STATEWIDE GRIEVANCE COMMITTEE

Zenas Zelotes Complainant	:	
vs.	:	
Matthew Rousseau Respondent	:	Grievance Complaint #09-0412
Zenas Zelotes Complainant	:	
vs.		
Gregg Wagman Respondent	:	Grievance Complaint #09-0414
Zenas Zelotes Complainant	:	
vs.		
Steven Lesko Respondent	:	Grievance Complaint #09-0415
Zenas Zelotes Complainant	:	
vs.		
Kenneth Lenz Respondent	:	Grievance Complaint #09-0416
Zenas Zelotes Complainant	:	
vs.		
Russell Small Respondent	:	Grievance Complaint #09-0418

MEMORANDUM OF DECISION ON RESPONDENTS' MOTION TO DISMISS

On November 12, 2009, at the conclusion of the Disciplinary Counsel's case-in-chief, the Respondents made an oral Motion to Dismiss the grievance complaints. Disciplinary Counsel objected to the Motion to Dismiss. For the reasons set forth below, this reviewing committee granted the Motion to Dismiss in a Summary Decision dated January 15, 2010.

I. Procedural History

The Complainant filed the above referenced grievance complaints on April 27, 2009. The Complainant's allegation that the Respondents' conduct violated the U.S Bankruptcy Code did not result in a finding of probable cause. Furthermore, this reviewing committee has no jurisdiction to consider alleged violations of the Bankruptcy Code. The findings of probable cause were the following:

On August 25, 2009, in Grievance Complaints #09-0412 and #09-0414, the New London Judicial District Grievance Panel found probable cause that the Respondents Matthew Rousseau and Gregg Wagman, respectively, violated Rules 7.2(c) and 8.4(1) of the Rules of Professional Conduct by paying a third-party website operator fees to recommend the attorneys to prospective clients, that the website was for profit, and was not a qualified referral service.

On July 10, 2009, in Grievance Complaint #09-0415, the Middlesex Judicial District Grievance Panel found probable cause that the Respondent, Steven Lesko, violated Rules 7.2(c) and 8.4(1) of the Rules of Professional Conduct by paying a third party website to recommend the attorney to prospective clients, that the website in question was for profit, and was not a qualified referral service.

On July 23, 2009, in Grievance Complaint #09-0416, the Ansonia/Milford Judicial District Grievance Panel found probable cause that the Respondent, Kenneth Lenz, violated Rule 7.2(c) of the Rules of Professional Conduct by paying a third party website to recommend the attorney to prospective clients, that the website in question was for profit, and was not a qualified referral service.

On August 5, 2009, in Grievance Complaint #09-0418, the Fairfield Judicial District Grievance Panel found probable cause that the Respondent, Russell Small, violated Rules 7.2(c) and 8.4(4) of the Rules of Professional Conduct by paying a third party website to recommend the attorney to prospective clients, that the website in question was for profit and was not a qualified referral service, and that the Respondent had potentially violated General

Statutes §51-87, "Solicitation of Cases for Attorneys."

Pursuant to Practice Book §2-35, these hearings were scheduled for a public hearing before the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee, at the Superior Court, 80 Washington Street, Hartford, Connecticut on November 12, 2009. Notice of the hearings was mailed to the Complainant, to the Respondents and to the Office of Chief Disciplinary Counsel on October 8, 2009. Pursuant to Practice Book §2-35(d), Chief Disciplinary Counsel Mark A. Dubois pursued the matters before this reviewing committee. The Complainant appeared at the hearings and testified. Respondents Gregg Wagman and Kenneth Lenz, represented by Attorney Kimberly A. Knox, appeared at the hearings. Respondents Matthew Rousseau, Steven Lesko and Russell Small, represented by Attorney David P. Atkins, appeared at the hearings. Nine exhibits were admitted into evidence.

