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6 Attorneys for the Maricopa County Bar Association

7  
8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 PETITION TO AMEND SUPREME ) Supreme Court No. R-\_\_\_\_\_  
11 COURT RULE 42 )  
12 ) Motion to Amend Supreme Court Rule  
42 on an Emergency Basis  
\_\_\_\_\_ )

13 Pursuant to Rule 28 of the Rules of the Supreme Court, the Maricopa County Bar  
14 Association ("MCBA") petitions the Arizona Supreme Court to amend Rule 42 of the  
15 Supreme Court, as set forth in Appendix A, attached hereto. Furthermore, pursuant to  
16 Rule 28(G) of the Rules of the Supreme Court, the Maricopa County Bar Association  
17 ("MCBA") moves the Arizona Supreme Court to consider this petition on an emergency  
18 and expedited basis.

19 The State Bar Ethics Committee has informed the MCBA that it will soon be  
20 issuing Ethics Opinion 10-01 (attached hereto as Appendix B), which states that the  
21 Rules 5.4 and 7.2 of the Arizona Rules of Professional Conduct prohibit a lawyer  
22 referral service from charging a percentage fee to lawyers who participate in the service.  
23 The MCBA Lawyer Referral Service (the "Service") has charged such percentage fees  
24 since April 2008. Such fees are calculated as a percentage of the legal fees earned by the  
25 lawyer for the matter referred to the lawyer by the Service. These fees partially fund the

1 Service's operating expenses, fund the Service's efforts to publicize the availability of  
2 legal services to underserved segments of the public, and partially fund the Maricopa  
3 County Volunteer Lawyers Program. Such percentage fees are permitted by the  
4 American Bar Association Model Supreme Court Rules Governing Lawyer Referral and  
5 Information (Model Rule IX, attached hereto as Appendix C), and such fees are a  
6 common practice of lawyer referral services throughout the United States. Percentage  
7 fees are either explicitly permitted by ethics rule or opinion, collected by a state bar-  
8 sponsored lawyer referral service, or collected by local lawyer referral services in thirty-  
9 seven states and the District of Columbia. (American Bar Association Survey of Public  
10 Service Lawyer Referral Regarding Percentage Fees, attached hereto as Appendix D.)

11 The Court should consider this petition on an expedited and emergency basis  
12 because this is "an urgent matter for which compelling circumstances render the annual  
13 rule processing cycle inadequate." Sup. Ct. R. 28(G). The Service provides invaluable  
14 assistance to clients who otherwise would not have a lawyer, and provides work to  
15 competent lawyers. If the Arizona Rules of Professional Conduct are not amended to  
16 allow lawyer referral services to charge percentage fees, then the issuance of Ethics  
17 Opinion 10-01 will force the Service to stop collecting such fees. This change will  
18 significantly impair the work of the Service and other lawyer referral services  
19 throughout the state, and will thus decrease the public's access to competent legal  
20 services. Delay in amending the ethical rules will also significantly damage the  
21 operations of the Volunteer Lawyers Program of Maricopa County, which received  
22 approximately \$17,500.00 from the Service in 2009. Additionally, delay will subject the  
23 approximately 150 attorneys who are panel members of the Service to ethical  
24 complaints and potential discipline.

1 To prevent the above-mentioned consequences, the MCBA seeks to amend the  
2 rules to remedy the concerns addressed in Ethics Opinion 10-01. The recommended rule  
3 change is strongly supported by the American Bar Association, the Maricopa County  
4 Volunteer Lawyers Program, and Community Legal Services. A letter of support from  
5 the Volunteer Lawyers Program and Community Legal Services is attached as  
6 Appendix E.

7 MCBA's proposed changes would add language to ER 5.4(a)(4) clarifying that  
8 lawyers may share "fees otherwise received and permissible under" the ethical rules.  
9 The proposed changes also add language to ER 7.2(b)(2) explaining that lawyer referral  
10 services may charge a fee calculated as a percentage of legal fees earned by the lawyer,  
11 but limits such a fee to ten percent, and requires that such fees be used to pay for the  
12 lawyer referral service's "reasonable operating expenses" and to fund "public service  
13 activities." The proposed amendments would also add a new comment to ER 7.2 which  
14 explains in context the terms "reasonable operating expenses" and "public service  
15 activities." The proposed amendments to Rule 42 are based on the language already  
16 adopted and approved by courts and local bar associations in other states to address the  
17 problems raised by the Ethics Committee in its opinion.

