



NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 597 - 1/23/89 (28-88)

Topic: Advertising service plans, distinguished from lawyer referral services.

Digest: A lawyer may not use an advertising service that places advertisements that do not include the name, office address and telephone number of the lawyer or law firm or that acts as a lawyer referral service and does not conform to DR 2-103(C); but a lawyer may use advertisements, prepared by an advertising service, that otherwise comply with the provisions of the Code.

Code: DR 2-100(A); 1-102(A)(2); 2-103(C); 2-101(A), (F); 2-102(C).

QUESTION

1. May a lawyer use an advertising service that places generic television advertisements for lawyer services in a particular field of law and refers to the lawyer all responses to the ad from a designated geographical area?

2. Is the result any different if the advertisement includes the names of a group of participating lawyers within the viewing area?

OPINION

A lawyer proposes to enter into a contract with an "advertising consultant" that runs television commercials aimed at persons with particular types of legal problems. The commercial suggests that viewers needing legal assistance in that area call an 800 number, and a lawyer will respond to the call

by telephone. The advertising agent agrees to provide each participating lawyer exclusively with the names of persons who have responded to the advertising who reside, are employed or request referral to a lawyer doing business, in a designated geographical service area, which may be a county or a zip code area. The lawyer is free to accept or reject any case that is so referred. For these services, the lawyer pays a fixed monthly fee that is not tied to the legal fees charged by the lawyer. The advertising agent requires that the lawyer be licensed and in good standing in the relevant geographical area, practice in the relevant field of law, and carry professional liability insurance of at least \$250,000.

Use of Generic Advertisements

DR 2-100(A) provides that "a lawyer shall not advertise or publicize himself or herself in violation of any statute or rule of court". DR 1-102(A)(2) provides that "A lawyer shall not circumvent a Disciplinary Rule through actions of another". Thus ads placed by a lawyer or by an advertising agent on behalf of a lawyer must conform to the court rules on advertising.

The court rules in each of the four Appellate Divisions provide that "All advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered."¹ This rule does not prohibit a lawyer from purchasing advertisements prepared by an advertising agent, as long as the advertisement is personalized with the name, address and telephone number of the particular lawyer. A lawyer may not participate in generic advertising however, that does not include the lawyer's or law firm's own name and office address, as well as a telephone number of an agent who will refer clients to the lawyer or to another lawyer participating in the agent's advertising program.

Lawyer Referral Service Aspects

We believe that a program in which an advertising agent runs generic ads for legal services and distributes prospective clients to participating lawyers who have been assigned the exclusive right to cases arising in particular geographical areas is more in the nature of a lawyer referral service than advertising by an individual lawyer. When a prospective client answers the

¹ 22 N.Y.C.R.R. §603.22(K) (1st Dep't); 22 N.Y.C.R.R. §691.22(k) (2nd Dep't); 22 N.Y.C.R.R. §806.15(k) (3rd Dep't); and 22 N.Y.C.R.R. §102.16(k) (4th Dep't). The Second Department has sustained its own rule as an aid to consumers. *Anonymous v. Grievance Committee*, 136 A.D. 344 (2d Dep't 1988).

advertisement, the purpose is to be given the name of a lawyer, rather than to contact a particular lawyer. DR 2-103(C) provides:

A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services . . . except that: (1) The lawyer may request referrals from a lawyer referral service operated, sponsored or approved by a bar association and may pay its fees incident thereto.

The program in question has not been approved by a bar association. Indeed, bar associations have not developed standards under which to consider approval of for-profit lawyer referral services. See generally, Ad Hoc Committee on Private Referral Services of the Association of the Bar of the City of New York, "Regulation of Private Legal Referral Services—A Recommendation", 44 *The Record* 3, 4 (Jan/Feb 1989). Consequently, a lawyer may not ethically request or accept referrals from the service. We believe it is irrelevant under DR 2-103(C) that the advertising agent has designated only one lawyer in each geographical area and therefore has no discretion in choosing lawyers for potential clients. As long as the client is not choosing the particular lawyer, but only a geographical location, the referral is prohibited.

Advertisements Which Include the Names of Particular Lawyers

Our conclusion is different if the advertisement presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical areas assigned to them, so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent. There is no intrinsic problem with a lawyer's using advertising prepared by others, as long as such advertising complies with the requirements of the Code and court rules. See, e.g., DR 2-101(A) (the ad must be truthful as applied to the particular lawyer); DR 2-101(F) (if the advertisement is broadcast, it must be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission must be retained by the lawyer for at least one year following the transmission). In addition, engaging in joint advertising with other lawyers does not necessarily violate the Code. Indeed, such joint advertising may be the only way it is economically feasible for a practitioner with a small practice to afford certain forms of advertising. We believe, however, that the advertisement should disclose that the participating lawyers are not related, so that the public will not be confused as to the size of each participant's law practice or the nature of the relationship among the lawyers

participating in the joint advertisement. (*Cf.*, DR 2-102(C) (“a lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.”))

We note that the court rules require an advertisement to contain “the telephone number of the attorney or law firm whose services are being offered”. We believe that the purpose of the rules is to identify the lawyer who is advertising, and to provide a number where the lawyer may be contacted. The rule does not require, however, that the number be listed on the lawyer’s letterhead or under the lawyer’s name in the telephone book. Consequently, it is permissible for the telephone number printed in the advertisement to be a central number staffed by the advertising agent or an answering service, which directs calls to the appropriate lawyer, as long as the agent answering the calls does not mislead callers as to scope of the agent’s responsibility or make recommendations with respect to participating lawyers.

CONCLUSION

A lawyer may not use an advertising service that places advertisements that do not include the name, office address and telephone number of the lawyer or law firm or that acts as a lawyer referral service and does not conform to DR 2-103(C); but a lawyer may use advertisements prepared by an advertising service which advertisements otherwise comply with the provisions of the Code.
