

*Zenas Zelotes, Esq. (Complainant)*

v.

*Kevin W. Chern, Esq. et al (Respondents)*

Case No. 09 CI 1670

**RECEIVED**

JUL 02 2009

REPLY BRIEF

ATTY. REG. & DISC. COMM.  
CHICAGO

I am in receipt of the respondent's memorandum and reply thereto.

As a preliminary matter: Mr. Zelotes will use this opportunity to call the panel's attention to an (exceptional) supplemental opinion not then available when the complaint initially issued: Virginia L.E.O. 1851 (Participation in a Third Party Internet Website; Released: April 14, 2009) (opinion attached; formal publication pending public comment and review). Mr. Zelotes believes the Virginia Commission on Legal Ethics could not have drafted an opinion more appropriately on point as relates to the issues at bar and strongly urges the panel to duly review and consider the same.

That stated:

The defense advanced in the respondents' memorandum fails to overcome the well reasoned critiques articulated in the complaint. A detailed response is not required. As a consequence: Mr. Zelotes' reply brief ... will be just that.

I will (nonetheless) afford the panel a *concise* summary of what I understand the respondent's voluminous brief to be; more specifically: the principal retorts advanced in the memorandum (reduced to everyday English) are:

- “WE should be permitted to do ... that which everyone else CANNOT do ... because the internet is the most AWESOME communication medium EVER (and SO WHAT if our clients pay us a \$65.00 referral fee for every prospective client referred ... the internet is AWESOME!)”
- “We should not get a ticket for speeding in a SCHOOL ZONE ... because WE have never been pulled over by a cop before (not even once) ... and ALL of our friends SWEAR we are excellent drivers (and oh, btw, did I mention: the internet is AWESOME!)”
- The state cannot enjoin us from GETTING PAID for a referral (notwithstanding that the First Amendment permits a FREE referral) because enjoining PAYMENT enjoins CONTENT (or, at the very least, because we would like to get paid).
- “I am not a prostitute, your honor, I am an escort. Every guy who pulls up on my corner signs a statement acknowledging there is NO MONEY for SEX involved (see, it says so right here, on Page 7. The \$400.00 that gets left on the motel dresser simply secures my CONVERSATION. Anything that happens between consenting adults after that is PURELY coincidental).”
- I had no idea Mr. Zelotes was an undercover ethics cop (NO FAIR)
- “Flat rate advertising SUCKS.”

Mr. Zelotes agrees with Mr. Chern only in this: “If it looks like a duck, swims like a duck, and quacks like a duck, it is probably a duck.”

The panel knows an impermissible referral fee when it sees it. The panel can recognize impermissible fee splitting when it occurs. The bankruptcy code is even more restrictive than the Rules themselves. Its substantive injunction is near absolute. Its transgression: *misconduct*.

Like a magician's slight of hand, Mr. Chern (through a voluminous brief) asks the audience to avert its eyes and suspend disbelief. His distinctions are distractions of no consequence. Mr. Zelotes' opinions, timing, motivations, and/or conversations are entirely inconsequential to a determination of misconduct.

Indeed, as of this writing, and upon the referrals cited in this complaint, probable cause that professional misconduct has occurred in one or more sister jurisdictions has since been established (*e.g.* Zelotes v. Lesko; Finding of Probable Cause; D. Conn. 09-09-0415; 06/24/09) (participation in Chern website violates Rules 7.2 & 8.4: "... any payment made by the lawyer participating in the [Chern] website violates this ethical restriction [Rule 7.2]. While the rule permits participation in a not-for-profit qualified referral services – the website in question is not qualified, and is for profit ... Whether or not R actually was retained by any individuals that visited the subject website is not relevant. His usage of the website was an attempt by him to have clients referred to him, and as such ... violates this restriction [Rule 7.2 & 8.4].")

Ignore the magician's hands. Keep your eyes and ears ... on the DUCK.

For the reasons cited in the complaint (and the supplemental Virginia LEO) the respondents are appropriately sanctioned.