18 For the reasons set forth above, the MCBA respectfully petitions this Court to  
19 amend Rule 42 of the Rules of the Supreme Court, as set forth in Appendix A.

20 **RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of March, 2010.

21 **OSBORN MALEDON, PA**

22 

23 Mark I. Harrison

24 James K. Rogers

25 2929 North Central Avenue, 21st Floor

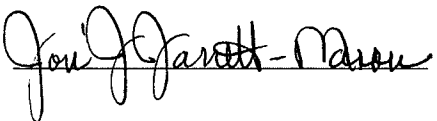
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**ORIGINAL** of the foregoing plus 6 copies  
(as well as a CD with the foregoing Motion  
in Word and PDF formats) filed this 15<sup>th</sup>  
day of March, 2010 with:

Clerk of the Court  
Supreme Court of Arizona  
1501 West Washington  
Phoenix, AZ 85007-3329

by: 

# **Appendix A**

#### **ER 5.4. Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

#### **Comment**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also ER 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

## **ER 7.2. Advertising**

(a) Subject to the requirements of ERs 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, which charges, in addition to any membership fee, may include a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall not exceed ten percent, and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono legal services. The fees paid by a client referred by such service shall not exceed the total charges which the client would have paid had no such service been involved. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with ER 1.17.

(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.

(d) Every advertisement (including advertisement by written solicitation) that contains information about the lawyer's fees shall be subject to the following requirements:

(1) advertisements and written solicitations indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (A) that the client will be liable for expenses regardless of outcome unless the repayment of such is contingent upon the outcome of the matter and (B) whether the percentage fee will be computed before expenses are deducted from the recovery;

(2) range of fees or hourly rates for services may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the total fee within the range which will be charged or the total hours to be devoted will vary depending upon that particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(3) fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the quoted fee will be available only to clients whose matters fall within the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged;

(4) a lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee, or range of fees, for at least ninety (90) days unless the advertisement specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(e) Advertisements on the electronic media may contain the same information as permitted in advertisements in the print media. If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.

(f) Communications required by paragraphs (c) and (d) shall be clear and conspicuous. To be "clear and conspicuous" a communication must be of such size, color, contrast, location, duration, cadence, and audibility that an ordinary person can readily notice, read, hear, and understand it.

#### Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the

bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see ER 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor ER 7.3 prohibits communications authorized by law, such as notice to members of a class action litigation.

[5] Lawyers are not permitted to pay others for channeling professional work. Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. But see ER 5.4. See ER 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. 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. Published and electronic group advertising and directories are not lawyer referral services, but participation in such listings is governed by ERs 7.1 and 7.4. A lawyer referral service, on the other hand, is any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or 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, such as the State Bar of Arizona, as affording adequate protections for prospective clients.

[7] The reasonable operating expenses of a legal service plan or lawyer referral service include payment of the actual expenses of operating, conducting, promoting and developing the service, including expenditures for capital purposes for the service, as determined on a reasonable accounting basis and with provision for reasonable reserves. Public service activities of a legal service plan or lawyer referral service include the following: (a) furnishing or providing funding for legal services to persons and entities financially unable to pay for all or part of such services; (b) developing and implementing programs to educate members of the public with respect to the law, the judicial system, the legal profession, or the need, manner of obtaining, and availability of legal services; and (c) creating and administering programs to improve the administration of justice or aid in relations between the Bar and the public.

[87] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See ER 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate ER 7.3.

[98] Paragraph (f) requires communications under paragraphs (c) and (d) to be clear and conspicuous. In addition to the requirements of paragraph (f), a statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, in a manner that is readily noticeable, readable, and understandable, and it must not be obscured in any manner.

## **Appendix B**



**OPINION NO. 10-01  
(January 2010)**

**SUMMARY**

A lawyer may not ethically participate in a not-for-profit lawyer referral service if, as a condition of such participation, the lawyer is required to pay the service a percentage of the fees earned on the case.