At the hearing, the Respondents filed a motion requesting that the reviewing committee consolidate the five hearings for the purposes of presentation of evidence. This reviewing committee granted the motion. We first heard Grievance Complaint #09-0412, Zelotes v. Matthew Rousseau. Disciplinary Counsel called the Complainant and the Respondent Matthew Rousseau as his witnesses. Disciplinary Counsel and counsel for the Respondents agreed that the testimony of the Complainant would be made a part of the record of all the Respondents. At the conclusion of Disciplinary Counsel's case-in-chief in Rousseau, Respondent's counsel orally moved to dismiss the grievance for lack of a prima facie case on the charges that the Respondent violated Rules 7.2(c) and 8.4(1) of the Rules of Professional Conduct. Respondent's counsel indicated that his motion was also applicable to his other clients, Attorneys Lesko and Small. Counsel for Attorneys Wagman and Lenz joined in the motion. For purposes of the Motion to Dismiss, the testimony of Respondent Rousseau concerning the business arrangement with the websites in question was also made a part of the record for all of the Respondents.

The Respondents argued that the grievances should be dismissed because: (1) the conduct complained of did not constitute a violation of Rule 7.2(c) because no "recommendation" of the attorneys' services was made; and (2) the fees paid to the websites constituted the costs of advertising. Disciplinary Counsel objected to the motion arguing that: (1) the websites' referral of a potential client to a single attorney who purchased an exclusive territory in a geographical area constituted a recommendation of the attorney's services; and (2) the fees paid to the websites constituted fees paid for leads to potential clients.

II. Factual Findings

This reviewing committee makes the following factual findings:

Clear Bankruptcy Inc. and Total Bankruptcy Inc. ("the websites") maintain an internet-

based service that matches a prospective bankruptcy client with an attorney in the county covered by the prospective client's zip code. The websites include general information about bankruptcy law, as well as an interactive function that implements the matching service. The operator of the websites spends considerable time ensuring that the websites are at the top of responses to search engine inquiries regarding bankruptcy lawyers. The Respondents purchased an exclusive territory from the websites comprised of a county in Connecticut and paid a monthly fee to the websites for each prospective client. When a prospective client visited the websites and decided to seek an attorney affiliated with them, the client was required to provide his or her name and zip code. The websites then provided the prospective client with the name of the attorney who had purchased the county covered by that zip code. The prospective client also had the option of providing additional information. This lead generated a per-prospect fee to be paid monthly by the Respondents to the websites. As of the date of the hearing, the websites contained disclaimers indicating that the participating attorneys were not endorsed by the websites.

The total monthly fee was $65 for each lead received by phone call or email from the websites. The fee consisted of three parts: marketing, technology, and database costs. The fee was charged to the attorney when the prospective client's contact information was forwarded to the attorney by the websites. The attorney could dispute charges, but the charges were incurred regardless of whether the potential client retained the attorney or not.

III. Argument

In moving to dismiss, the Respondents argued that since the per-lead charges were paid by the participating attorney whether or not the prospective client actually retained the attorney or paid the attorney any legal fees, they did not constitute a fee paid for a recommendation of the attorney and that the amount paid reflected the reasonable cost of advertising on the website. The Respondents also argued that because the website only required a limited amount of information before providing the lead to the attorney; because no effort was made to evaluate the specific legal needs of the potential bankruptcy client other than to match the client with the attorney based on a zip code; and because the website did not tout the attorney's competence, expertise or credentials beyond the neutral and objective fact that he was a bankruptcy attorney, it did not make attorney "recommendations." Finally, the Respondents asserted that disclaimers placed on the website clearly explained that the website was not "recommending" any particular attorney to the viewer.

Disciplinary Counsel argued that the fees paid by the attorneys to participate in the websites were illegal and unethical. Disciplinary Counsel maintained that because the fees were tied to the number of leads supplied to the attorney they did not constitute appropriately shared costs for advertising, which are allowed by Rule 7.2(c). Disciplinary Counsel also argued that because the Respondents were allowed to purchase an exclusive territory from the websites, the exclusivity was an implied "recommendation" of the attorney by the websites in

violation of Rule 7.2(c).

