashville, Tennessee, 37217.
- (e) A list of the names and addresses of all lawyers providing legal services for Tennessee residents.
 - (f) A specimen copy of the form of all contracts made or to be made between the organization and any providers of legal services.
 - (g) A specimen copy of the form of any contract made or to be made between the organization and any person, corporation, partnership, or other entity for the performance on the organization's behalf of any function, including, but not limited to, marketing, administration, enrollment, investment management, and subcontracting for the provision of legal services.
 - (h) A specimen copy of the form of any group or pre-paid legal service contract which is to be issued to employers, unions, trustees, individuals, or other organizations and a specimen copy of any form of evidence of coverage to be issued to subscribers.
 - (i) A schedule of rates and charges for each contract to be used.
 - (j) A description of proposed plans of marketing.
 - (k) A description of the subscriber complaint procedures to be established and maintained.
 - (l) A complete copy of the organization's grievance procedure that facilitates the resolution of subscriber grievances.
 - (m) Pre-paid legal insurance providers are required to comply with T.C.A., Title 56, Chapter 43, known as the *Tennessee Legal Insurance Act* and to attach to their initial registration statement a copy of a *Certificate of Authority* to sell legal insurance issued by the Commissioner of the Tennessee Department of Commerce and Insurance.
- (2) The annual registration statements shall set forth or be accompanied by the following:

- (a) A copy of the organization's most recent financial statements audited by an independent certified public account shall be filed annually and also with the initial registration statement.
 - (b) A description and copy of any material changes in any previously filed initial or annual registration information contained in the statement.
- (3) The following organizations are exempt from filing initial or annual registration statements with the Board:
- (a) Legal aid or public defenders officers;
 - (i) operated or sponsored by a duly accredited law school;
 - (ii) operated or sponsored by a governmental agency;
 - (b) A military legal assistance office.
 - (c) A lawyer referral or legal aid service operated by the Tennessee Bar Association, Tennessee Trial Lawyers Association, Memphis Bar Association, Nashville Bar Association, Chattanooga Bar Association or Knoxville Bar Association, provided they meet or exceed the ABA Standards governing lawyer referral and information services as adopted by the ABA House of Delegates in August, 1993, incorporated herein as Appendix A.

Advertising and Marketing Requirements

- B. The following regulations are applicable to all advertising and marketing activities of intermediary organizations:
- (1) The information about legal services shall be governed by and comply in all respects with the requirements of Chapter 7 of the Rules of Professional Conduct.
 - (2) No communication or advertisement shall contain or refer to any of the following:
 - (a) Any guarantee or warranty regarding the outcome of a legal matter.
 - (b) Statements or symbols stating that the lawyer or services in the advertisement can generally obtain immediate cash or quick settlements.
 - (c)
 - (i) An impression of the name, voice, photograph, or electronic image of any person other than the lawyer, directly or implicitly purporting to be that of a lawyer.
 - (ii) An impersonation of the name, voice, photograph, or electronic image of any person, directly or implicitly purporting to be a client featured in the advertisement, or a dramatization of events, unless disclosure of the impersonation or dramatization is made in the advertisement.
 - (iii) A spokesperson, including a celebrity spokesperson, unless there is disclosure of the spokesperson's title.
 - (d) A statement offering representation on a contingent basis unless the statement also advises whether a client will be held responsible for any costs advanced by the member when no recovery is obtained on behalf of the client. If the client will not be held responsible for costs, no disclosure is required. The message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. The message means

the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. Factually substantiated means capable of verification by a credible source.

- (3) There shall be a rebuttable presumption affecting the burden of producing evidence that the following messages are false, misleading, or deceptive:
 - (a) A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result.
 - (b) The depiction of an event through methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation.
 - (c) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client. A reference to money or monetary recovery includes, but is not limited to, a specific dollar amount, characterization of a sum or money, monetary symbols, or the implication of wealth.
- (4) If an advertisement conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts.
- (5) Advertisements by lawyer-advertising cooperatives shall contain the identity and location of at least one attorney licensed and practicing in Tennessee. The appropriate Rule 8 certification of specialization disclosure is required for each field or area of law advertised.

Qualifications of Lawyers

- C. The following regulations are applicable relating to the qualifications of lawyers participating in intermediary organizations:
 - (1) Participating lawyers are required to be qualified as follows:
 - (a) On active status and in good standing with the Board of Professional Responsibility.
 - (b) In compliance with Rule 21, CLE Requirements.
 - (c) Have been on continuous good standing with the Board of Professional Responsibility and with no record of Public Discipline within the past 3 years.
 - (d) Maintain a professional liability insurance policy in the minimum amount of \$100,000 per claim or occurrence.
 - (e) Agree to permit any dispute concerning fees arising from such participation, to be submitted to the fee disputes committee of the appropriate local or state bar organization, or independent arbitration, if the client so desires.
 - (f) Agree to permit the organization to release and furnish any information in the lawyer's application to the lawyer's clients or potential clients.

- (g) Execute a waiver of Rule 9, Section 25 confidentiality provisions and agree to disclosure of records to the organization by the Board.
- (h) Comply with all the organization's requirements for disclosure of information, payment of fees, and qualifications for participation.
- (i) Agree to participate in and abide by the organization's quality control or client satisfaction programs.

D. Any interested person may petition this court to change these regulations relating to lawyer intermediary organizations with proposals which would facilitate informed selection of lawyers by potential consumers of legal services.

APPENDIX A

Model Supreme Court Rules Governing Lawyer Referral & Information Service

Rule 1

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(c) 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(c) 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 nonlawyer 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 1,076 (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(c) 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. 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.