

Minutes

Attorney Referral Fees Committee

Meeting Date: September 10, 2018

Location: OSB Center, Tigard

Chair: Kurt Hansen

Members present: Leigh Gill, Thomas Christ, Michael O'Brien, Steven Berman, John Grant III, Vanessa Nordyke,

Members via phone: Mika Blain, Erin Pettigrew, Ankur Doshi, Scott Howard, Cathy Yao, Jermaine Brown

Interested party via phone: Theo Lenihan

OSB Staff Members: Helen Hirschbiel, Susan Grabe, Matt Shields, Kellie Baumann

1. Minutes from June 20, 2018 meeting approved with 2 small changes by consensus.

2. Helen provided a brief recap of the last meeting.

- The committee discussed bringing in a presenter to discuss the economics of loosening the ethics requirements around paying for a referral. Since there are so many background materials that discuss this issue, Helen and Kurt decided it was not necessary to bring someone in to present right now.
- The committee was left with a desire to look at proposals

3. Kurt asked which of the options seemed best

- Steve Berman asked for the committee to walk through each option and discuss

4. Option 1:

- Option 1 was presented to HOD in November 2017

5. Option 2:

- Option 2 will allow sharing of legal fees with for-profit referral services as long as the percentage is not calculated based on payment for legal services rendered. In this option, attorneys would be able to pay for successful leads.
- Steve Berman asked for clarification: pay \$20 to be listed if successful lead, then \$50? When is the amount calculated?
- Helen explained that the draft rule option as written only says that you cannot calculate the amount based on percentage. Current rules prohibit this pay for successful lead scenario because it ties getting a client with the amount they are paying. It is considered sharing legal fees because you are sharing what you've earned.
- Tom Christ asked if there were companies out there looking for this sort of relationship and agreement.
- Helen responded that she did not know specifically. The idea behind this committee is to look at the Rules of Professional Conduct with an eye towards questioning the assumption that rules are geared towards protecting the client or if we can loosen the

rules to allow for better access to justice

- Michael O'Brien said that the committee could tweak the model to fill the gap of the pay for client option. Many of the companies cannot get their math right. It will be interesting to see if these companies may leave further down the line because attorneys don't want to pay what the companies are asking
- Helen explained that she knows there are a lot of background materials for these meetings, but they really help to explain these topics. She discussed an article she was reading that explains the biggest access to justice gap is people not knowing that they have a legal problem and can't find a lawyer.

The committee is looking to see if the advertising rules should be lowered so attorneys can better market and help clients, but in a way that still protects consumers and provides better access to justice.

- Steve Berman asked if this option would allow paying a lawyer referral service \$100 for a \$10,000 lawsuit or \$200 if \$20,000? Or is it a set fee? There is a potential of getting into the percentage construct.
- Helen said the idea behind the rule was that you cannot do that. The fee cannot be calculated as a percentage.
- John Grant said he could see room for a certain step program within this language, there is potential vagueness in the wording.
- Kurt Hansen said that once the lawyer has a relationship with the client, the fee should be set. The problem is where does that happen? Right at the beginning or once you know the final amount of the case?
- The committee thinks this option will need to be reworded and worked through.

6. Option 3:

- Option 3 allows for a calculation of percentage of legal fees received but only for a limited scope representation.
- Tom Christ asked if "limited scope presentation" was defined anywhere.
- Leigh Gill read RPC 1.2b regarding limited scope.
- Theo Lenihan said that as a litigation attorney, she sees many clients with limited representation. For example, filings where the attorney only represents the client for status or asylum representations. A rule like this would be handy for colleagues.
- Vanessa Nordyke said she sees limited scope representation more in tune with lawyer referral websites. If you have a full complicated case, you are more likely to go to a physical office for a lawyer. Limited scope seem more in line with websites.
- Tom Christ said there are problems with the term "for limited purposes" would an appeal be considered for limited purposes?
- Vanessa Nordyke said it depends on how we define it. It would be helpful to define the term up front.
- Erin Pettigrew asked whether referral programs increase the number of people that are able to identify their legal issues and come to the lawyer. Does anyone have experience that these companies are helping?
- Theo Lenihan said about 1/3 of her new clients find her online through sign up services like Thumbtack where she pays a fee to be listed and makes contact with the client. She

thinks it is especially helpful to non-english speaking clients.

- Helen said so as a committee, we are generally not opposed to allowing limited scope as long as we can adequately define it.
- Tom Christ said he is not comfortable with option 3 compared to option 2.

7. Option 4:

- Option 4 is the North Carolina State Bar's proposed amendments. This would allow fee sharing limited to situations where payment for administrative or marketing services with no interference with judgment or attorney client relationship.

It expands fee sharing to marketing and group sharing platforms but they have to prove the worth of their administrative and marketing services.

