

7 Ethics Considerations For Lawyers Using Lead Generators

By **Lucian Pera, William Hornsby and Peter Jarvis**

For years now, lawyers have increasingly turned to marketing professionals to help them identify new clients. As a direct result, the business of lead generation for lawyers has emerged.

Of course, marketers have long sold leads to other businesses and professionals; lawyers are just now catching up.

The Old Days Are Gone

In what now seem ancient times, consumer bankruptcy lawyers might buy utility cutoffs — contact information for individuals whose electricity or gas service had been terminated for nonpayment — thinking they were good prospects for direct-mail marketing.

Today's sophisticated marketing pros use straightforward advertisements on television and websites; demographically targeted social media outreach; aggressive retargeting of website visitors; and data-gathering tools such as cookie trackers and web scraping bots to identify prospects, or leads, among consumers who may want help for legal matters such as personal injury claims, student debt relief, debt counseling or bankruptcy.

The leads generated can be very specific — by the precise type of legal help sought, by the consumer's location or by other categories. There's a thriving market for these leads, with numerous national players and other mom-and-pop providers routinely pitching their services to lawyers.

For lawyers looking for new clients, the opportunity can be tempting. Indeed, many lawyers have found successful, and entirely ethical, ways to use lead generation to build or augment their practices.

The Ethics Context for Lawyers

Even though lead generation for lawyers has been around for a while, the ethical and legal requirements for lawyers to safely use these services can be murky, and the formal guidance out there for careful lawyers can be thin.[1]

How does a thoughtful lawyer safely navigate this terrain? That's our topic — identifying what prudent lawyers should do when considering dealing with lead generators.

A Lawyer's Ethical Responsibility



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Before turning to specific issues, it's worth noting the overriding principle for a lawyer considering working with a lead generator: The lawyer may well be held responsible for the conduct of that lead generator, as if the lead generator were a direct employee of the lawyer, working in the office next door under the lawyer's direct supervision. That may somewhat overstate the lawyer's risk, but prudent lawyers may well err in this direction.

A few things are clear. The ethics rules in every jurisdiction generally follow the substance of American Bar Association Model Rule of Professional Conduct 5.3, which governs lawyer supervision of "nonlawyers employed or retained by or associated with" the lawyer.

That includes marketing professionals and lead generators. That rule generally requires that the lawyer take "reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Is the lawyer vicariously liable under the disciplinary rules for conduct by a marketer that does not comply with, for example, each of the lawyer advertising and solicitation rules? Perhaps not, but there is a requirement of at least some supervision.

At the very least, that implies good due diligence on the activities of the lead generator. It almost certainly requires some level of supervision of the lead generator to assure compliance with the lawyer ethics rules.

Can a lawyer avoid some of her supervision obligations if she simply buys leads at arm's length from a lead generator on an occasional basis, without a broader continuing arrangement with the lead generator? Maybe, but there's no good authority out there on this, so prudent lawyers will want to do business only with lead generators they have thoroughly vetted to be comfortable with their professional conduct.

Lawyer Due Diligence

That brings us to the issues lawyers should consider when dealing with lead generators.

1. Is the lead generator "recommending" your services?

In virtually every jurisdiction, the ethics rules broadly prohibit a lawyer from paying anything to anyone "for recommending the lawyer's services."^[2] One exception everywhere is that a lawyer may "pay the reasonable costs of advertisements."

Assuming that the lead generator doesn't recommend the lawyer, the ABA model rules do clearly allow lawyers to pay lead generators, but they require compliance with the ethics rules in doing so.^[3]

What does "recommend" mean? It means "endorses[ing] or vouch[ing] for a lawyer's credentials, abilities, competence, character, or other professional qualities," but just listing a lawyer's practice area or credentials doesn't count.^[4]

Of course, that means a lawyer needs to be aware of, and vigilant about, what a lead generator actually says about the lawyer.

