

Zenas Zelotes, Esq. (*Complainant*)

v.

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

COMPLAINT / MEMORANDUM OF LAW

Rule 8.3. Reporting Professional Misconduct (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The purpose of this writing is to alert the United States Department of Justice (Office of the United States Trustee) and the 47 State Disciplinary Boards (wherein respondents are identified) of such acts that which (cumulatively considered) may well prove the most comprehensive plan of unlawful activities and/or professional misconduct ever perpetrated before the United States Bankruptcy Courts by a consortium of debtors counsel.

A copy of this complaint has been filed with disciplinary authorities in all jurisdictions wherein Kevin W. Chern, Esq. (an active member of the State Bar of Illinois) and all such other attorneys who have acted in concert with Mr. Chern, are known to have engaged in material professional misconduct (a comprehensive list of such attorneys and firms, in excess of 500 attorneys nationwide, appear as and appended exhibit). In instances wherein legal entities are identified as doing business with Mr. Chern and such entities have (or are presumed as having) multiple members, to facilitate the grievance process, Mr. Zelotes has designated the first named partner (or first identified partner) as the tentative nominal respondent. Mr. Zelotes respectfully submits

that all partners having enjoyed the benefits of unjust enrichment (resulting from the misconduct herein recited) are collectively accountable for the acts of their firm.

Mr. Zelotes urges the U.S. Trustee and the respective Disciplinary Boards to take immediate remedial action.

FACTUAL BACKGROUND

The undersigned complainant, Mr. Zenas Zelotes, is an attorney residing in Connecticut (New London County). Mr. Zelotes is a full-time practitioner of bankruptcy and a sustaining member of the National Association of Consumer Bankruptcy Attorneys (NACBA). Mr. Zelotes has an accomplished background in both bankruptcy law and consumer protection litigation and (most recently) achieved distinction as the first attorney in the United States to have filed a successful federal action contesting the Constitutionality of various free speech restrictions enacted as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 (*Zelotes v. Martini*).

On March 25, 2009, Mr. Zelotes received an unsolicited telephone call from Mr. Aaron Roemig. Mr. Roemig identified himself as calling from the Law Office of Attorney Kevin Chern. Mr. Roemig told Mr. Zelotes that Mr. Chern was a Chicago attorney who developed and promoted a high-ranking bankruptcy website (www.ClearBankruptcy.com) and that Mr. Chern's office was seeking a local bankruptcy attorney in New London County to whom prospective bankruptcy clients visiting Mr. Chern's website could be referred.

Mr. Zelotes surmised that Mr. Roemig's unsolicited gesture was motivated by less than charitable considerations (i.e. the prospect of pecuniary gain) and asked Mr. Roemig to cut direct to the chase: what (if anything) was Mr. Chern soliciting of Mr. Zelotes?

Mr. Roemig explained he was soliciting an arrangement wherein Mr. Zelotes would pay Mr. Chern \$65.00 for each and every (prospective) client directed (*i.e.* referred) to Mr. Zelotes through Mr. Chern's website.

Mr. Roemig further explained to Mr. Zelotes that, if this arrangement was accepted, Mr. Zelotes would be given exclusive rights to New London County as relates to attorney inquiries on ClearBankruptcy.com.

Mr. Zelotes next inquired of the other Connecticut counties. Mr. Roemig told Mr. Zelotes that Middlesex County was (likewise) available but that exclusive arrangements were already established in most other Connecticut counties. Mr. Zelotes asked who he might know who was an existing client of the website. Mr. Roemig offered a couple names.

Mr. Zelotes politely thanked Mr. Roemig for his time, informed him that he would take the matter upon due consideration, and concluded the call.

Over the course of days, Mr. Roemig attempted to follow-up with Mr. Zelotes.

Mr. Zelotes (in the meantime) contacted the Office of the United States Trustee, Region 11 (Chicago Division), and relayed the contents of his conversations to Assistant United States Trustee, Constantine (Dean) Harvalis. Mr. Zelotes is (and remains) of a firm conviction that the aforementioned proposed referral fee arrangement is expressly prohibited under both the U.S. Bankruptcy Code and the applicable Rules of Professional Responsibility.

n.b. Mr. Zelotes does not purport to speak or act on behalf of the United States Trustee. As such, Mr. Zelotes encourages the reviewing committee to contact the Office of the United States Trustee (Dean Harvalis) direct.

Mr. Zelotes subsequently (and on his own initiative) contacted Mr. Roemig anew and requested a copy of the proposed referral fee agreement (intending to forward the same to the UST).

Immediately upon Mr. Zelotes having made the request, the very first thing Mr. Roemig did (in response) was to make most clear to Mr. Zelotes that (when reviewing the agreement) "... what we are avoiding saying is that you are paying us a referral fee." (*n.b.* the foregoing is an exact quote transcribed contemporaneously as it was recited).

Mr. Roemig next told Mr. Zelotes that, when reviewing the proposed agreement, Mr. Zelotes would observe that the \$65.00 "marketing fee" or "lead fee" (as Mr. Roemig would refer to the fee in his discussions) was (in fact) broken down into three separate fees (\$15 call center fee; \$25 marketing fee; \$25 CMS licensing fee). Having explained this, and intending to avoid potential confusion, Mr. Roemig then assured Mr. Zelotes (in a candid tone) that "... the outcome is the contact information" (exact quote).

Having (communicated) the aforementioned, Mr. Roemig next proceeded to assure Mr. Zelotes (absent any affirmative solicitation from Mr. Zelotes) that Mr. Chern had hired an "independent ethics attorney" (exact quote) to "cover our asses" (exact quote) and that the aforementioned attorney spent "250 hours" researching "every case in the nation ... so that we would not have to submit our proposal to the bar." (exact quote)

Mr. Zelotes (in turn) asked Mr. Roemig if Mr. Zelotes was correct in understanding from his last statement that their proposed fee arrangement had never been submitted to a bar association for an independent advisory opinion. Mr. Roemig confirmed it had not.

Mr. Zelotes (again) asked why the aforementioned "marketing fee" was not (in fact) an impermissible referral fee. Mr. Roemig told Mr. Zelotes that the (referral) fee was not an impermissible referral fee because the attorney pays the (referral) fee regardless of the whether the (referred) client subsequently retains the attorney.

Mr. Zelotes (again) politely thanked Mr. Roemig for his time, informed him that he would take the matter upon due consideration, concluded the call, and relayed the contents of his conversation to the UST.

Mr. Zelotes thereafter contemplated how next to proceed. Mr. Zelotes was aware that another company (Total Attorneys) was a headline sponsor of the upcoming NACBA convention in Chicago and surmised that if Total Attorneys was promoting a similar online referral fee service as was Mr. Chern, then that organization should likewise be investigated and reported to the UST. Mr. Zelotes was deeply concerned that the prominence of Total Attorneys at the NACBA convention might be misinterpreted as an implicit endorsement of Total Attorneys by NACBA and that this misrepresentation might (in turn) lessen the likelihood that attorneys contemplating such an arrangement would engage in critical legal and ethical analysis. With that in mind: Mr. Zelotes visited the Total Attorneys website (www.TotalBankruptcy.com) and confirmed his suspicions correct. Mr. Zelotes typed his personal contact information into the website's online request form (as a prospective interested attorney) and awaited a response.

Shortly thereafter, Mr. Roemig (again) called Mr. Zelotes. Mr. Roemig then shared an opinion that the reason Mr. Zelotes was then (likely) uncommitted to ClearBankruptcy.com was because Mr. Zelotes was actively engaged in comparison shopping. Mr. Roemig (in turn) explained his opinion on account of his having received Mr. Zelotes' POC information direct from www.TotalAttorneys.com. Mr. Zelotes asked Mr. Roemig if the two sites were both run by Mr. Chern and operated under the same fee arrangement. Mr. Roemig confirmed this understanding as correct. Mr. Roemig further explained that there was no correlation between exclusivity on one site and exclusivity on the other (i.e. that the attorneys on the respective sites were, in essence, competing with one another, and all-the-while forwarding their fees on to Mr. Chern).