**FACTS**

A lawyer who is licensed to practice law in Arizona is eligible to participate in a certain not-for-profit lawyer referral service if the lawyer (a) pays an annual fee, (b) carries a minimum amount of professional liability insurance, (c) agrees to provide the client with a free 30-minute consultation, and (d) signs an agreement promising to abide by the rules of the service. One of the provisions of the agreement requires the lawyer to pay the service a percentage of any fees earned on any case that is referred to the lawyer by the lawyer referral service.

**QUESTION PRESENTED**

May a lawyer ethically participate in a not-for-profit lawyer referral service if, as a condition of such participation, the lawyer is required to pay the service a percentage of the fees earned on the case?

**APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT (“ER \_\_”)**

**ER 5.4 Professional Independence of a Lawyer**

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
  - (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

**Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rule changes, a different conclusion may be appropriate.**

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- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

....

#### **ER 7.2 Advertising**

- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

...

- (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 an appropriate regulatory authority;

....

#### **RELEVANT ETHICS OPINIONS**

Ohio Ethics Op. 92-001; South Carolina Ethics Advisory Op. 93-09; Wisconsin Ethics Op. E-88-8

#### **OPINION**

Subject to specific exceptions, ER 5.4(a) provides that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.” The purpose of ER 5.4(a) is “to protect the lawyer’s professional independence of judgment.” ER 5.4 (comment [1]). If a non-lawyer is permitted to share legal fees, the non-lawyer, seeking to enhance that interest, and not being bound by the ethical standards to which lawyers are subject, may attempt to influence the lawyer’s exercise of professional judgment in a manner that is detrimental to the client or to the legal system or both. Thus, unless one of the exceptions set forth in ER 5.4(a)(1)-(4) is applicable, a lawyer may not ethically participate in a lawyer referral service if, as a condition of such participation, the lawyer is required to pay the service a percentage of the fees earned on the case.

Whenever a rule or requirement seeks to protect an important interest, such as the professional independence of lawyers, “a[n] . . . exception to that requirement should be construed narrowly

or the exception may swallow the rule.” See *Arizona’s Towing Professionals, Inc. v. State*, 196 Ariz. 73, 76, 993 P.2d 1037, 1040 (App. 1999) (internal citations omitted). We examine the exceptions set forth in ER 5.4(a)(1)-(4) with that standard in mind.

The exceptions set forth in ER 5.4(a)(1)-(3) are not applicable.

ER 5.4(a)(4) provides that “a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.” If a court has approved the amount of the fee to be paid to the lawyer, the fee is, by definition, fair and reasonable. In addition, in the case of a court-awarded fee, some person or entity other than the client is usually bearing the financial impact of the fee. In such circumstances, there seems to be little, if any, danger that a lawyer’s professional independence of judgment will be compromised. If the lawyer referral service is a nonprofit organization within the meaning of ER 5.4(a)(4), and if it employed, retained, or recommended employment of the lawyer in the matter, and if the fee to be paid to the lawyer has been approved by a court, then the lawyer may ethically share that fee with the nonprofit lawyer referral service that employed, retained, or recommended the lawyer. With respect to the lawyer referral service plan described in this opinion, however, a lawyer who participates in the plan is required to pay the service a percentage of the fee earned in all cases, whether or not the fee received by the lawyer has been approved by a court. ER 5.4(a)(4) does not extend that far.

ER 7.2(b)(2) permits a lawyer to “pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service,” but that provision is an exception to a general prohibition on “giv[ing] anything of value to a person for recommending the lawyer’s services.” As noted above, exceptions to general prohibitions should be construed narrowly.

ER 7.2(b)(2) does not specifically address the question of fee sharing. The usual rule of statutory construction in Arizona is that a more specific statute controls over the more general. *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 945 P.2d 1283 (1997). In addition, Comment 5 to ER 7.2 contains a cross-reference to ER 5.4, which suggests that any latitude permitted to a lawyer under ER 7.2 is subject to the restrictions on fee sharing that are set forth in ER 5.4.

The term “usual charges” cannot be construed to include a percentage of fees earned on the case. A percentage fee would be different in each case, would not necessarily bear any relationship to any reasonable costs incurred by the lawyer referral service, and therefore cannot be said to be usual. See South Carolina Ethics Advisory Op. 93-09 (state supreme court subsequently modified the comment to the rule).

In our view, the general language of ER 7.2(b)(2) is insufficient to overcome the specific prohibition contained in ER 5.4.

