

1 **FLORIDA BAR ETHICS OPINION**  
2 **DRAFT PROPOSED ADVISORY OPINION 18-1**  
3 **October 12, 2018**

4 **Advisory ethics opinions are not binding.**

5 The Board of Governors of The Florida Bar has received inquiries regarding which  
6 methods of payment by Florida Bar members to for-profit qualifying providers are permissible.

7 Lawyers are permitted to participate with for-profit qualifying providers only if the  
8 qualifying providers meet specific requirements set forth in Rule 4-7.22(d). Lawyers may not  
9 participate with a for-profit qualifying provider if that qualifying provider charges a fee that  
10 constitutes a division of legal fees. *See* Rule 4-7.22(d)(2). *See also*, Rule 4-5.4.

11 The comment to Rule 4-7.22 provides further guidance:

12 A lawyer may not participate with a qualifying provider that receives any fee that  
13 constitutes a division of legal fees with the lawyer, unless the qualifying provider  
14 is The Florida Bar Lawyer Referral Service or a lawyer referral service approved  
15 by The Florida Bar pursuant to chapter 8 of these rules. A fee calculated as a  
16 percentage of the fee received by a lawyer, or based on the success or perceived  
17 value of the case, would be an improper division of fees. Additionally, a fee that  
18 constitutes an improper division of fees occurs when the qualifying provider  
19 directs, regulates, or influences the lawyer's professional judgment in rendering  
20 legal services to the client. *See e.g.* rules 4-5.4 and 4-1.7(a)(2). Examples of  
21 direction, regulation or influence include when the qualifying provider places  
22 limits on a lawyer's representation of a client, requires or prohibits the  
23 performance of particular legal services or tasks, or requires the use of particular  
24 forms or the use of particular third party providers, whether participation with a  
25 particular qualifying provider would violate this rule requires a case-by-case  
26 determination.

27 The prohibition against fee sharing found in Rule 4-5.4 is based on preservation of the  
28 lawyer's independent professional judgment against interference by a third party with whom the  
29 lawyer partners or divides legal fees. *See, Annotated Model Rules of Professional Conduct*, 8<sup>th</sup>  
30 Edition (2015); Simon, "Fee Sharing Between Lawyers and Public Interest Groups," 98 Yale L.J.

31 1069 2989). Prohibitions against fee sharing and paying for referrals also discourage improper  
32 solicitation of clients. *See*, Simon, above. Rule 4-7.22(d)(1) explicitly prohibits a lawyer’s  
33 participation with a qualifying provider that violates rules on lawyer advertising and solicitation.

34 Other states have addressed how entities that connect lawyers and prospective clients are  
35 paid. This issue is complicated by the fact that many states prohibit for-profit lawyer referral  
36 services. States have permitted lawyers to participate in Internet sites that do not charge the  
37 lawyer, but instead profit from charges to consumers or selling advertising to others. *See*, New  
38 York City Bar Opinion 2000-1 (2000) (lawyer may participate in website where clients post legal  
39 projects, lawyer “bids” on legal projects, but only consumer is charged by website); Maine  
40 Ethics Opinion 174 (2000) (lawyer may be listed on a website where website charges consumers  
41 for using the website and obtains revenue from advertising posted on the website). Two states  
42 have opined that a fixed monthly or annual fee (or other set periodic fee not related to cases  
43 generated) is permissible. *See*, Oregon Ethics Opinion 2007-180 (2007) (lawyer may pay based  
44 on fixed annual or other set periodic fee not related to particular work generated from  
45 advertising, but may not pay based on number of referrals, retained clients, or revenue generated  
46 from advertisements) and South Carolina Ethics Opinion 01-01 (2001) (Lawyer may pay Internet  
47 service for advertising services based on a set monthly or yearly fee or based on the number of  
48 hits on the lawyer’s information, but may not direct the Internet site user to a particular lawyer  
49 and may not pay any part of legal fees from clients who were referred).

50 A majority of states that have addressed payment of a fixed amount “per click” or “per  
51 hit” have concluded that lawyers may participate in a group advertising program charging a fixed  
52 amount “per click” or “per hit.” Those opinions conclude that the payment is for exposure, and  
53 not for the referral of clients, the hiring of the lawyer by particular clients, or the amount of fees  
54 paid to the lawyer. *See*, Arizona Ethics Opinion 11-02 (2011) (lawyer may pay website on a pay  
55 per lead or pay per click basis); Kentucky Ethics Opinion E-429 (2008) (lawyer may pay group  
56 marketing program based on number of “hits” but not per referral); New Jersey Ethics Opinion  
57 43 (2011) (pay per lead or per click is not prohibited).

58 One state has concluded that a lawyer may participate in a website in which lawyers  
59 “bid” on projects posted by consumers and pay for each “bid,” because the lawyer pays to bid  
60 regardless of whether selected by the consumer. Utah Ethics Opinion 15-05 (2015). Another  
61 has advised that lawyers may pay per referral to participate in a for-profit, Internet based service

62 that matches lawyers with prospective clients. New York State Bar Association Ethics Opinion  
63 1131 (2017). However, two states have concluded that payment per referral is prohibited. *See*,  
64 Kentucky Ethics Opinion E-429 (2008) (lawyer may pay group marketing program based on  
65 number of “hits” but not per referral); Oregon Ethics Opinion 2007-180 (2007) (lawyer may pay  
66 may not pay based on number of referrals, retained clients, or revenue generated from  
67 advertisements).