Mr. Zelotes proceeded to ask additional probing questions of Mr. Roemig who (in turn) directed Mr. Zelotes to a person identified as an office paralegal, Mr. Bret Libigs.

Mr. Zelotes requested from Mr. Libigs a copy of the opinion letter and/or memorandum of law (presumptively) resulting from the (aforementioned) “250 hours” of ethics research. Mr. Libigs told Mr. Zelotes that he was aware of no such document. Sensitive to Mr. Zelotes’ implicit reservations about the ethical propriety of the proposed arrangement, Mr. Libigs assured Mr. Zelotes that the head of the American Bar Association of Advertising and Ethics (Will Hornsby) “helped put together the agreement.” Mr. Zelotes (suffice to say) was neither impressed with, nor influenced by, the aforementioned name dropping. Mr. Zelotes politely thanked Mr. Libigs for his time, informed him that he would take the matter upon due consideration, concluded the call, and relayed the contents of his conversation to the UST.

Mr. Zelotes (then) began to reflect upon various advertised support services he stumbled upon while visiting the Total Attorneys website. Upon due reflection, Mr. Zelotes became progressively concerned that the aforementioned services might (likewise) involve inherent client deception and/or impermissible fee sharing arrangements between firms. Mr. Zelotes further surmised that (if his instincts were correct) that such an arrangement might entail a comparable degree of code and/or ethical violations (and proceeded to investigate).

Mr. Zelotes (as he would soon discover) was keen to trust his instincts.

Mr. Zelotes called Mr. Roemig and told him that (upon due consideration) he would not enter into a fee arrangement with www.ClearBankruptcy.com. Mr. Zelotes did (nonetheless) voice interest in the other services referenced on www.TotalBankruptcy.com and asked if he could review a proposed contract speaking to the same. Mr. Roemig told Mr. Zelotes that he would need to speak to Mr. Libigs about that service (a process Mr. Roemig referred to as “Legal Processing Optimization” [a/k/a “Legal Process Outsourcing”]) and thereafter transferred the call.

When Mr. Libigs entered the conversation, Mr. Zelotes asked Mr. Libigs to send him a sample LPO contract. Mr. Libigs hesitated. Mr. Libigs insisted that he first walk

Mr. Zelotes though the LPO process and that his presentation would require approximately 20 minutes. Mr. Zelotes invited Mr. Libigs to begin.

Mr. Libigs told Mr. Zelotes that Mr. Chern's office was staffed by a team of paralegals who take "everything off of the attorney's plate except the 341 hearing and the initial consultation." Mr. Libigs told Mr. Zelotes that Mr. Zelotes would supply Mr. Chern with a copy of Mr. Zelotes' letterhead, affix it to Mr. Chern's questionnaire, and that the client would (thereafter upon completion) fax the questionnaire back to a paralegal in Chicago.

Mr. Libigs next told Mr. Zelotes that each attorney would receive a "dedicated toll-free line, unique to the attorney" which would be answered by a member of Chern's staff, who would (in turn) answer as a member of Mr. Zelotes' law office staff. Mr. Libigs added that, on account of the unique assigned toll free number and customized greeting "... they don't even know we are in Chicago." Mr. Zelotes (upon hearing the foregoing) asked Mr. Libigs to re-confirm for him that the client calling the toll free number would do so believing he was contacting Mr. Zelotes' law office. Mr. Libigs (again) confirmed this to be true, adding that, upon receiving the call, the client would then be directed to one of Chern's "liaisons" who would (in turn) hold him or herself out as a member of Mr. Zelotes' staff. Mr. Libigs told Mr. Zelotes that the liaison would contact the client shortly after retention to introduce himself and to the bankruptcy process, attend to all of the client's subsequent needs, inquiries, communications and requests, excepting that if the liaison opined that the client was requesting (or in need of) legal advice, that the liaison would then attempt to contact Mr. Zelotes at his office and, if successful in reaching Mr. Zelotes, that the liaison would transfer the call to Mr. Zelotes as if Mr. Zelotes and the liaison were in the same physical location.

Mr. Libigs next told Mr. Zelotes that once the petition was ready to be filed, the attorney would be notified of the same, and that the petition would be forwarded to the attorney for filing. Mr. Chern's office would (in turn) be added to the creditor mailing matrix, such that Mr. Chern's office would be made aware of the date of case

commencement and the 341 hearing. Mr. Libigs told Mr. Zelotes that Mr. Chern's office would contact the client twice before the schedule 341 hearing "to prep them" for the hearing, remind them of their identification requirements and to "... tell them that these are questions you will be asked ... or will not be asked." Mr. Libigs next stated that the liaison would remain on call throughout the balance of the case to answer any follow up questions the clients might have.

Mr. Libigs continued to praise the program, emphasizing that as a result of the aforementioned delegations, the outsourcing attorney would be freed from the need to hire local assistants from his or her home community. Mr. Libigs next added that (as a result of our bumper to bumper outsourcing and unlimited capacity to accept new clients) "... you can focus instead on client growth without limitation. It's the perfect storm"

Perfect storm indeed ...

Mr. Libigs concluded with the pricing: \$395.00 for Chapter 7; \$495.00 for Chapter 13. To facilitate the same, the local attorney would be required to advance (and replenish) a \$1,700.00 security retainer.

Mr. Zelotes (again) politely thanked Mr. Libigs for his time, informed him that he would take the matter upon due consideration, concluded the call, and relayed the contents of his conversation (and a copy of the proposed agreement) to the UST.

ANALYSIS

FIRST ISSUE: IMPERMISSIBLE REFERRAL FEES

Our analysis begins with basic principles.

11 U.S.C. 504 expressly provides that attorneys representing debtors in bankruptcy are prohibited from sharing (or agreeing to share) compensation, except as concerning fees shared between a member, partner, or regular associate of a firm. Section 504 (likewise) permits referral fees only when paid to a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

See: 11 U.S.C. 504: Sharing of compensation

- (a) Except as provided in subsection (b) of this section, a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share--
 - (1) any such compensation or reimbursement with another person; or
 - (2) any compensation or reimbursement received by another person under such sections.
- (b)
 - (1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.
 - (2) An attorney for a creditor that files a petition under section 303 of this title may share compensation and reimbursement received under section 503(b)(4) of this title with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.
- (c) This section shall not apply with respect to sharing, or agreeing to share, compensation with a bona fide public service attorney

referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

Comparable fee sharing prohibitions are found in most (if not all) state Codes of Professional Conduct. In the Complainant's home state of Connecticut (for example), Rule 7.2(c) provides:

(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 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 lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

A referral service (in turn) is generally understood to mean "any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers . . ." Formal Opinion 2106, Washington State Board of Governors (*Infra*)

Mr. Chern claims he is not a for-profit referral service. This position is untenable. Mr. Chern's assertion defies not only that which is open and obvious to any rational thinking creature, but also stands entirely inconsistent with near every formal opinion (if not all formal opinions) solicited of state Boards of Governors (each of which, Mr. Chern is assuredly aware, if not himself the undisclosed subject of one or more such proposed opinions). Pertinent excerpts from such representative opinions appear below:

See: Formal Opinion 2007-180, Oregon Board of Governors (Excerpts Below)

Facts: Lawyer wants to participate in a nationwide Internet-based lawyer referral service and has received solicitations from companies offering this service. Customers who use the referral service are not charged. Some providers will charge Lawyer through various mechanisms. The referral service will not be involved in the lawyer-client relationship. A referred consumer is under no obligation to work with a lawyer to whom the consumer is referred. The referral service will inform consumers that participating lawyers are active members in good standing with the Oregon State Bar who carry malpractice insurance. Consumers may also be informed that participating lawyers may have paid a fee to be listed in

the directory. Furthermore, consumers will be informed that lawyers have written their own directory information and that a consumer should question, investigate, and evaluate the lawyer's qualifications before he or she hires a lawyer.