(Virginia Ethics Opinion Attached)

06/29/09

**RESPECTFULLY,**

*/s/ Zenas Zelotes, Esq.*



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1 (DRAFT – APRIL 14, 2009)

2  
3 LEGAL ETHICS OPINION 1851

PARTICIPATION IN A THIRD-PARTY  
INTERNET WEBSITE

4  
5  
6 This staff generated opinion addresses whether a lawyer may participate in a  
7 third-party Internet website which invites a prospective client to submit case information.  
8 The prospective client's information is then forwarded to each of the participating  
9 lawyers in the relevant geographic and practice area. The method for forwarding the  
10 information is fully automated. The contacted lawyers review the information and  
11 respond to the prospective client directly if interested in representation. Participation on  
12 the website is generally restricted to five or fewer lawyers. A lawyer may also be  
13 permitted to purchase an exclusive listing in a specific geographic area. The fee paid by  
14 a participating lawyer for inclusion on the website often varies depending on the lawyer's  
15 practice area and geographic area. In some instances, the lawyer pays a fee based upon  
16 the number of referrals received or the number of client contacts made by the lawyer.  
17 The prospective client does not pay a fee to utilize the website in finding a lawyer.

18  
19 QUESTION PRESENTED

20  
21 May a lawyer ethically participate in a third-party Internet website service that  
22 invites a prospective client to submit case information and then automatically forwards  
23 that information to a very limited number of participating lawyers if the service:

- 24 (1) charges a fee based upon either an agreement to an exclusive geographical  
25 listing for the lawyer;  
26 (2) charges a fee based upon very strict limitations on the number of participating  
27 lawyers in each geographical practice area; or  
28 (3) charges a set fee per referral or client contact.

29  
30 APPLICABLE RULES AND ANALYSIS

31  
32 Rules 7.2(c) and 7.3(d) restrict a lawyer from giving something of value to a  
33 person or organization in exchange for recommending employment by a client or as a  
34 reward for having made a recommendation resulting in employment by the client.<sup>1</sup>

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<sup>1</sup> Rule 7.2 Advertising

(c) 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 not-for-profit lawyer referral service or legal services organization;  
and  
(3) pay for a lawyer practice in accordance with Rule 1.17.

Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment  
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(d) A lawyer shall not give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a

35 Unlike for-profit directory advertising, which is open to anyone who wishes to  
36 participate, and which is permitted by the rules, the third-party website in question limits  
37 its listing to less than five lawyers in a given geographical or practice area. By restricting  
38 the number of lawyers who are listed, the website appears to be recommending  
39 participating lawyers to the prospective client.<sup>2</sup> Therefore, any payments made by the  
40 lawyer who participates on such a website amounts to an impermissible "giving of value"  
41 in exchange for a recommendation of employment by a client in violation of Rules 7.2(c)  
42 and 7.3(d).

43  
44 Furthermore, the Committee considers the payment based upon the number of  
45 referrals, which vary depending on the number of client contacts made, amounts to an  
46 impermissible *quid pro quo* for services because the fee paid by the lawyer is directly  
47 related to the number of prospective clients with whom the lawyer makes contact. Such  
48 fees do not represent the usual fees or dues charged by a lawyer referral organization, nor  
49 are they the normal fees that a lawyer might pay an organization for public advertising.

50  
51 Rule 7.2(c) further prohibits a lawyer from participating in a referral service that  
52 is operated for-profit. Therefore, to the extent the website described in this opinion can  
53 be characterized as a referral service, where the referral service fees are in excess of the  
54 amount required to cover reasonable overhead expenses, lawyer participation in the  
55 service is prohibited.<sup>3</sup> See also Legal Ethics Opinions 1175, 1348, 1689, and 1750 for  
56 additional information regarding lawyer referral services in Virginia.

57  
58 This opinion is advisory only, and not binding on any court or tribunal.

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client, except that the lawyer may pay for public communications permitted by Rules 7.1 and 7.2 and the usual and reasonable fees charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rules 7.1 and 7.2, as appropriate.

<sup>2</sup> Indeed, by restricting participation to only five lawyers in a geographic area, the third-party Internet website described in this opinion seems to be granting exclusivity to those five lawyers by referring prospective clients only to those lawyers who have paid to participate. See LEO 1348, no single lawyer should have access to more than a single opening (position) on the referral list in the lawyer's geographic region; LEO 1689, the actual configuration of lawyers in a referral service must be such that subscribing members of the public are not deceived as to the availability of a variety of lawyers; and LEO 1750, it is deceptive to state or imply that there are a substantial number of attorneys or firms participating in the lawyer referral service when in fact all calls in a geographic area will be directed to one or two attorneys or firms.

<sup>3</sup> See LEO 1348, a lawyer referral service can require the lawyer to pay a one-time enrollment and production fee, in addition to monthly administrative and media fees, so long as there is no correlation between the fees paid to the corporation and either the number of referrals received by a given attorney or the amount of the legal fees generated in any given case.