68 Several states reviewed an Internet based program in which lawyers agreed to accept flat  
69 fees that varied for particular types of cases, the entity collected the entire fee from the client, the  
70 entity paid the fee to the lawyer after the lawyer has concluded the legal work on the matter, and  
71 the lawyer paid a separate “marketing fee” to the entity that varied according to the type of  
72 matter referred to the lawyer. Most of those states concluded that lawyers may not pay a set fee  
73 for each accepted case. *See*, Indiana Ethics Opinion 1-18 (2018); New Jersey Ethics Opinion  
74 732 (2017); New York State Ethics Opinion 1132 (2017); Ohio Ethics Opinion 2016-3 (2016);  
75 Pennsylvania Ethics Opinion 2016-200 (2016); South Carolina Ethics Opinion 16-06 (2016);  
76 Utah Ethics Opinion 17-05.

77 States also generally have advised lawyers against participating with entities that receive  
78 a percentage of the lawyer’s fee. *See*, Arizona Ethics Opinion 99-06 (1999) (lawyer may not  
79 participate in website to answer consumer questions where lawyer is charged a one-time fee, a  
80 minimum deposit for first 30 questions, a separate fee for each question referred, and a  
81 percentage of any fee from a client whose question is referred to the lawyer); South Dakota  
82 Ethics Opinion 98-10 (1999) (internet referral service with annual fee and requirement that  
83 lawyer pay 10% of legal fees over \$100 for referred cases violates rules prohibiting fee-splitting);  
84 South Carolina Ethics Opinion 01-03 (2001) (lawyer may not pay Internet service any part of legal  
85 fees from clients referred by the service).

86 The board cannot address every possible method of calculating the charges of a  
87 qualifying provider, which must be assessed on a case-by-case basis. In determining whether a  
88 qualifying provider’s particular method of charging for participation violates Rules 4-5.4 and 4-  
89 7.22(d)(2), the board believes the following factors should be considered.

90 The following factors would mitigate in favor of a conclusion that the charge is  
91 permissible:

- 92 • the charge is reasonably based on the qualifying provider’s costs for marketing  
93 and administration plus a reasonable profit; and
- 94 • the charge is imposed regardless of whether the lawyer is hired by the prospective  
95 client.

96 The following factors may or may not lead to a conclusion that the charge is permissible,  
97 depending on the circumstances, and might require further scrutiny:

- 98 • the charge varies and on what basis; and
- 99 • the qualifying provider sets the lawyer’s fee and on what basis.

100 The following factors would mitigate in favor of a conclusion that the charge is  
101 impermissible:

- 102 • the charge is based on the perceived value of the individual matter;
- 103 • the qualifying provider collects the lawyers’ fees directly from the consumer,  
104 takes a portion of the fee as the charge for the referral or match, then remits the  
105 remainder to the lawyer;
- 106 • the qualifying provider interferes with the lawyer’s independent professional  
107 judgment in representing clients or directs the lawyer’s activities in representing  
108 clients; and
- 109 • there is sufficient incentive for the qualifying provider to improperly solicit  
110 prospective clients or improperly market the service.

111 In applying these facts, the board believes the following would generally be permissible:

- 112 • a reasonable, pre-arranged fixed charge per time period such as weekly, monthly,  
113 or yearly;
- 114 • a reasonable, pre-arranged fixed charge for each time a consumer views  
115 information about a specific lawyer, commonly referred to as “pay-per-click”;

116           • a reasonable, pre-arranged fixed charge per matter referred to the lawyer that is  
117           not contingent on the outcome of the matter and does not vary based on the  
118           amount at issue in the matter; and

119           • a reasonable, pre-arranged fixed charge per matter referred to the lawyer that  
120           varies based on the type of matter only if the varying charge is based on  
121           demonstrably different marketing and administrative costs rather than the  
122           perceived value of the case;

123           The board believes the following would generally be impermissible:

124           • a charge calculated as a percentage of the fee received by a lawyer;

125           • a charge calculated as a percentage of the client's recovery in the matter;

126           • a charge based on the perceived value of the case referred to or accepted by a  
127           participating lawyer;

128           • a flat charge that differs based on the perceived value of the case referred to or  
129           accepted by a participating lawyer;

130           • a flat charge per case accepted by a participating lawyer; and

131           • a flat charge per case accepted by a participating lawyer that differs based on the  
132           type of matter (e.g., personal injury versus family law).

133           In summary, determining whether a particular method of charging for the services of a  
134           qualifying provider comply with Rules Regulating The Florida Bar which prohibit a lawyer from  
135           sharing fees with a qualifying provider must be determined on a case-by-case basis, which will  
136           be guided by the considerations set forth in this opinion. The board cautions that this opinion  
137           addresses solely the issue of whether a particular method of charging for the services of a  
138           qualifying provider constitute impermissible fee splitting, that the method by which particular  
139           qualifying providers operate may raise other ethics concerns under the Rules of Professional  
140           Conduct, and that lawyers should not assume that a lawyer may participate with a particular  
141           qualifying provider solely because the qualifying provider's method of charging for its services  
142           falls within one of the methods the board concludes generally would be found to be permissible.