...

The questions presented here raise issues relating to both advertising and recommending a lawyer's services. Advertising and recommendation are distinguished as follows: "When services are advertised, the nonlawyer does not physically assist in linking up lawyer and client once the advertising material has been disseminated. When a lawyer's services are recommended, the nonlawyer intermediary is relied upon to forge the actual attorney and client link." *Former OSB Formal Ethics Op No 1991-112* (discussing *former DR 2-101* and *former DR 2-103*). ...

Oregon RPC 7.1(d) permits a lawyer to pay others to disseminate information about the lawyer's services, subject to the limitations of RPC 7.2. That latter rule, in turn, allows a lawyer to pay the cost of advertisements and to hire others to assist with or advise about marketing the lawyer's services. RPC 7.2(a). RPC 7.2(a) provides: (a) A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.

At the same time, Oregon RPC 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer (except in limited circumstances that are not relevant to the questions presented here). RPC 5.4(a) provides: A lawyer or law firm shall not share legal fees with a nonlawyer, except that: ... (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. This rule "prohibits a lawyer from giving a non-lawyer a share of a legal fee in exchange for services related to the obtaining or performance of legal work." *In re Griffith*, 304 Or 575, 611, 748 P2d 86 (1987) (interpreting *former DR 3-102*, which is now RPC 5.4(a)). In the context of advertising, Oregon RPC 5.4 thus precludes a lawyer from paying someone, or a related third party, who advertises or otherwise disseminates information about the lawyer's services **based on the number of referrals, retained clients, or revenue generated** from the advertisements. By contrast, paying a fixed annual or other set periodic fee not related to any particular work derived from a directory listing violates neither RPC 5.4(a) nor RPC 7.2(a). A charge to Lawyer based on the number of hits or clicks on Lawyer's advertising, and that is **not** based on actual referrals or retained clients, would also be permissible.

...

Substantive law may also limit Lawyer’s ability to pay a referral fee. 5 Here, the referral fee would be paid to a private third party rather than a “public service referral program,” and it thus appears that the U.S. Bankruptcy Code’s general prohibition against fee-sharing applies. (boldface: added)

See: Ethics Opinion KBA E-429, Kentucky Bar Association, (June 17, 2008)
(Excerpts Below)

The KBA Ethics Committee has been asked to opine on the ethical propriety of various group marketing arrangements, specifically those that provide prospective clients with information about participating lawyers through the internet or an 800 telephone number.

...

It would be virtually impossible to address the specific details of each and every conceivable group marketing model. It is, however, possible to describe some of the more common features of these models and address the most frequent challenges and pitfalls a lawyer may face. Most of the group marketing models have several common characteristics. They are all sponsored by for-profit entities and the lawyer pays a fee to participate. In addition, the initial advertisement, whether it is in the newspaper, on television or on the internet, is generic in nature; it usually does not promote an individual lawyer. Only after the prospective client makes an initial contact with the group marketer, either through an 800 number or over the internet, does the prospective client receive more individualized information about one or more specific lawyers. Some group advertisements are targeted at anyone who might need a lawyer, while others target those with specific needs, such as those who have been charged with a crime or have been injured in an accident. As the following discussion indicates, the marketer’s level of involvement in analyzing the problem and identifying a specific lawyer may vary substantially. At one end of the spectrum, there are marketing arrangements designed so that the prospective client inputs certain demographic information, such as a zip code or type of practice needed, and a list of participating lawyers is provided. The list may include an internet link to each lawyer’s webpage or provide a way to contact the participating lawyers. It is up to the client to evaluate the information about the lawyers and decide which, if any, to contact. At the other end of the spectrum is the arrangement where the prospective client provides considerable detail about his or her needs; the marketing organization then evaluates the client’s needs and selects one or more lawyers from its participating members. The organization may represent that it is evaluating the needs of the client and the qualifications of the lawyer, thereby providing the prospective client with the best “match.”

...

Much of the debate over group marketing has focused on whether the marketing arrangement is just another type of advertising or is really a for-profit referral service. Whether a particular arrangement falls in one category or the other will depend upon a careful analysis of the facts. ... For example, some group marketing arrangements require the prospective client to provide extensive information about the client's needs. In some cases, third parties arrangement goes beyond the mere pooling of financial resources of group advertisers. The participating lawyer is paying a fee for a specific referral, something that is prohibited by Rule 7.20(2). Once the advertising organization becomes actively involved in screening cases and matching prospective clients to specific lawyers, the arrangement functions as a lawyer referral service, which the rules prohibit, except when it is a nonprofit organization. The Committee agrees with the substantial number of jurisdictions that have addressed this issue and concluded that such arrangements are unethical. NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); Wa. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001).

Finally, the Committee understands that some group marketing arrangements limit the number of lawyers who may participate in a particular field or geographic area so as to assure that the participating lawyers will not be competing with other lawyers for the clients who contact the service. Without an appropriate disclaimer, such an arrangement may mislead the client into believing that there is an evaluative process being conducted when in fact there is not. This would violate the prohibition on false, deceptive or misleading advertisements. Further, it is the Committee's view that, by limiting the number of participants in this way, the service is in effect directing prospective clients to a particular lawyer, thus violating Rule 7.20(2) in the same way that the matching process described above violates the rule.

...

The Rules of Professional Conduct prohibit a lawyer from paying a non-lawyer for recommending his or her services, but the rule authorizes a lawyer to "pay the reasonable costs of advertising or communications permitted by [the] rule." Rule 7.20(2). Most group advertising arrangements require the participating lawyer to pay some kind of enrollment fee, and/or a monthly or yearly fee. The arrangement is not substantially different than the arrangement with the print advertiser who charges a set-up fee of some kind, and then charges another fee for the specific time that the advertisement runs. As long as the advertising costs are reasonable, there is nothing unethical about this type of compensation arrangement. The compensation issue becomes more complicated if the advertising fee paid by the lawyer is based in whole or in part on the presumed or real economic benefit to the lawyer. ... For example, if the group advertising organization becomes active in directing potential clients to a specific lawyer and then charges the lawyer a fee for a specific

referral, then the arrangement violates Rule 7.20, which prohibits the lawyer from paying for referrals. As the Comments to the Rule observe, “[a] lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work.” Once the group marketing organization becomes actively involved in matching or referring clients, it ceases to be advertising and a lawyer may not give anything of value for that service. See, New York State Bar Association Committee on Professional Ethics, Opinion Number 799 (2006); South Carolina; SCR 3.130 - Rule 5.4; 7.01 - 7.06; 7.09-7.50; 8.3; KBA E-427; KBA E-428; NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); WA. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001). Also problematic is the compensation system that is tied to the fee that is earned in a referred case. In addition to the fact that it is payment for the referral, which is prohibited under the Rules, it also is fee splitting with a non-lawyer, which is likewise prohibited under Rule 1.5(e).

See: Formal Opinion 2016, Washington State Bar Association (Excerpts Below)

I. NATURE OF INQUIRY: The inquiring attorney asked whether there were ethical implications involved in participating in a legal marketing plan operated by an Internet company (the “Company”). The inquiring attorney explained that he would be one of no more than six attorneys practicing in his field who would potentially bid for work from potential clients who have contacted the Company.