Other jurisdictions have permitted a lawyer to participate in a lawyer referral service even though the lawyer is required to pay the service a percentage of the fees earned on the case.<sup>1</sup> Two

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<sup>1</sup> The Committee recognizes that other jurisdictions and the ABA have approved similar fee-sharing provisions. Several of these jurisdictions, however, have rules that regulate the amount of the percentage that may be paid, the

examples are found in Ohio and Wisconsin. *See* Ohio Ethics Op. 92-001 and Wisconsin Ethics Op. E-88-8. The Ohio and Wisconsin opinions are distinguishable, however, because they are supported by rules of professional conduct that are not found in Arizona.

In Ohio, a lawyer is permitted to pay “the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio.” Ohio Rule 7.2(b)(3). Ohio Supreme Court Rule XVI, Section 1(C)(1), specifically permits a lawyer referral service to require lawyers participating in the service to “[p]ay a fee calculated as a percentage of legal fees earned” to the service, but in exchange for that, the Ohio Supreme Court imposes significant regulations on the service. Any fees received by the service “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 public services.” Ohio Rule XVI, Section 1(C)(1). The Ohio Supreme Court also prescribes detailed regulations on how the service is to be operated. *See* Ohio Rule XVI, Section 1(A)(1)-(9).

In Wisconsin, “such a fee-sharing arrangement would only be permissible when the referral service is operated by a bar association and nonprofit, . . . [and] the fees remitted to the referral service should be reasonably related to the cost of operating the service.” Wisconsin Ethics Op. E-88-8.

ER 7.2(b)(2), by contrast, imposes no such limitations. If we were to construe ER 7.2(b)(2) as authorizing a lawyer to participate in a lawyer referral service and pay the service a percentage of the fees earned on the case, we would be extending a benefit to lawyer referral services without the service being subject to any correlative obligation. There would be no restriction on the amount of the percentage that could be paid, the purposes for which the fees could be used by the service, or the manner in which the service is to be operated. Without such restrictions, a lawyer, facing the prospect of reduced compensation, may be less willing to accept referrals or be tempted to increase the fee to be charged for the service provided. The lawyer referral service would have an incentive to refer cases only to those lawyers willing to pay the highest percentage. None of these actions would serve the public interest or protect the professional independence of lawyers.

We express no opinion on whether the Rules of Professional Conduct should be amended to authorize lawyers to share fees with a not-for-profit lawyer referral service operated by a bar association.

## **CONCLUSION**

A lawyer may not ethically participate in a not-for-profit lawyer referral service if, as a condition of such participation, the lawyer is required to pay the service a percentage of the fees earned on the case.

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purposes for which the fees can be used by the not-for-profit lawyer referral service, and the manner in which the service is to be operated. Arizona has no such rules.

## **Appendix C**

## **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(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 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(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.

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

## **Appendix D**

**Survey of Public Service Lawyer Referral Regarding Percentage Fees**  
**American Bar Association**  
**Standing Committee on Lawyer Referral and Information Service**

Last Updated: October 2004

	State Bar LRIS Collects Percentage Fee?	Ethics Opinion/Rule Supports Collection?	Comments
Alabama	No	Yes	1 of 3 local programs collect percentage fees
Alaska*	No		
Arizona	No State Bar LRIS		
Arkansas	Yes	Yes	
California	No State Bar LRIS		30 of 38 local programs collect percentage fees
Colorado	No State Bar LRIS		1 of 2 local programs collect percentage fees
Connecticut	No State Bar LRIS	Yes	2 of 3 local programs collect percentage fees
Delaware*	No		
Florida	Yes		
Georgia		Yes, Rule 7.3( c )(2)	
Hawaii*	No		
Idaho*	No		
Illinois	Yes	Yes	
Indiana	No State Bar LRIS		3 of 5 local programs collect percentage fees
Iowa*	Yes		
Kansas	Yes	Yes	
Kentucky	No State Bar LRIS		2 of 2 local programs collect percentage fees
Louisiana	Yes		
Maine*	Yes		
Maryland	No State Bar LRIS		1 local programs collects percentage fees
Massachusetts	Yes		
Michigan	Yes		
Minnesota	No		1 of 3 local programs collect percentage fees
Mississippi	No State Bar LRIS		
Missouri	Yes		
Montana*	Yes		
Nebraska	No		
Nevada*	Yes		
New Hampshire*	Yes		
New Jersey	No State Bar LRIS		3 of 8 local programs collect percentage fees
New Mexico	Yes		
New York	Yes	Yes	
North Carolina	No		1 local program collects percentage fees
North Dakota*	No		

