

# LEGAL REFERRAL SERVICES: New Technology, New Ethics Guidelines



**Ronald C. Minkoff** is the head of the Professional Responsibility Group at Frankfurt Kurnit Klein & Selz, P.C., and a member of Committee on Standards of Attorney Conduct and the Committee on Technology and the Legal Profession. Blog: [www.newyorklegalethics.com](http://www.newyorklegalethics.com). Facebook: [www.facebook.com/FrankfurtKurnit/](http://www.facebook.com/FrankfurtKurnit/). Instagram: @FrankfurtKurnit. LinkedIn: [www.linkedin.com/company/frankfurt-kurnit-klein-&-selz/](http://www.linkedin.com/company/frankfurt-kurnit-klein-&-selz/). Twitter: @FrankfurtKurnit. Website: <http://fkks.com>.



**Tyler Maulsby** is an associate at Frankfurt Kurnit Klein & Selz, P.C. and the secretary of the NYCBA Committee on Professional Ethics. LinkedIn: [www.linkedin.com/in/tyler-maulsby](http://www.linkedin.com/in/tyler-maulsby). Twitter: @TylerMaulsby.

Online lawyer referral services (“Online LRS”) – sometimes called “online marketing services” or “lead generators” – are proliferating, and many solo and small-firm lawyers want to get on board. Who can blame them? An Online LRS can help lawyers grow their practice by exposing them to potential clients who have a need for specific services. But questions remain as to whether lawyers can participate in this relatively new technology without violating their ethical obligations.

In August 2017, the New York State Bar Ethics Committee (the “Committee”) issued a pair of opinions making clear that a lawyer can take advantage of an Online LRS, subject to certain limitations. The first, NYSBA Ethics Op. 1131 (2017), outlined generally what an Online LRS (and an attorney participating in one) must do to comply with the New York Rules of Professional Conduct (RPC). The second, NYSBA Ethics Op. 1132 (2017), issued the same day, concluded that New York practitioners may not use Avvo’s Online LRS (called Avvo Legal Services) in its current form. Taken together, these opinions are certain to make waves as the legal profession struggles to adapt to new technologies, unbundle legal services, and offer clients cost-effective solutions.

Here’s what New York lawyers need to know.

## WHAT THE NEW YORK RULES SAY

For-profit legal referral services predate the internet age, and have long been frowned upon by Bar regulators. Indeed, RPC 7.2(a) prohibits a lawyer from “compensat[ing] or giv[ing] anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made” such a recommendation. More specifically, RPC 7.2(b) limits the organizations that a lawyer may pay to “recommend[] [or] employ” the lawyer, or “recommend or promote the use of a lawyer’s services,” even assuming “there is no interference with the exercise of independent professional judgment on behalf of a client.” This rule limits lawyers to using not-for-profit lead providers, such as legal aid or public defender offices, military legal assistance offices, a “lawyer referral service *operated, sponsored or approved by a bar association or authorized by law or court rule,*” or bona fide organizations that provide legal referrals to members, such as labor unions (emphasis added). This is a narrow rule indeed. Combined with RPC 5.4, which prohibits lawyers from splitting fees with non-lawyers, and RPC 7.3, which prohibits soliciting business from the general public by “real-time or interactive computer-accessed communication,” the obstacles to participating in a for-profit Online LRS may seem insurmountable.

But a for-profit Online LRS can take different forms. On the one extreme is a service which specifically recommends a given lawyer as the best person for the client’s assignment. At the other is a listing of lawyers, perhaps by



area of expertise, such as was found in the old-fashioned yellow pages. The first can pose a risk that lawyers will pay more – either voluntarily or at the service’s behest – in return for the service recommending them more often to potential clients, and that the recommendations themselves may be unrelated to the lawyer’s expertise. Lawyer listings, on the other hand, pose no such risk.

Also, each Online LRS has a different business model, with some charging flat fees, some taking a piece of the legal fee, and others charging based on the amount of work received or performed. Again, the more payment is keyed to work performed or fees received, the more Bar regulators fear that the Online LRS will interfere with participating lawyers’ independent judgment.

So how to separate a good for-profit Online LRS from a bad one? Do we simply reject them all, as RPC 7.2(b) seems to suggest? Or do we take a more nuanced approach? The Committee chose the latter. While not exactly writing on a clean slate – the Nassau County Bar Association Ethics Committee had approved a model for an ethically appropriate Online LRS 17 years ago in Nassau Co. 01-04 (2001) – the Committee came up with the most comprehensive guidance yet for lawyers wishing to participate in one of these services.