... 1. The Company Apparently Constitutes an Impermissible For-Profit Referral Service in Violation of RPC 7.2(c). RPC 7.2(c) provides as follows: A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the charges of a not-for-profit lawyer referral service or other legal service organization. The website states that the Company is an “attorney/client matching service and is not a referral service.” There are apparently no Washington State Bar opinions defining a referral service. In a 1999 opinion prohibiting lawyers from participating in Internet referral plans, the Arizona State Bar defined “referral service” as follows: The Committee has previously found **the defining characteristic of a lawyer referral service to be ‘[t]he process of ascertaining the caller’s legal needs and then matching them to a member having the appropriate area of expertise.’** Arizona Bar Op. 99-06. Later, the Arizona Bar, in Opinion No. 05-08 (July 2005), reviewing the same or a similar service at issue in this response, concluded that it was a for-profit referral service, and therefore violated Arizona’s ER 7.2. That opinion relied on **Comment 6 to Arizona ER 7.2**, which **defines referral service**

as “any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers” The Company says that it is not a referral service: [The Company] does not allocate or transfer requests to a particular lawyer or lawyers or recommend any lawyer’s services. Member attorneys review the posts and decide whether they wish to advertise their services to any of the posters. Oct. 5, 2005, email from the Company. **Despite the Company’s characterizations, it ascertains consumers’ legal needs and forwards case descriptions to lawyers who practice in that particular specialty, a subset of who are “Verified” as capable of providing superior services. Furthermore, the pool of lawyers who may choose to “advertise” in response to the case descriptions forwarded to them may be quite small. The attorney making the Bar inquiry apparently was told he would be one of six trademark lawyers in the “Western U.S.” to whom trademark cases were circulated. Thus, while consumers are not referred to a particular lawyer, their cases are sent for review by only a small group of lawyers.** Other state bars have examined this issue with regard to the same or similar Internet services. The South Carolina Bar opined that the service was not a referral service. Among other things, it noted that “the service provider plays no role in the decision-making process of the recipient of the information provided” (i.e., the potential client). **It noted, however, that “a different answer would be reached if the Internet site provider was in anyway active in directing the user to a particular attorney.”** It concluded that “so long as the Internet site provider does not make specific recommendations to a particular attorney and there are no subjective judgments made by a third party in directing the user to one attorney over another . . . it would not be a referral service.” **The Ohio Supreme Court, Op. 2001-02, indicated that one of the identifying characteristics of a referral service is if the company provides “services that go beyond the ministerial function of placing the attorney’s or law firm’s information into the public view.”** Rhode Island concluded that the Company was not a referral service. Rhode Island concluded that the fee was a flat fee which purchased advertising and access to requests for legal services attorney’s legal fees. Moreover, Rhode Island concluded that the Company does not recommend, refer or electronically direct consumers to a specific attorney. Attorney-client relationships are established off line and without the Company’s participation. Under the above authorities, it appears that the Company’s system is a referral service. (boldface: added)

See: Formal Opinion 561, Professional Ethics Committee for the State Bar of Texas (August 2005) (Excerpts Below)

A lawyer is considering participating in, registering with and/or subscribing to a privately owned for-profit internet service (the "Internet

Service") that encourages lawyers and law firms to list their names and areas of practice so that the Internet Service can assist consumers who desire legal assistance to connect with lawyers who might be available to represent such individuals. The Internet Service charges participating lawyers a fixed monthly or annual fee to subscribe and be listed on the Internet Service. The Internet Service does not receive any share of legal fees that may be generated by a lawyer who is retained as a result of being listed with the Internet Service. A consumer who desires to utilize the service typically fills out a form on the web page for the Internet Service. The form asks for basic information such as name, address, telephone number, date of incident, and a description of the problem for which the person is seeking legal assistance. The Internet Service then emails the consumer's information to one or more lawyers who have registered with or subscribed to the service so that the lawyer or lawyers can contact the consumer. The Internet Service is not involved in any way in a participating lawyer's providing legal services to a consumer

...

Under section 952.002 of the Texas Lawyer Referral Act, a lawyer referral service is defined to be ". . . a **person or the service provided by the person that refers potential clients to lawyers regardless of whether the person uses the term "referral service" to describe the service provided.**" A person may not operate a lawyer referral service in Texas unless such person obtains a certificate from the State Bar of Texas. Section 952.101 of the Texas Lawyer Referral Act. To obtain a certificate, the lawyer referral service must, among other requirements, be operated either by a governmental entity or a non-profit entity. Section 952.102 of the Texas Lawyer Referral Act. The Internet Service is not a lawyer referral service meeting the requirements of the Texas Lawyer Referral Act because it is a privately owned, for-profit organization that is not eligible to obtain the required certificate. Rule 7.03(b) prohibits the payment of a fee by a lawyer to a non-lawyer for soliciting or referring prospective clients to the lawyer but allows payments for advertising and public relations services rendered in accordance with the Rule. In this case, the Internet Service provides lawyers and law firms with an opportunity, in return for payment of a fee, to list their names and areas of practice with the Internet Service so that consumers with legal problems can be connected with lawyers who might be available to represent such individuals. The Internet Service collects information on the internet from a consumer and that person's information and legal issues are then conveyed by the Internet Service to one or more of the lawyers who have registered with or subscribed to the Internet Service by paying a fee. The services provided by the Internet Service are not advertising or public relations services as allowed by Rule 7.03(b). The Internet Service is instead a service to solicit or refer prospective clients to subscribing lawyers who have paid a fee, and it is thus an arrangement prohibited by Rule 7.03(b).

A defining characteristic of soliciting or referring prospective clients is to ascertain information about a person's legal needs and then match or connect such person with a lawyer who has experience in the area of law appropriate to the legal problem. In general, if an internet site merely provides information about participating lawyers from which a consumer chooses a lawyer or group of lawyers based on the consumer's consideration or evaluation of that information, the site does not solicit or refer prospective clients but rather advertises for the lawyers listed. On the other hand, if an internet site is using information about participating lawyers for the purpose of identifying or selecting a lawyer or group of lawyers whose names are then suggested, offered or recommended to a consumer for consideration, the site is not advertising or providing public relations services but is rather soliciting or referring prospective clients. (boldface: added)

n.b. For purposes of this Complaint, the Complainant identifies Mr. Chern as synonymous with (i.e. d/b/a) TotalAttorneys Inc. and TotalAttorneys LOP, LLC. Mr. Zelotes is careful to note (however) that the proposed referral and LPO agreements expressly provide that the provide referral and LPO arrangements are not as between two attorneys but (rather) as between a non-attorney and an attorney. Although this distinction is not of material significance in relation to the fee sharing injunction of Bankruptcy Code 504, this distinction (from time to time) is afforded significance is select instance under the Rules of Professional Conduct.

See: Proposed Contract (LPO), Para. 6(v) (“(ii) Neither TotalAttorneys, nor any third party service provider with which TotalAttorneys works in providing the Services, is a licensed attorney anywhere in the United States, and as such, neither TotalAttorneys nor any such service provider is authorized or qualified to provide legal advice or otherwise practice law anywhere in the United States.

See: Proposed Contract (LPO), Para. 6(v) (...Licensee hereby agrees and acknowledges that ClearBankruptcy is in no way acting as

legal counsel or co-legal counsel with respect to any Contact or any of Licensee's clients.

As noted above, Mr. Chern and the respondents herein named are neither members, partners nor regular associates of a firm. Mr. Chern does not operate a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals. Section 504 and/or comparable state provisions (thus) prohibit any form of referral fees and/or shared compensation.