2. Is the lead generator making any false or misleading statements?

Lawyers know that at the very heart of the lawyer ad rules in every jurisdiction is the ban

on any false or misleading statements.[5] Many jurisdictions still read that ban very broadly, from merely including statements that are misleading by omission to a flat-out ban on discussion of a lawyer's prior results.

A prudent lawyer will engage in sufficient due diligence of the lead generator's communications and methods to be comfortable that her big new case can't be derailed by a later misconduct charge.

3. Is the lead generator including the disclaimers and disclosures required by the ad rules in the lawyer's jurisdiction?

Jurisdictions vary wildly on the disclaimers and other disclosures they impose on lawyer advertising. Any prudent lawyer working closely with a lead generator will want to assure herself that the lead generator is complying with these regulations. And remember, too, that should include compliance with those requirements in any jurisdiction from which the lawyer is seeking leads.

4. Do the lead generator's methods of communication comply with any lawyer ad requirement of transparency concerning the lawyer's identity?

Many states have rules that require that a lawyer or law firm be identified in every lawyer ad. Careful lawyers will confirm that a lead generator's communications comply with any such requirements.

5. Does the lead generator comply with any operational requirements of the lawyer ad rules?

A number of jurisdictions require lawyers to keep copies of all ads they run, along with where and when those ads run. A few require filing copies of ads with a designated state office. Any prudent lawyer working closely with a lead generator will want to ensure that the lead generator is either complying with these requirements or providing the lawyer with the data needed to do so.

6. Does the lead generator's fee structure comply with ethics rules, especially including the ban on lawyer fee-sharing?

The dominant fee structure for lead generators for lawyers appears to be a fixed per-lead fee. That may well reflect the fact that almost all other fee structures run a serious risk of running afoul of every jurisdiction's fee-sharing prohibition.

Broadly speaking, a lawyer cannot pay for a lead based on any measure that is directly connected to the gross revenues, fees or profits resulting from that lead.

Can a lawyer pay more for certain leads than others? Yes, because some leads are, in fact, better than others, just as some lawyer billboards and other ads cost more than others, because of their location and reach. But a lawyer must exercise great caution over any fee arrangement that gives the appearance of allowing a lead generator to participate in the results of a lead.

7. Ask the vice-presidential question.

Political legend has it that every potential nominee for a major party vice-presidential nomination is always asked some form of this question: "Is there anything else in your

history and background that might later cause you to be a problem for the ticket?"

Any lawyer considering doing business with a lead generator needs to be vigilant in vetting them. The market is largely unregulated, constantly evolving and filled with players from the fly-by-night to the impressively professional. And there's no one out there to prequalify your new vendor for you.

Evaluate them as a business. Are they part of a larger organization? Is that organization experienced and reputable? How long have they been in business? Who do they do business with? Are they reputable? Do they have references? What do those references say? Have any of their leads or their business model ever led to trouble for other lawyers or nonlawyers?

One concern we have recently heard is whether lead generators repurpose or recycle their lawyer leads to other nonlawyer vendors. For example, a lead generated as a likely prospect for a bankruptcy lawyers might be sold both to a bankruptcy firm and to a credit card company mining secured or advanced-pay credit cards. Would that comply with the ethics rules? Do the lead generators get permission from the leads to do so?

The moral is plain: Lead generators can be an effective tool for lawyers to build their practice. But the price for lawyers is real vigilance. Be careful out there.

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[1] The authors have prepared a comprehensive White Paper on A Lawyer's Ethics Obligations When Participating in a Lead Generation Program, sponsored by Consumer Attorney Marketing Group. The White Paper and a state ethics rules database are available to review and download at <https://camginc.com/state-rules/>.

[2] (ABA Model Rule 7.2(b).).

[3] (Comment [5] to ABA Model Rule 7.2(b).).

[4] (Comment [2] to ABA Model Rule 7.2(b).).

[5] (ABA Model Rule 7.1.).