Disciplinary Counsel argued that by engaging the services of the websites the Respondents Matthew Rousseau, Gregg Wagman, Steven Lesko and Kenneth Lenz had also violated Rule 8.4(1) and the Respondent Russell Small had violated Rule 8.4(4) of the Rules of Professional Conduct. Regarding the charge of a Rule 8.4(4) violation, Disciplinary Counsel argued that the arrangement between the Respondents and the websites also violated C.G.S. §51-87,[1] which prohibits an attorney from paying a third party to find clients.

The Respondents maintained that C.G.S. §51-87 does not apply because their conduct was permissible attorney advertising.

IV. Legal Analysis

We conclude that Disciplinary Counsel did not establish a prima facie case that the business arrangement between the Respondents and the websites constituted a recommendation of the lawyers' services pursuant to Rule 7.2(c) of the Rules of Professional Conduct.

A. Standard of Review

We are mindful that attorney advertising is commercial speech protected by the First and Fourteenth Amendments. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). The State's interest in regulating commercial speech must be substantial; the regulation must further that interest; and it must be as narrowly drawn as possible. Central Hudson Gas & Electric Co. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). While protection of consumers and the reputation of the bar are important interests, Ohralik v. Ohio State Bar Association, 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), these concerns are not dispositive of the issue. Mason v. Florida Bar, 208 F.3d 952, 956 (11th Cir. 2000).

The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Reno v. American Civil Liberties Union, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). "The internet is not as invasive as radio or television. [C]ommunications over the internet do not invade an individual's home or

[1] The probable cause finding in Grievance Complaint #09-0418, Zelotes v. Russell Small, recites a potential violation of C.G.S.§51-87: "(a) Any person who (1) pays, remunerates or rewards any other person with something of value to solicit or obtain a cause of action or client for an attorney-at-law or (2) employs an agent, runner or other person to solicit or obtain a cause of action or a client for an attorney-at-law or (3) pays, remunerates or rewards any other person with something of value for soliciting or bringing a cause of action or a client to an attorney-at-law...shall be fined not more than one thousand dollars or imprisoned not more than three years or both."

appear on one's computer unbidden. Users seldom encounter content by accident." (Internal quotation marks omitted.) Id. at 869. The application of our current Rules of Professional Conduct to this unique medium is undeniably difficult. See M. Mercer, "Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel", 39 Brandeis L. J. 713 (2001).

Against this backdrop, the Respondents have moved to dismiss these complaints arguing that the evidence produced by the Disciplinary Counsel did not establish a prima facie case. A motion to dismiss a grievance complaint at the conclusion of the Disciplinary Counsel's case-in-chief at a reviewing committee hearing is a rare procedural vehicle that should be entertained only in exceptional circumstances. Nevertheless, we note that Rule 7 C. 1. of the Statewide Grievance Committee Rules of Procedure contemplates that the participants in a hearing may raise a motion on "any . . . matter to be considered by the hearing body." Moreover, although the court rules that govern the civil process are not followed in attorney disciplinary hearings, we recognize the wisdom of adopting a procedure such as that set forth in Practice Book §15-8 to dismiss matters in which there has been no prima facie case established by the Disciplinary Counsel.

Practice Book §15-8 provides in relevant part, "[i]f . . . the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case." The standard of review on a motion for judgment is well settled:

> A prima facie case . . . is one sufficient to raise an issue to go to the trier of fact. In order to establish a prima facie case, the [Disciplinary Counsel] must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove . . . . In evaluating a motion to dismiss, the evidence offered by the [Disciplinary Counsel] is to be taken as true and interpreted in the light most favorable to the [Disciplinary Counsel], and every reasonable inference is to be drawn in the [Disciplinary Counsel's] favor. Whether the [Disciplinary Counsel] has established a prima facie case entitling the [Disciplinary Counsel] to submit a claim to a trier of fact is a question of law . . . .

LaPointe v. Commissioner of Correction, 113 Conn. App. 378, 388 (2009) (internal quotation marks and citations omitted). The issue in these grievances is whether the Disciplinary Counsel established a prima facie case that the Respondents' payment for internet-based leads was in exchange for a "recommendation." In dismissing these matters, we conclude that a prima facie case was not established.