- Tom Christ said there is always profit in numbers given by a company.
- Steve Berman said he is uncomfortable with option 4. What may seem reasonable to a new lawyer won't seem reasonable to a seasoned attorney.
- John Grant said he is not sure how much clarity this rule would bring to ease the burdens on the modest means program participants. He has concerns this could be used as a backdoor to percentage fee sharing.
- Theo Lenihan asked how the marketing fee is determined? What is the difference?
- Helen said this rule would allow calculation of percentage of fees by including language regarding administrative and marketing services in an attempt to limit sharing to a reasonable amount.

8. Option 5:

- Option 5 is like a combination of the first two options. It would allow referral to be calculated as a percentage of fees received but only if for a short time limited representation. Not contingent on outcome of the representation.
- Michael O'Brien said that all clients could think their representation is for a short limited time.
- Helen explained that there is language about short term representation is RPC 6.5. The rule is to encourage attorneys to volunteer for legal aid and not worry about conflicts of interest. We want to address the same population where there is access to justice issues.
- Leigh Gill said that it is relevant to discuss the need for legal services and the scope of representation. If referral service company is helping give that education and offers a way to discuss the clients issue with an attorney, the economics must be big enough to cover the cost of giving that information to clients. Modeled on a 1-2 hour conversation on legal rights, it's not enough to induce participants.

9. Other options:

- Helen asked if there were any other options the committee wanted to discuss
- Kurt Hansen said he can easily support a fixed fee regardless of the matter to avoid complicating factors like scope.
- Michael O'Brien said he is in favor of fixed fee with a menu of options. The fee may be different depending on the scope of the representation.
- Leigh Gill discussed how attorneys can pay more to be boosted higher on Google.

- Vanessa Nordyke said she thinks there should be a separate rule for how attorneys can pay to be displayed on the web. It's similar to the OLCC who posts the price of liquor.
- Steve Berman asked if the lawyer referral service companies would have another fee if the client retains the lawyer for a further case. He also asked if there is a definition of "lawyer referral service?" He is worried that lawyers will get into an agreement with a company that does not consider themselves to be a lawyer referral service. There should be something for lawyers to know exactly what the bar considers a lawyer referral service.

10. Option 2 revisited:

- Tom Christ said he is conceptually okay with option 2. It will promote access to justice because it connects clients with lawyers without fee sharing entanglements. Lawyers have fiduciary duties to their clients where non-lawyers are only looking out for themselves. If the committee can do some wordsmithing, option 2 can avoid entanglement.
- Vanessa Nordyke asked if anyone on the phone had an opinion on option 2
- Theo Lenihan said she has no problem with option 2 – a flat fee makes sense. She is also not opposed to option 4 or some version of increased fees depending on representation but shares concerns with an inflated percentage.
- Ankur added that there are two consumer protection elements in Option 1 HOD proposal that should be added to whichever proposal the committee moves forward on.
- John Grant said that the flat fee should be pre-negotiated. It should be expressly stated in the rule that the marketing transaction is separate.
- Vanessa Nordyke said that the referral amount up front reminded her of the Storage Wars television show where people don't know what they are getting when they pay up front, but they pay it regardless. After the referral is done, only the attorney and client are left, even if the client is a dud.
- Steve Berman explained that he is unsure if the market will fix the problem of people who need legal help and aren't receiving it. He is not sure that this is the bridge to fix that issue.
- John Grant said that the committee can remove the barriers and run an experiment in controlled circumstances to better help the consumer. The LRS is a revenue stream for the bar. Maybe these businesses can be better at reaching consumers than we already are.
- Tom Christ discussed how newer lawyers don't have a large marketing budget and they want to pay for something that will give them results.
- Leigh Gill said that is a fair assumption. New lawyers are more willing to use technology and more interested to connect online.
- Helen said she is hoping the committee will be looking at the Rules of Professional Conduct with a critical eye and asking since they haven't been changed in a long time, are they still serving consumer protections or are the barriers to access to justice too restrictive?

11. Rewriting Option 2

- Kurt Hansen suggested the committee crafts a rule to answer these concerns.
- Scott Howard asked if a pay for lead is okay. For example, if he received a name and

information that someone was in an accident, can he call the wife?

- Helen explained that that is allowed based on RPC 7.3 and is a separate issue. Not this issue.
- Scott discussed the findings of the Futures Task Force Report that 46% of people don't know that they need legal advice, if they are contacting a website, aren't they taken out of that percentage?
- John Grant explained that when people have a problem, they are not shy about sharing that with their phones. That is a place for intermediary to share that they have a legal problem. These legal information providers can provide a pathway for the consumer to connect with a lawyer.
- Kurt said he believes the committee is okay with a flat fee option. He asked for volunteers to form a subcommittee to rewrite option 2.
- The subcommittee will be composed of: Tom Christ, Erin Pettigrew, Steve Berman, Leigh Gill, John Grant, Ankur Doshi and Theo Lenihan.

12. **Next meeting:** Third week of October. Pending Doodle Poll.