As the Oregon Board of Governors correctly observed, referral fees in the context of bankruptcy (be such fees shared between attorneys or between an attorney and non-attorneys) are impermissible, even if the proposed fee sharing arrangement would otherwise be permissible under an applicable Code of Professional Conduct. There can be no question that Mr. Chern's referral fee arrangement violates the aforementioned substantive prohibitions recited in Bankruptcy Code Section 504. As noted by the USDC (*infra*) "the potential for harm makes such arrangements reprehensible as a matter of public policy as well as a violation of the attorney's ethical obligations."

As the Oregon Board of Governors (likewise) correctly observed, the Rules do not enjoin a referral fee paid only in instances wherein the referred client is subsequently retained, but also in instances wherein the prospective client referred ultimately declines the representation (i.e. compensation based on the cumulative number of referrals made).

The mere fact that Mr. Chern's referral fee (thus) is entirely unrelated to the issue of whether the prospective client referred subsequently retains a particular attorney is of no legal or ethical significance. It is prohibited. Mr. Chern does not charge a fixed annual or other set periodic fee not related to any particular work derived from a directory (a practice which the Board of Governors opined permissible). Mr. Chern does not limit his services to the "ministerial function of placing the attorney's or law firm's information into the public view." The referral fee paid to Mr. Chern is a fee for a

specific referral, which in turn is based (in whole or in part) upon the real or presumed economic benefit to the lawyer.

Mr. Chern contends that its referral fees are not (in fact) “referral fees” but are (instead) a “marketing expense.” Such disingenuous weasel-speak attempts a distinction of no material consequence. As the Washington Board of Governors correctly observed, a website disclaimer that says the site is an “attorney/client matching service and is not a referral service” does not make it so. This approach is consistent with the aforementioned language cited in the Texas Lawyer Referral Act, defining a lawyer referral service to be “. . . a person or the service provided by the person that refers potential clients to lawyers regardless of whether the person uses the term “referral service” to describe the service provided.” Mr. Chern’s attempt to disavow the “referral service” label does not (in any way) change the nature of his acts. Mr. Chern solicits and “receives requests” for lawyer services (free bankruptcy consultation) and then “allocates such requests to a particular lawyer” (based on the prospective client’s zip code). As earlier observed by the Arizona State Bar, Comment 6 to Arizona ER 7.2 defines a referral service as (“any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers . . .”). Mr. Chern’s service is clearly a referral service.

It is also worth noting that all referral fees are by definition “marketing fees.” The former is a subset of the latter. Calling a referral fee a marketing fee (with a wink and a handshake) or disguising the referral fee as (three) component parts of something else does not make an otherwise (impermissible) referral fee arrangement permissible.

n.b.: “Referral fees are payments made by providers to other parties as **quid pro quo for referring customers. They are essentially a marketing expense.** Referral fees raise the cost to debtors because providers must charge more to cover the cost . . . **As referral fees in consumer transactions have often been the source of abuse, we oppose any rule that permits such fees.**” See: Joint Commentary of Carey D. Ebert, President, National Association of Consumer Bankruptcy Attorneys, and John Rao, Attorney, National Consumer Law Center in re: United States Trustee’s

Notice of Proposed Rulemaking on Application Procedures for Approval of Providers of a Personal Financial Management Instructional Course. (boldface: added)

Additional violations are noted:

The Ohio Ethics Commission indicated that one of the identifying characteristics of a referral service is if the company provides “services that go beyond the ministerial function of placing the attorney’s or law firm’s information into the public view.” As observed, Mr. Chern does more than place an attorney’s information into public view. In fact: Mr. Chern solicitations and home pages fail to meet even this (basic) indicia of an advertisement, as the attorney’s information (to whom the client is referred) is never placed in public view at all.

This last observation presents a particularly troubling (Catch-22) dilemma for Mr. Chern for even if his services are (*arguendo*) an “advertisement” (a disingenuous contention the complainant rejects) the absent identification of each such attorney “advertising” his or her services would itself compel a finding of professional misconduct.

To illustrate: in the Complainant’s home state of Connecticut, Rule 7.2(d) provides (in pertinent part): “Any advertisement or communication made pursuant to this Rule shall include the name of at least one lawyer admitted in Connecticut responsible for its content.” If Mr. Chern’s home page is an “advertisement” of one or more such Connecticut attorneys, then the Rule 7.2 violation is *prima facie*. Were this (in fact) an “advertisement,” one might likewise anticipate (and investigate) whether a concurrent violation of Rule 7.2(b)(2) is also to be found: “A lawyer shall comply with the mandatory filing requirement of Practice Book Section 2-28A.” Mr. Zelotes might expect as much.

n.b. Mr. Zelotes notes that the list of “sponsoring attorneys” on both ClearBankruptcy and TotalBankruptcy is buried deep within the website

boilerplate, and then (again) only accessible through the channeling of two obscure hyperlinks. It was (even for the undersigned attorney complainant) very difficult to locate. On [www.Chapter 7.com](http://www.Chapter7.com) (an identical Chern website) the requisite hyperlink does not function (and as such, Mr. Zelotes was unable to identify such additional attorneys who have engaged in professional misconduct and are otherwise properly joined as respondents). Mr. Zelotes encourages the United States Trustee and the Offices of Chief Disciplinary Counsel to compel the identification of all such persons doing business with Mr. Chern on [www.Chapter 7.com](http://www.Chapter7.com) and all such additional Chern websites as may be identified in the forthcoming investigations.

Were Chern's service an "advertisement" (again: *arguendo*), the Kentucky & New Jersey Ethics Commissions would likewise find serious ethical fault with Mr. Chern's (absent and/or inconspicuous) disclaimers regarding the site and the information gathering process (*infra*). Nowhere conspicuous on these websites does there appear an appropriate disclaimer calculated to prevent a prospective client from being misled into believing that an evaluative process was being conducted (when in fact there is not) or that the websites (e.g. [Chapter 7.com](http://Chapter7.com)) were something more than a simple paid advertisement.

See: Opinion 36, New Jersey Committee on Attorney Advertising, 182 N.J.L.J. 1206 (December 26, 2005)

When advertising is done through a vehicle which is not explicitly referenced as an advertisement, and is not readily known to consumers as a place of pure advertising (as, for example, the Yellow Pages would be), there is a possibility that the presentation and language could lead a reasonably informed consumer to believe that the listing has some sort of professional or authoritative imprimatur, as a kind of endorsement, such as an authorized lawyer referral service might give (*e.g.*, **a web page presented as "anti-trust lawyers.com," as a hypothetical**). Such a presentation **could, intentionally or inadvertently, thus mislead consumers into believing it was other or more than simply a paid advertisement, and carried greater weight**. Such a consequence would appear more likely when only a very limited number of lawyers are listed

for a particular geographical, subject matter or other defined area. To forestall such a possibility, **we conclude that a lawyer who seeks to give anything of value in order to participate in such a listing must, before doing so, ensure that the listing or advertisement contains a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that “all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.”** (boldface: added)

e.g. Questions asked of prospective clients on Mr. Chern’s websites which, cumulatively considered, may mislead persons to believe that an evaluative process is being conducted (when in fact it is not) include:

Zip Code:

Why are you considering bankruptcy? (select all that apply)

- Garnishment
- Creditor Harassment
- Repossession
- Foreclosure
- Lawsuits Illness/Disability
- License Suspension
- Divorce
- Loss of Income
- Other:

Estimate Total Debt:

What bills do you have? (select all that apply)

- Credit Cards / Store Cards
- Personal Loans
- Child Support
- Student Loans
- Auto Loans Income Taxes
- Payday Loans

Medical Bills
 Other:

Estimate Total Monthly Expenses:

Do you own real-estate?