B. Violation of Rule 7.2(c) of the Rules of Professional Conduct

Rule 7.2(c) of the Rules of Professional Conduct provides:

> 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 cost of advertisements or communications permitted by this Rule; (2) pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.

Rule 7.2(c) provides that an attorney may not pay a third party to "recommend" the attorney's services. We note that the Rule's drafters chose the term "recommending" and not "referring." While the terms are sometimes used interchangeably, they mean different things. The term "recommend" is not a defined term within the Rules of Professional Conduct. According to the dictionary, the word "recommend" means, "(1) to give in charge; commit; entrust (2) to suggest favorably as suited for some use, function, position, etc." Webster's New World Dictionary (3d College Ed. 1988). The term "refer," on the other hand, means for our purposes, "to send or direct . . . for aid, information, etc." Id. A "recommendation" connotes an endorsement; a "referral" does not.

In interpreting court rules, we follow the same principles that govern statutory construction. Dartmoor Condominium Ass'n v. Guarco, 111 Conn. App. 566, 569 (2008). Court rules in Connecticut are adopted by the judges of the Superior Court, who serve as the legislative body. Practice Book §1-9. It is axiomatic that "terms in a statute are to be assigned their ordinary meaning unless context dictates otherwise." State v. Lutters, 270 Conn. 198, 206 (2004). Moreover, "[i]t is a principle of statutory construction that a court must construe a statute as written. Courts may not by construction supply omissions or add exceptions merely because it appears that good reasons exist for adding them . . . . The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say . . . . [T]he court cannot itself rewrite a statute to accomplish a particular result. That is a function of the legislature." Southwick at Milford Condominium Ass'n v. 523 Wheelers Farm Road, 294 Conn. 311, 320-321 (2009)(citations omitted).

Accordingly, Rule 7.2(c) requires us to determine whether the evidence adduced by the Disciplinary Counsel establishes a prima facie case of a "recommendation." The evidence before us did not establish that the websites "recommended" the participating attorneys to viewers of the website. To that end, we conclude that the territorial exclusivity of the arrangement was not an implied endorsement and that the fees charged to the Respondents were the appropriate costs of advertising on the websites.

Potential clients had to take the affirmative step of visiting the websites and requesting the contact before their name was given to the participating attorney. The websites automatically connected potential clients to participating attorneys by using the potential client's zip code only. Apart from the potential client's name, no other information was required of the potential client. Additionally, the websites contained disclaimers to indicate that no recommendation about the participating attorney was made. We conclude that because (1) the potential client initiated the contact by visiting the website and by providing voluntarily the requested information and (2) the websites did not contain any language of endorsement but rather express disclaimers to the contrary, there are appropriate safeguards built into the design of this advertising arrangement to remove the implication that the referral is a recommendation based on a client's particular legal needs or the competence of the attorney.

Only one higher court decision has interpreted Rule 7.2(c) and lawyer referral services. In State Bar Association v R.W. Lynch Co., Inc., 655 So.2d 982 (Ala. 1995), the Alabama Supreme Court examined Rule 7.2(c) in connection with a television advertisement that provided an "Injury Hotline" toll-free number that prompted the viewer to call. Upon phoning, callers were asked for their name, phone number and zip code by the answering service. That information was forwarded to the attorney or firm that had contracted for the geographical area covered by the zip code. The court held that the commercial and the answering service were a permissible form of group advertising. The court examined the nature of attorney referral services and such factors as whether a consumer's needs were screened or evaluated by the answering service; whether representations of the attorneys' skills were made; whether only an attorney discussed the contact's legal needs; and the method of payment. The court noted that callers were forwarded to an attorney solely on the basis of geography. Id. at 984. Unlike the matter before this reviewing committee, the method of payment in Lynch was a flat fee paid regardless of the number of contacts forwarded to the attorney and did not involve internet technology.