Ohio	No State Bar LRIS	Yes	10 of 13 local programs collect percentage fees
Oklahoma	No State Bar LRIS – Online Directory		
Oregon	No		
Pennsylvania	No		4 of 9 local programs collect percentage fees
Rhode Island*	Yes		
South Carolina*	Yes	Yes	
South Dakota*	Unknown		
Tennessee	No State Bar LRIS		5 of 5 local programs collect percentage fees
Texas	No	Yes	5 of 8 local programs collect percentage fees
Utah*	No		
Vermont*	Yes		
Virginia	No State Bar LRIS	Yes	
Washington	No State Bar LRIS		3 of 4 local programs collect percentage fees
West Virginia*	No		
Wisconsin	Yes		
Wyoming*	No		
District of Columbia*	Yes	Yes	

\* Denotes that, according to ABA records, this lawyer referral service is the only public service-oriented LRIS operating in the state.

## **Appendix E**



# Volunteer Lawyers Program

A joint project of the Maricopa County Bar Association and Community Legal Services

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March 15, 2010

The Honorable Rebecca White Berch, Chief Justice  
The Honorable Andrew Hurwitz, Vice Chief Justice  
The Honorable Scott Bales  
The Honorable John Pelander  
The Honorable Michael D. Ryan  
Arizona Supreme Court  
1501 W. Washington  
Phoenix, AZ 85007

Re: Maricopa County Bar Association's Emergency Rule 28 Petition to Amend  
Supreme Court Rule 42

Dear Honorable Justices:

I write this letter in my capacity as the chair of the Advisory Committee for the Volunteer Lawyers Program ("VLP") and as vice-president of the Board of Directors of Community Legal Services ("CLS"). As the Court may be aware, the VLP is a program that is jointly supported by the Maricopa County Bar Association ("MCBA") and CLS.

CLS and VLP both support the MCBA's Emergency Rule 28 Petition to Amend Supreme Court Rule 42, so that the MCBA's Lawyer Referral Service ("LRS") may ethically continue to receive a percentage fee for referring cases to private lawyers who participate in the service. As the MCBA's Petition notes, the MCBA uses the fees it receives from the Lawyer Referral Service to partially fund the VLP. In 2009, the VLP received approximately \$17,500 from this funding source.

As a direct result of the partnership with the VLP and the MCBA Lawyer Referral Services, more than 5,000 people receive access to justice through the Family Law Assistance Project in the downtown Central Phoenix Self Help Center. This is made possible through the financial support from the MCBA lawyer referral revenue sources. These are people that would not have access to lawyers or legal advice had not the project been created and operated with VLP staff and the MCBA Lawyer Referral Services.

I hope the Court can appreciate the VLP's and CLS' desire to preserve their funding sources these days -- particularly in light of the precipitous drop in IOLTA funds to CLS in 2010 (CLS has budgeted a funding decrease of greater than 50% from IOLTA), along with decreases from other public and private sources due to the challenging economic times. Further erosion of

Supreme Court Justices

March 15, 2010

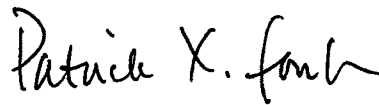
Page 2

funding sources will impact the ability of VLP and CLS to provide *pro bono* legal services to a steadily-increasing client population.

The LRS is itself an important resource for persons in our community who otherwise have difficulty in locating competent legal services. Moreover, it does not appear that the percentage fee received by LRS impairs the legal representation of the client in any way.

Accordingly, for all of the foregoing reasons, the Volunteer Lawyers Program and Community Legal Services support the Maricopa County Bar Association's Emergency Petition to Amend Supreme Court Rule 42.

Respectfully Submitted,



Patrick X. Fowler  
Chair, Volunteer Lawyers Program Advisory  
Committee and Vice-President of the Board of  
Directors of Community Legal Services

PXF:ks

cc: Lillian Johnson, Executive Director, Community Legal Services  
Patricia Gerrich, Director, Volunteer Lawyers Program  
Allen Kimbrough, Executive Director, Maricopa County Bar Association