If Yes, are you behind in these payments?

Do you own an vehicle (car, truck, van, motorcycle)?

If Yes, are you behind in these payments?

Do you own any other assets worth more than \$1,000?

Big Screen Television; Boat; 40

If Yes, please describe:

What types of income do you have? (select all that apply)

Employed, Full-time
 Employed, Part-time
 Social Security
 Pension/Retirement Child Support/Maintenance
 Other:
 No Income

Estimate Total Monthly Income: \$

First Name:

Last Name:

Home Phone #:

Work Phone #:

Cell Phone #:

E-mail:

Address:

n.b. The Total Bankruptcy website claims that “More than half a million people have trusted Total Bankruptcy when they were looking for bankruptcy information.” Putting aside the obvious ethical implications of

the foregoing misuse of “trusted,” the reverse implication (for present purposes) suggests (on that one website alone) more than a half million people may have been deceived. On information and belief, Mr. Chern manages more than a dozen such sites. That adds up to be a hell of a lot of misplaced trust (and professional misconduct) ...

Additionally: despite a (weak) disclaimer present on the respective website footers (attempting disclaiming itself as an attorney referral service), Mr. Zelotes notes that the aforementioned disclaimers are so purposefully hidden from view (in a miniscule semi-transparent font) that the New Jersey Committee would opine its published presentment as an independent form of misconduct. (*supra*)

See: Exhibit (Clear Bankruptcy Home Page)

e.g.: Unaltered “cut & paste” lifted from Clear Bankruptcy website appears directly below in original (transparent) 7.5 size font (worth also noting: the grey transparent font below appears on a grey background, making its comprehension even more difficult than appears here)

This Web site is an advertisement for the sponsoring bankruptcy lawyers. It is not a bankruptcy lawyer referral service or prepaid legal services plan and the owner neither endorses nor recommends any sponsoring bankruptcy attorney.

The foregoing is (admittedly) an exercise in academia as we are not an addressing an advertisement (or a reputable listing service; e.g. Martindale Hubble) but are (instead) dealing with a for-profit referral service. Mr. Chern gathers information about a prospective client and (upon forwarding said information [or live communication] to the referred attorney) assists the prospective client forge the actual attorney client link. In exchange for helping to forge such links, the referring attorney agrees to compensate Mr. Chern. The Oregon Board of Governors declares such a practice impermissible.

See: Formal Opinion 00-07, Iowa Supreme Court Board of Professional Ethics and Conduct (12/05/2000)

The Company in question seeks to operate as a Reputable Law List or Directory. The use of law lists and directories is authorized by DR 2-101(C) ... “A reputable legal directory is a publication

which contains a list of lawyers or law firms in designated geographical areas, contains only the information permitted under DR 2-101, presents such information for each lawyer in the same size and style of type and in a dignified manner and the sole purpose of which is to assist lay-persons and lawyers in selecting a lawyer in the geographical area which it covers. A directory which charges a fee for a listing is not reputable unless it makes a listing available to every practicing lawyer in the geographical area on the same terms and conditions as every other lawyer in the area.

Other ethical improprieties:

The Kentucky Ethics Commission would also find serious ethical fault with Mr. Chern's exclusivity arrangements. As earlier noted, the Kentucky Commission believes that by limiting the number of participants (or, in this instance, directing the client to an exclusive geographical attorney), Mr. Chern is in effect "matching" prospective clients to a particular lawyer and (in so doing) his services could not be understood as "advertising." The impermissible aim of such an arrangement is to compensate Mr. Chern for "channeling professional work" and (for this) a lawyer may not give him anything of value.

The United States Bankruptcy Court, District of Delaware, recently articulated why referral fees and fee sharing arrangements present a matter of heightened concern in the context of Bankruptcy Code proceedings:

The Bankruptcy Code prohibits the sharing of compensation under nearly all circumstances. Section 504 provides that "a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share (1) any such compensation or reimbursement with another person; or (2) any compensation or reimbursement received by another person under such sections." 11 U.S.C. §504. Bankruptcy Code §504 "provides only two exceptions: partners or associates in the same professional association, partnership, or corporation may share compensation, inter se; and attorneys for petitioning creditors that join in a petition commencing an involuntary case may share compensation." H.R. Rep. No. 95-595 at 356 (1977); S. Rep. No. 95-989 at 67 (1978); 11 U.S.C. §504(b). **"Accordingly, fee sharing among attorneys is generally prohibited under the Bankruptcy Code unless the relationship between the attorneys falls within one of the narrow exceptions."** In re Greer,

271 B.R. 426, 430 (Bankr. D. Mass. 2002) (holding that a fee-sharing agreement in which one attorney paid another \$50 for each creditors' meeting the other attorney attended on her behalf violated §504).

Although many states, including Delaware, allow the sharing of fees under certain circumstances, the Bankruptcy Code is more restrictive. My colleague, Chief Judge Walrath, discussed the prohibition in *In re Worldwide Direct, Inc.*, 316 B.R. 637 (Bankr. D.Del. 2004):

Whenever fees or other compensation are shared among two or more professionals, there is incentive to adjust upward the compensation sought in order to offset any diminution to one's own share. Consequently, sharing of compensation can inflate the cost of a bankruptcy case to the debtor and therefore to the creditors.... **The potential for harm makes such arrangements reprehensible as a matter of public policy as well as a violation of the attorney's ethical obligations.** *Worldwide*, 316 B.R. at 649, quoting *In re Peterson*, 2004 WL 1895201 at *4 (Bankr. D. Idaho 2004).

The purpose of §504 also has been described as **the preservation of “the integrity of the bankruptcy process so that the professionals engaged in bankruptcy cases attend to their duty as officers of the bankruptcy court, rather than treat their interest in bankruptcy cases as ‘matters of traffic [i.e., matters of trade or commerce].’”** See 4-504 *Collier on Bankruptcy*, P. 504.02[1] at 504-5 (Alan N. Resnick & Henry J. Sommer, eds. 15th Edition Revised 2007) citing *Matter of Arlan's Department Stores, Inc.*, 615 F.2d 925, 943-44 (2d Cir. 1979).

Moreover, fee sharing is prohibited in bankruptcy proceedings because fee sharing **“subjects the professional to outside influences over which the court has no control, which tends to transfer from the court some degree of power over expenditure and allowances.”** 4-504 *Collier on Bankruptcy* P. 504.01 citing *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 470 (2d Cir. 1981), cert. denied, 455 U.S. 941 (1982).

See: *In re Winstar Communications*, Case No. 01-1430 through INC., et al.,: Case No. 01-1462 (KJC): (Jointly Administered) Debtors. (Carey, J.) (boldface: added)

Mr. Chern's contentions that referral fees somehow lose their characterization as referral fees if (1) the referral fees are paid in advance of the resulting consultation (in lieu of an *ex-post-facto* kickback); or if (2) one or more of the referred persons do not ultimately sign and retain the referred attorney; entail scant more than a bizarre and

nonsensical rationalization entirely inconsistent with the spirit, intent and letter of Section 504.

In soliciting, inducing and accepting impermissible referral fees, Mr. Chern violated both the strict prohibitions of the U.S. Bankruptcy Code and the Rules of Professional Conduct (of each applicable state reviewing this complaint). In his soliciting, inducing and accepting impermissible referral fees, Mr. Chern engaged in conduct prejudicial to the administration of justice, and conduct casting serious doubt upon his ethical fitness to practice.