Several states' ethics opinions have examined group advertising models, both internet-based and pre-internet. Among the pre-internet opinions, Connecticut Bar Association ("CBA") Informal Opinion 90-14 (March 28, 1990), examined an advertising model similar to that found in Lynch—a television commercial advertising a toll-free number to call for the name of a lawyer who had purchased exclusive rights to the zip code of the caller. While finding that the advertising model was not a violation of Rule 7.2(c) on its face, the opinion confined its analysis to the mechanical set up of the answering service connecting the caller by zip code. The CBA committee reserved opinion as to whether there is any potential Rule 7.1 violation and/or an implied recommendation if the caller is not advised that the reason for the referral to the attorney is that the attorney purchased the zip code of the caller. See also CBA Informal Opinion 94-10 (February 7, 1994) and Statewide Grievance Committee Ethics Opinion 95-1 (1995).

Internet technology is rapidly changing and as noted by the Kentucky Bar Association in

an ethics opinion, "the Rules of Professional Conduct were not designed to specifically address many of the issues that arise in an age of advanced technology and sophisticated marketing techniques." Kentucky Bar Association Ethics Opinion KBA E-429 (June 17, 2008). The Kentucky ethics opinion provides a thorough discussion of the potential blurring of group advertising models and the characteristics of referral services and notes that "whether a particular arrangement falls into one category or the other will depend on a careful analysis of the facts." Id. at 4. The Kentucky Ethics Committee answered a qualified yes to lawyer participation in internet arrangements and internet based payment systems. The bar association's opinion also noted that some group marketing arrangements limit the number of lawyers who participate in a particular field or geographic area, and opined that without appropriate disclaimers, a potential client may be misled into believing that there was an evaluative process.[2] See also Nebraska Ethics Advisory Opinion No. 07-05 (2007), South Carolina Ethics Advisory Opinion 01-03 (2001), Oregon Formal Opinion No. 2007-180 (2007) and Opinion 36 of the New Jersey Committee on Attorney Advertising, 182 N.J.L.J. 1206 (December 26, 2005) for approval of other internet group advertisements.

At the hearing, there was reference to modifications to the websites made subsequent to the grievance complaints and occurring on a regular basis. The website modifications purportedly expand the disclaimers indicating that the websites are not recommending attorneys, and provide a list of the sponsoring attorneys as a group on the website. In light of the unique ability of the internet advertising medium to undergo constant, immediate and reactive changes, we see no reason not to consider the post-grievance efforts made by the websites to make them compliant with our rules. Although the details of the website modifications were not made part of the record, we conclude nonetheless that the Respondents did not pay the websites to recommend their services in violation of Rule 7.2(c).

C. Violation of Rules 8.4(1) and 8.4(4) of the Rules of Professional Conduct

Rule 8.4(1) provides:

> It is professional misconduct for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Rule 8.4(4) provides:

> It is professional misconduct for a lawyer to: (4) engage in conduct that is prejudicial to the administration of justice.

[2] The probable cause findings in the instant grievances did not include a finding of a violation of Rule 7.1.

This reviewing committee cannot conclude that the arrangement between the websites and the Respondents violated Rule 7.2(c). Accordingly, we cannot conclude that the Respondents Matthew Rousseau, Gregg Wagman, Steven Lesko and Kenneth Lenz violated Rule 8.4(1).

We now address the allegation that Respondent Russell Small's conduct violated C.G.S. §51-87, which forbids a person to give something of value "to any person to solicit or obtain a cause of action or client for an attorney-at-law," in turn violating Rule 8.4(4) of the Rules of Professional Conduct.

We observe that while the statute forbids giving value to "any person," it also elaborates by specifically addressing solicitations by "an agent [or] runner," and payments to a "police officer, court officer, correctional institution officer or employee, a physician, any hospital attaché or employee, an automobile repairman, tower or wrecker [or] funeral director."

"According to the [doctrine] of ejusdem generis, unless a contrary intent appears, where general terms are followed by specific terms in a statute, the general terms will be construed to embrace things of the same general kind or character as those specifically enumerated." Hackett v. J.L.G. Properties, LLC, 285 Conn. 498, 513-514 (2008)(citations omitted).