### **NYSBA ETHICS OP. 1131 – APPROVING SOME TYPES OF FOR-PROFIT ONLINE LRS**

In Opinion 1131, the Committee addressed whether a lawyer could pay an Online LRS to provide the lawyer with contact information for potential clients in need of legal services. The Opinion concluded that such a

payment was permissible – and thus participation in the Online LRS was permissible – so long as (1) the Online LRS selected the lawyer by “transparent and mechanical methods” and did not otherwise analyze the client’s legal issue or the qualifications of the lawyer; (2) the Online LRS did not explicitly or implicitly recommend the lawyer; and (3) the Online LRS’ communications about the lawyer’s services complied with the attorney advertising rules, mainly RPC 7.1 and 7.3.

It is important to note that Opinion 1131 turned on the fact that the lawyer would pay the lead generator either a fixed monthly fee or a fee for the name of each potential client. The lead generator’s fee did not vary depending on whether the potential client actually retained the lawyer, how much work the lawyer performed, or the size of the lawyer’s fee.

How does this work in practice? A client contacts a for-profit Online LRS looking for a matrimonial lawyer in the client’s hometown. If the Online LRS provides a list of matrimonial lawyers in that town (perhaps listed alphabetically), or provides the name of a single matrimonial lawyer based on a randomized computer algorithm, that would be permissible under Opinion 1131, provided the selection through a randomized algorithm was transparent to the client. If, on the other hand, the Online LRS asks for a description of the problem and determines that an experienced matrimonial lawyer knowledgeable about custody issues would be needed due to the complexity of the client’s legal issue, that would be impermissible. So would giving preferences to lawyers who pay the Online LRS more, who the Online LRS rates as a “better” law-

yer, or who the owners or managers of the Online LRS favor for some personal reason of their own.

Also relevant is how the Online LRS is paid. As stated previously, if the Online LRS receives a flat monthly or per-contact fee to list the lawyer, that is permissible. If the Online LRS receives a larger payment when the lawyer ends up doing more work, or is paid a portion of the legal fee received, that is impermissible.

## **NYSBA ETHICS OP. 1132 – AVVO LEGAL SERVICES**

In Opinion 1132, the Committee applied the principles articulated in Opinion 1131 to Avvo Legal Services, a service introduced in 2016 by the lawyer rating website Avvo. Specifically, the Committee addressed whether Avvo Legal Services' payment structure violated RPC 7.2. The Opinion described Avvo Legal Services as follows: a prospective client in need of legal services can visit a section of Avvo's website and answer a series of questions about the client's specific legal matter. The client can choose a specific "package," which includes a combination of services including "advice sessions, document reviews, and start-to-finish support." The client can then choose to be connected to a lawyer either at random or by selecting a lawyer among a list presented on the website. On the back end, Avvo pays the participating attorney all of the legal fees generated when the client purchases the "package," but then separately charges the attorney a "marketing fee" for each completed service. The marketing fee depends on the price of the legal service the lawyer provided. Crucially, Avvo also displays a "rating" for each lawyer based on an internal formula which generates a numerical value between 1 and 10.

The Committee concluded that Avvo Legal Services' marketing fee was a prohibited referral fee under RPC 7.2. The reason: Avvo's rating system, combined with marketing promoting the ratings as a tool to help clients find the "right" lawyer, created "the reasonable impression that Avvo is 'recommending' those lawyers."

With Opinion 1132, New York became one of several jurisdictions to challenge Avvo Legal Services – all but one have flatly rejected it, usually on more grounds than just the illegal fee. But more important, the Opinion acknowledged the vigorous debate that Avvo's business model has spawned both inside and outside the legal profession. For instance, the Opinion noted that "[t]he number of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting." The Committee concluded that "changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions."

## **THE TAKEAWAY**

The Committee's opinions were obviously bad news for Avvo. In our view, rightly so: Avvo overreached by creating a model that it must have known breached the ethics rules in a failed effort to become an Uber-like disrupter of the legal profession. But this is vastly outweighed by the good news. The Committee has now recognized that a for-profit Online LRS may exist comfortably under the rules, provided the Committee's guidelines are followed. Not only that, but the Committee all but recommended that the existing rules be re-examined to broaden lawyers' access to Online LRS and similar technologies, knowing this will help access to justice by connecting lawyers with clients who need their services.

This is a signal of great hope. Over the past several years the "legal tech" world has exploded with numerous websites and other online tools geared toward delivering legal services in a non-traditional fashion. The goal of many of these services is to try and close the "justice gap" and provide affordable legal services to individuals who cannot otherwise pay for them. These attempts often have been met with significant resistance by Bar regulators and ethics committees, largely owing to the current state of the law and ethics rules. These regulatory bodies are facing increasing pressure to adapt to the times and allow some mechanism by which legal tech providers can coexist with our ethics rules. Opinions 1131 and 1132 show the Committee doing just that. We look forward to rule changes consistent with these opinions in the near future.