The abetting attorneys (also subject to this complaint) who knowingly agreed to furnish Mr. Chern with impermissible referral fees for their respective and mutual pecuniary gain (likewise) violated both the strict prohibitions of the U.S. Bankruptcy Code and the corresponding Rules of Professional Conduct (of each applicable state reviewing this complaint). In both conveying and in conspiring to furnish Mr. Chern with said impermissible referral fees, these attorneys (likewise) engaged in conduct prejudicial to the administration of justice, and conduct casting serious doubt upon their ethical fitness to practice.

Mr. Zelotes is not unmindful that Mr. Chern actively endeavored to deceive and mislead prospective attorney clients as relates to the ethical propriety of his referral services, and that his efforts to mislead those with whom he does and did business might itself form an independent basis for ethical sanction. Mr. Chern's misrepresentations (however) entail neither an excuse nor a justification. Attorneys are not entitled to rely upon the assurances of others when assessing the ethical propriety of their conduct and must (instead) exercise their own professional judgment before engaging in transactions prohibited under law or an applicable Code of Professional Conduct. If an attorney is uncertain about a proposed course of conduct, a reasonably prudent attorney seeks the advice and counsel of his or her respective Board of Governors. The respondents did not do this. The Respondents (instead) proceeded knowingly and/or recklessly in clear contraposition to both the express injunction of Section 504 and the respective Rules of

Professional Conduct, and such attorneys did so act motivated by the pursuit and prospect of personal pecuniary gain.

See: Ethics Opinion KBA E-429, Kentucky Bar Association, (June 17, 2008)

Rule 8.3 provides that “[i]t is professional misconduct for a lawyer to violate ... the Rules of Professional Conduct ... through the acts of another.” Thus, lawyers who participate in group marketing arrangements are responsible for the content of the advertisements and methods employed in promoting their services. Lawyers who rely on marketing organizations to promote their professional services **must thoroughly investigate the practices of the organization to assure that they comply with all of the applicable Rules of Professional Conduct.** (boldface: added)

The Complainant believes that the aforementioned form of serial misconduct must be both sanctioned and deterred. The Complainant believes that Mr. Chern and the respondents referenced herein should be presented to the state and federal courts for consideration of appropriate discipline, and the unjust enrichment resulting from such pattern misconduct be ordered disgorged and returned to the debtor clients and/or estate.

SECOND ISSUE: IMPERMISSIBLE FEE SHARING AND DECEPTION

Mr. Zelotes is (likewise) ethically troubled by Mr. Chern’s (attorney unique) toll free telephone number and the inherent deception implicit in his affirmatively misrepresenting or otherwise misleading the debtor clients as relates to the identities of persons handling his or her representation.

Ubiquitous rules that may be implicated (by analogy to Connecticut) include (but are not necessarily limited to):

Rule 1.4. Communication

- (a) A lawyer shall: ... (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

Rule 8.4. Misconduct

- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;

Mr. Zelotes suspects any reasonable person would be deeply troubled were he or she a client who had retained Attorney X and (unbeknownst to him or her) the client had been fundamentally misled as to the identity, whereabouts, backgrounds and affiliations of persons to whom his or her confidential communications were being directed and to whom personal (sensitive) case documents were being provided. In this context, the client is led to believe that (in dialing the Attorney X's unique toll free number and speaking to his or her assigned "liaison") that the client is communicating with a member of Attorney X's local law office when (unbeknownst to the client) he or she is (in fact) directing his or her communications and documents to persons whose whereabouts, credentials, affiliations and identities he or she is entirely unaware.

There is something very troubling about this type of covert deception.

Mr. Zelotes contends that the foregoing misrepresentation and/or material omission of disclosure constitutes professional misconduct.

It gets even worse (much worse) ...

Not only might the respondent attorneys (themselves) be unaware of the whereabouts, credentials, affiliations and identities of such persons involved in his or her client's case, but a careful examination of Mr. Chern's contracts reveals that both Mr. Chern and the abetting (LPO) attorneys have expressly agreed that some such legal services (along with the client's confidential case information and sensitive case documents) are (unbeknownst to the debtor clients, the United States Trustee or the United States Bankruptcy Court) being outsourced to unknown persons domiciled **outside the United States.**

See: Proposed Contract (LPO), Para. 6(ix) ("Attorney acknowledges that certain portions of the Services will be outsourced to third party service providers including, without limitation, attorneys located outside of the United States which are not licensed to practice law within the United States.")

Also: Proposed Contract (LPO), Para. 6(ix) (“(vi) Foreign-licensed lawyers are, without additional licensing, precluded from practicing law in the United States, and as such, any documentation or other materials prepared by any foreign-licensed attorney engaged by TotalAttorneys in providing the Services shall not, under any set of circumstances, be deemed to constitute legal advice.”)

Also: Proposed Contract (Clear Bankruptcy), Para. 24. (“Licensee hereby acknowledges that ClearBankruptcy may, in its sole discretion, outsource and/or subcontract certain functions in providing the Service. ClearBankruptcy shall not be liable for any actions of any such third party.”)

This is utterly reprehensible.

n.b. Mr. Zelotes can only surmise the reaction of debtor clients [in an age of identity theft concerns] were such persons alerted (after-the-fact) that their tax returns, pay advices, credit reports, and/or confidential communications, were forwarded (not only) to unknown persons in Chicago, but also to some unknown persons and place in Bangalore India. Mr. Zelotes contends that this form of deception and/or material non-disclosure likewise forms the basis of an independent ethics violation.

n.b. Mr. Zelotes encourages the Office of Disciplinary Counsel and/or the United States Trustee to compel Mr. Chern (by subpoena service) to release the names of all attorneys (nationwide) who agreed to participate in the LPO program and to further identify all clients whose confidential case information was outsourced to Mr. Chern pursuant to such LPO agreements. In all such cases, Mr. Zelotes recommends a full disgorgement of fees (*inter alia*).

n.b. “... fee sharing is prohibited in bankruptcy proceedings because fee sharing “subjects the professional to outside influences over which the court has no control, which tends to transfer from the court some degree of power over expenditure and allowances.” 4-504 Collier on Bankruptcy P. 504.01 citing *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 470 (2d Cir. 1981), cert. denied, 455 U.S. 941 (1982).

There is (additionally) something troubling about the prospect of a client’s attorney being near entirely disengaged from the day-to-day process of the client’s representation (or, as earlier represented to Mr. Zelotes: “freed” to focus not on the needs of one’s existing clients but (rather) upon “client growth without limitation.”) Mr. Zelotes surmises that this speaks to the same concern the Second Circuit Court of Appeals voiced when explaining the aims of Section 504 (enjoining fee sharing arrangements) as preserving “the integrity of the bankruptcy process so that the professionals engaged in bankruptcy cases attend to their duty as officers of the bankruptcy court, rather than treat their interest in bankruptcy cases as ‘matters of traffic [i.e., matters of trade or commerce].’” See: 4-504 Collier on Bankruptcy, P. 504.02[1] at 504-5 (Alan N. Resnick & Henry J. Sommer, eds. 15th Edition Revised 2007) citing *Matter of Arlan’s Department Stores, Inc.*, 615 F.2d 925, 943-44 (2d Cir. 1979).

Mr. Zelotes submits that the (implicit or express) deception inherent in this masked delegation scheme is entirely inconsistent with requirements of the Code of Professional Responsibility (and submits this issue for the Committee’s due consideration).

Mr. Zelotes likewise submits that this comprehensive delegation of communications and case management (itself) entails an impermissible fee sharing arrangement prohibited under 11 USC 504.