We conclude that the statute is aimed not at advertising, including the type of advertising at issue in these grievance complaints, but rather at in-person contacts initiated by third parties to solicit clients for attorneys in exchange for money or other value.[3] This construction is consistent with both the language of the statute and the legislative purpose of eliminating "ambulance chasing," the dominant theme in the legislative history. "[T]his bill would make unlawful what is commonly termed ambulance chasing by or on behalf of an attorney and paying something for that service." 26 S.Proc., Pt. 6, 1957 Sess., pp. 3659-3660, remarks of Senator Filer.

"The common essentials of an ambulance chasing case are (1) the victim of an accident, (2) prompt contact by a runner, usually unknown to the victim, (3) recommendation by the runner of a 'good lawyer,' also usually unknown to the victim, (4) contact by the lawyer and arrangement of terms on a contingent basis, (5) disposition of the case by the lawyer by settlement if possible, or by trial." In re Chapnick, 4 Conn.Sup. 90, 93 (1936).

[3] In Disciplinary Counsel's Memorandum of Fact and Law, P.A. No. 09-222 is also cited as additional support for the prohibition against paid solicitation of clients for attorneys. The Public Act concerned solicitations by third parties known as "runners," but the Public Act contains an express exception for advertising in the public media.

The arrangement between these Respondents and the websites does not constitute the bankruptcy equivalent of "ambulance chasing." The first communication is initiated by the prospective client, not the referral source (the website), and is not face to face. The communications do not include a "recommendation"; see discussion supra; and do not take place in a context that suggests undue influence. We conclude that C.G.S. §51-87 is not aimed at the conduct that is the subject of these grievance complaints.

Furthermore, this reviewing committee notes that the statute was passed in 1957, long before the Supreme Court's decision in Bates v. State Bar of Arizona, supra, 433 U.S. 350, recognizing that attorney advertising is commercial speech entitled to some protection under the First Amendment. Thus even if the statute could be read as arguably applying to the advertising arrangement at issue here, we believe that such a construction would run afoul of the Constitutional protections articulated in Bates and its progeny.

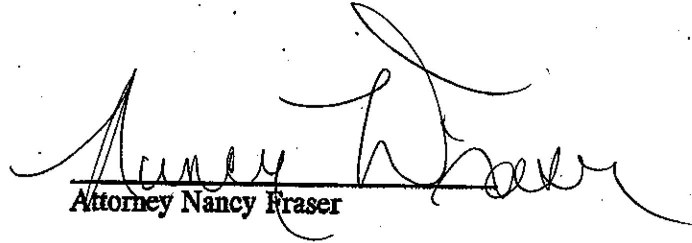
For these reasons, this reviewing committee concludes that C.G.S. §51-87 is inapplicable to the arrangement made between the Respondents and the websites.

IV. Conclusion

We conclude that the evidence did not establish a prima facie case that the applicable Rules of Professional Conduct had been violated. We have some concern about the exclusive nature of the arrangement and its potential effect on consumers of legal services. Furthermore, we believe that this website business model has been designed to accomplish compliance with the Rules of Professional Conduct with very little margin for error; on slightly different facts, we may well have concluded that a prima facie case of ethical violations had been established. Nevertheless, the essential question before us was whether or not, based on the facts presented, the Respondents engaged in an unethical advertising scheme by which they paid for recommendations. Since we conclude that they did not, the motions to dismiss are granted.

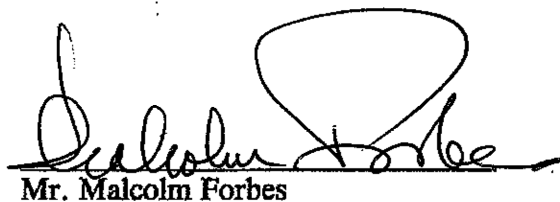
(E)

MEMORANDUM DATE: February 8, 2010



Attorney Nancy Fraser

Attorney William J. O'Sullivan



Mr. Malcolm Forbes