



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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Ms. Karen A. Gould
Executive Director
Virginia State Bar
Eighth and Main Building
707 E. Main Street, Suite 1500
Richmond, Virginia 23219

Dear Ms. Gould:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether conduct appearing to be permissible under a proposed amendment (“amendment”) to Rule 7:2 of the Rules of Professional Conduct that would allow under certain circumstances a lawyer to refer clients to lawyers or non-lawyer professionals under a reciprocal referral agreement (“agreement”) would violate Virginia’s statutory prohibition on “running and capping.”

Response

It is my opinion that conduct permitted under the proposed amendment would violate the statute because the amendment would implicate both the person working for the lawyer under § 54.1-3939 and the lawyer if he engages in reciprocal referrals with another lawyer, which would make them both runners and cappers under § 54.1-3941.

Background

You indicate the issue has arisen because the Virginia State Bar (“Bar”) is considering a proposed amendment to the Rules of Professional Conduct. The proposed amendment addresses Rule 7.2, which governs “Advertising” by lawyers. It would create an exception to the prohibition against a lawyer obtaining anything of value in return for another person referring the lawyer to a potential client under Rules 7.2(c) and 7.3(d).¹

¹ Rule 7.3(d) forbids a lawyer from compensating or giving “anything of value” to a person or organization for recommending, or securing employment for, a lawyer except as provided under Rules 7.1 and 7.2. The proposed amendment, by creating an exception to this prohibition in Rule 7.2, will make these reciprocal agreements permissible under Rule 7.3(d).

Applicable Law and Discussion

Section 54.1-3941 provides: "It shall be unlawful for any person to act singly or in concert with others as a runner or capper for an attorney." Section 54.1-3939 provides the following definitions:

"Agent" means any person who acts for another with or without compensation at the request, or with the knowledge and acquiescence, of the other in dealing with third persons.

"Runner" or *"capper"* means any person acting within the Commonwealth as an agent for an attorney in the solicitation of professional employment for the attorney.

"Solicitation of professional employment" means obtaining or attempting to obtain, for an attorney, the opportunity to represent or render other legal services to another person, for which services the attorney will or may receive compensation. Solicitation of professional employment shall not include conduct (i) limited to mere statements of opinion respecting the ability of an attorney, (ii) pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar or (iii) pursuant to any qualified legal services plan or contract of legal services insurance.

* * *

The proposed amendment to Rule 7.2 states as follows:

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement;

Applying the statutory definitions above, I conclude that the amendment would allow conduct that would constitute running and capping in violation of § 54.1-3941. The reciprocal agreement envisioned by the amendment, moreover, would make the attorney liable under § 54.1-3941 if the attorney acted "in concert" with another lawyer to obtain business for that other lawyer.²

A previous opinion of this office addressed running and capping in the context of the relationship between attorneys and real estate brokers.³ Specifically, the issue concerned instances where the broker included a lawyer's name on prepared contracts. This Office concluded that the arrangement constituted running and capping under then current statute. The language of the broker's contract implicated both the broker, who was obtaining clients for the attorney, and the attorney, who would be able to infer from the form of the contract that the broker was serving as his agent. The opinion noted that a broker would be

² Because someone can only violate § 54.1-3941 by running and capping "for an attorney," a lawyer would only violate this statute if he or she worked to obtain business for another lawyer. A reciprocal agreement between a lawyer and a non-lawyer would only make the non-lawyer a runner and capper.

³ 1971-72 Op. Va. Att'y Gen. 19.

liable under the statute even if he acted with a home purchaser's authority to select an attorney without the attorney's knowledge.

The instant facts are analogous. If the pre-printed contracts used by real estate brokers, which had attorneys' names on them, violated the prohibition on running and capping, the agreements described in the amendment would violate the statute because these agreements are designed expressly for the purpose (in part) of obtaining clients for lawyers.

An earlier version of the running and capping statute also has been addressed by the courts. The Supreme Court of Virginia denied the appeal of an injunction issued by the circuit court that found an arrangement in which a labor union was referring its members to union-approved lawyers violated the statute.⁴ On appeal, however, the United States Supreme Court reversed, finding that the statute unconstitutionally limited the union's First Amendment rights, including helping union members prosecute their rights under federal statutes.⁵

On remand to the Virginia circuit court, the court entered another injunction forbidding "solicitation" but allowing the union to recommend attorneys.⁶ The Supreme Court of Virginia reversed, stating that the United States Supreme Court ruling did not permit that distinction.⁷ Under the Supreme Court of Virginia's ruling, a lawyer may still be prohibited from soliciting, joining in or authorizing running and capping where the First Amendment concerns addressed by the United States Supreme Court are not present.⁸ There is no other controlling case law on the issue of Virginia's running and capping prohibition.

The scenario that would be created by the amendment is distinguishable from the situation presented to the United States Supreme Court in *Brotherhood of Railroad Trainmen*, where a labor union had the First Amendment right to express its opinion about lawyers by recommending them to union members, in order to help those members protect their rights under federal law. That case did not involve the kind of express, reciprocal agreements envisioned in the proposed amendment, which would constitute the soliciting, joining in, or authorizing of running and capping that the Supreme Court of Virginia says still may be proscribed even after the U.S. Supreme Court decision.⁹

Comment 8 to the proposed amendment only reinforces my conclusion. That Comment shows that the proposed amendment would allow a lawyer to refer a client to a healthcare professional (for example) with the "expectation" that the professional would reciprocate by sending clients to the attorney for legal representation. This would make the healthcare professional an "agent" of the attorney for obtaining business.

⁴ *Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 203 Va. lxx (1962). See *Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E.2d 265 (1966).

⁵ *Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 377 U.S. 1, 8 (1964).

⁶ *Commonwealth ex rel. Virginia State Bar v. Brotherhood of Railroad Trainmen*, 11 Va. Cir. 296 (1965).

⁷ 207 Va. at 190, 149 S.E.2d at 272, *cert. denied*, *Virginia ex rel. Virginia State Bar v. Bhd. of R.R. Trainmen*, 385 U.S. 1027 (1967).

⁸ *Id.* at 190-91.

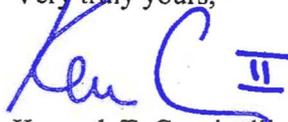
⁹ 207 Va. at 190-91.

Conclusion

Accordingly, it is my opinion that conduct authorized by the proposed amendment would violate Virginia's "running and capping" prohibition.

With warmest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with "Ken" written in a cursive-like font and "C II" in a more blocky, bold font.

Kenneth T. Cuccinelli, II
Attorney General