To what extent (if any) an attorney might avail himself of such third party services, Mr. Zelotes does not purport to know. This articulation is properly reserved for the courts. It is clear (however) that that if such a line exists, as relates to the division of labors and impermissible sharing of fees under Section 504, that line has most certainly been crossed. In this regard, Mr. Zelotes is reminded of the comments of former Supreme Court Justice Potter Stewart, who in a concurrence opinion once noted that "hard-core pornography" was hard to define, but that "I know it when I see it." Mr. Zelotes (likewise) knows when he sees the impermissible division of fee. Mr. Zelotes suggests that an inconsistent contention would be entirely at odds with the aforementioned analysis of Judge Corey and the holding of *In re Greer*, 271 B.R. 426, 430 (Bankr. D. Mass. 2002) (holding that a fee-sharing agreement in which one attorney paid another \$50 for each creditors' meeting the other attorney attended on her behalf violated §504).

n.b. Mr. Zelotes does not have direct knowledge of whether Mr. Chern (or those acting in concert with Mr. Chern) have engaged (or are presently engaged) in the unauthorized practice of law. This notwithstanding, in light of the sweeping breadth of the aforementioned proposed LPO delegations, Mr. Zelotes suggests that a person of reasonable prudence and caution would diligently investigate the same (probable cause). The propriety of such an investigation is of particular (pressing) concern given that Mr. Chern acknowledges that he avails himself of the services of foreign attorneys neither admitted nor domiciled in the United States. Mr. Zelotes appreciates that Mr. Chern expressly disclaims such unauthorized practice in his proposed agreements (and perhaps this is true), but a disclaimer alone (in the foregoing context) should prove of little assurance to the Courts and to this Committee. Mr. Zelotes submits this concurrent issue to the United States Trustee and the respective Offices of Disciplinary Counsel for their due and proper consideration.

Mr. Zelotes will add this additional observation:

Bankruptcy Rule of Procedure 2016 requires an attorney representing a debtor to disclose the compensation received in each case and to certify that he or she has not shared (or agreed to share) such compensation with any other person. Mr. Zelotes surmises that few (if any) attorneys who have availed themselves of the aforementioned referral and/or LPO services have affirmatively disclosed such fees paid. In omitting this material information, these attorneys have knowingly and affirmatively evaded the required active oversight of both the Bankruptcy Courts and the Office of the United States Trustee (said office being affirmatively tasked with reviewing and monitoring attorney 2016 statements).

Mr. Zelotes suggests that the reviewing committee and/or the United States Trustee compel both the respondents (and such other persons subsequently identified as having done business with Mr. Chern) to furnish all 2016 statements filed in each case referred by Mr. Chern or involving other LPO services, to affirmatively determine whether the respondents (and such other persons to be identified) have knowingly omitted this information from their 2016 statements and (in so doing) affirmatively evaded USBC and UST oversight (said documents are available online via ECF and pursuant to USBC two-year record keeping requirements). Mr. Zelotes likewise suspects few (if any) such respondents will have disclosed the extent to which LPO fees paid were shared with third persons outside the United States. Knowingly submitting a false 2016 statements entails both a false certification to a tribunal and may form the basis for some modicum of disgorgement. This equitable determination is appropriately reserved for the courts and Mr. Zelotes affords no associated recommendation. Mr. Zelotes (nonetheless) represents that the omission of this material information on 2016 statements is conduct prejudicial to the administration of justice and thereby also professional misconduct.

CONCLUSION

Mr. Chern is (without question) a talented businessman who has demonstrated remarkable ambition. As a general rule, Mr. Zelotes does not begrudge the success of persons who have achieved far greater success in our field of practice. As a former U.S. Marine, Mr. Zelotes appreciates that meaningful accomplishment often turns upon a rare combination of determination, courage, planning and endurance. Persons demonstrating such attributes are (more often than not) the proper subject of his sincere admirations. When (however) attorneys conspire to transfer from the court an impermissible degree of power over expenditure and allowances ... when attorneys deceive, mislead and withhold material information from his or her clients ... when attorneys endeavor to obtain a more substantial market share by means of unfair methods of competition and/or deceptive trade practices ... there is rightful reason for both alarm and protest. In this instance, Mr. Chern (and those attorneys herein identified with whom he does business) acted knowingly and/or recklessly, turning a blind eye to the numerous advisory opinions promulgated by the Boards of Governors (obtained through the initiative of persons more appropriately mindful of their ethical obligations), the Rules of Professional Conduct as promulgated by the Judiciary, the commands of our elected representative in Congress assembled as set forth in the U.S. Code, and the holdings recited in our corresponding case law published by our Courts. Rather than conform their collective conduct to the requirements of the Rules of Professional Conduct and the corresponding substantive requirements of the United States Bankruptcy Code, Mr. Chern (and those with whom he conspired) aimed to (and did) affirmatively circumvent these rules (and thereafter rationalize the aforesaid circumvention) with an eye toward personal pecuniary gain and a more substantial market share. Mr. Chern (and those attorneys who have willfully abetted him) have profited substantially from their professional misconduct and did so at the expense and detriment of both the fair administration of justice and the reputation of our esteemed profession. This is no trivial matter. The remedies imposed must aim not only to enjoin and remedy the wrongs committed, but also to affirmatively deter and

enjoin similar misconduct by both Mr. Chern and those who would seek to replicate (or otherwise share in) his ill-begotten financial success.

Professional discipline (and/or presentment) is both warranted and recommended.

As relates specifically to Mr. Chern, Mr. Zelotes urges full disgorgement, meaningful injunctive relief, and disbarment (*inter alia*).

The exhibits identified below (and a copy of this complaint) are furnished to the aforementioned authorities on an accompanying compact disk in digital (pdf.) format. To facilitate ease of subsequent replication, reduce bulk, and mitigate (onerous) printing, assembly and/or postal expense to the complainant (who is acting in the public interest alone), a paper copy of such (voluminous) documents are not contemporaneously provided.

LIST OF EXHIBITS

1. Exhibit 1: Clear Bankruptcy Services Agreement
2. Exhibit 2: Total Attorneys LPO Services Agreement
3. Exhibit 3: e-Mail Correspondence & Miscellaneous e-Mail Attachments
4. Exhibit 4: Kevin Chern Auto-Biography
5. Exhibit 5: Clear Bankruptcy Screen Captures
6. Exhibit 6: Total Bankruptcy Screen Captures
7. Exhibit 7: Select Chapter 7.com Screen Captures

8. Exhibit 8: Comprehensive List of All Identified Respondents Broken Down Into Their Respective States
9. Exhibit 9: Clear Bankruptcy Respondents (National Directory)
10. Exhibit 10: Total Bankruptcy Respondents (National Directory)

11. Exhibit 11: In re Greer
12. Exhibit 12: In re Winstar Communications
13. Exhibit 13: Joint Statements of NACBA & NCLC
14. Exhibit 14: Arizona Formal Opinion 06 06
15. Exhibit 15: Iowa Formal Opinion 00 07
16. Exhibit 16: Kansas Formal Opinion E 429
17. Exhibit 17: New Jersey Formal Opinion 36
18. Exhibit 18: Oregon Formal Opinion 2007 180
19. Exhibit 19: Texas Formal Opinion 561
20. Exhibit 20: Washington Formal Opinion 2106
21. Digital File: Memorandum
22. Digital File: Memorandum Integrated With All Attached Exhibits

(Signature Page Follows)

Date: 04/14/09

Respectfully Submitted,



Zenas Zelotes, Esq. // Fed. Bar No. ct23001 // Conn. Juris. 419408
Zenas Zelotes LLC // P.O. Box 1052 // Norwich CT 06360
T (860) 449-0710 // F: (866) 475-6785 // E: ZenasZelotes@Gmail.com

In accord with 28 U.S.C. 1746 “I declare under penalty of perjury under the laws of the United States of America that the averments of fact recited in the foregoing complaint are true, accurate and correct to the best of my knowledge and belief.”

Executed on 04/14/09



Zenas Zelotes, Esq.