

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 625 - 2/14/92 (14-91)

Topic: Advertisement, by recorded telephone messages on 900 number; legal fee, for preparation of telephone message for 900 number.

Digest: A lawyer may record a message to be played on a 900 number which includes an advertisement for his services provided the message and any advertisement for the message meet legal and ethical criteria; the lawyer may charge a fee for his services in preparing the message.

Code: DR 2-101, 2-104; EC 2-1, 2-2, 2-5

QUESTIONS

1. May a lawyer record a message to be played on a 900 telephone number that provides the caller with general information about the law of a particular subject matter?
2. May a lawyer utilize such a message on a 900 number to advertise the lawyer's services?
3. May a lawyer accept a fee from a nonlawyer owner of a 900 number as compensation for the preparation of the message?
4. May a lawyer and a nonlawyer owner of a 900 number share the profits generated by calls to the 900 number on which such a message is played?

OPINION

We answer the first question in the affirmative. The Code of Professional

Responsibility permits lawyers to speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice. DR 2-104(E). The choice of the media to convey the message is irrelevant. This Committee has recognized that such information could be delivered by cassette tapes as well as by seminars, lectures and written publications. N.Y. State 204 (1970). The use of a 900 number provides an additional means of public access to an appropriate informational message. In preparing the message, a lawyer should be careful not to appear to offer individual advice. It generally would be necessary to include a statement in the text that the message constitutes general information, not legal advice, and to caution the listener not to attempt to solve individual problems based on the general information contained in the message. DR 2-104(E); EC 2-5. Both the message and advertisements for the message may identify the author as a lawyer and by name, and a lawyer may accept employment which results from participation. DR 2-104(C); N.Y. State 204 (1971). We also answer the second question in the affirmative. Where the message includes or constitutes an advertisement for the lawyer's services, additional considerations are applicable. A message delivered to the caller of a 900 number constitutes an advertisement if it invites the caller to seek additional services from the lawyer who prepared the message. Such an invitation may be expressed or implied, such as by providing the office telephone number of the lawyer.

Where the message is an advertisement, it must comply with all requirements applicable to lawyer advertising. In addition, an advertisement of the 900 number also must comply with those requirements. Thus, for example, neither the message nor any advertisement for it may contain any false, deceptive or misleading statement or claim. DR 2-101(A). Furthermore, both the message and an advertisement for it must include the name, office address and telephone number of the lawyer whose services are being offered. DR 2-101(K); N.Y. State 597 (1989).¹ In order to avoid an advertisement of the message to be not deceptive or misleading, the advertisement must clearly indicate that the caller will be charged for the call and will be connected with a recorded message which is or includes an advertisement for the services of the identified lawyer.

We note that some portion of the audience for the proposed 900 service will be composed of relatively unsophisticated members of the public. It is important that members of the public not be deceived into paying for a 900 call for which they do not receive the value they have been led to believe they would obtain. Accordingly, the lawyer must take care to assure that the promotion of the 900 service accurately discloses to the prospective caller (a) that the content will include an

¹ If the 900 number service offered to place the caller in contact with an unidentified lawyer, further disclosure is required. N.Y. State 597 (1988) held that such a service utilizing an 800 number would constitute an unauthorized, impermissible referral service unless the advertisement for the service specified "the names of lawyers or law firms participating in the group advertisement, along with their addresses and the geographical area 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 on the part of the advertising agent." The same requirements would apply if such a service utilized a 900 number.

advertising message, and (b) that there are substantial limitations on the value to the caller of the informational content since it necessarily will be of general applicability. This disclosure should be made in terms that the general public reasonably can be expected to understand. A copy of the advertising message and of each advertisement of the 900 number must be filed with the disciplinary committee of the appropriate judicial department. DR 2-101(F).

We also answer the third question in the affirmative. If the message prepared for use on a 900 number is not an advertisement, the lawyer may accept a fee from the nonlawyer owner of the 900 number. This is analogous to accepting a fee for writing a published article or for speaking at a seminar. *See, e.g.*, N.Y. State 89 (1968), N.Y. State 204 (1971).

The lawyer also may accept a fee for preparation of a message which is or includes an advertisement. Although the concept of a person who provides an advertising medium paying a fee to the advertiser is somewhat radical, so is the concept of a consumer willingly paying to listen to an advertisement. We have no reason to speculate as to the number of consumers who would be willing to call a 900 number to listen to a message which itself has been clearly identified as an advertisement in any advertising promoting the 900 number.

Finally, we answer the last question in the affirmative. A lawyer may share the profits generated by the 900 number with the owner of the number.² There is no logical distinction between sharing the profits of the recorded message and sharing book royalties.

CONCLUSIONS

1. A lawyer may record a message to be played on a 900 telephone number which provides general information about a particular area of law.

2. A lawyer may utilize a message played for callers of a 900 number to advertise the lawyer's services provided not only the message, but also any promotional material advertising the message, meet all ethical and legal criteria applicable to advertising by lawyers.

3. A lawyer may accept a fee from the owner of a 900 number for preparing a recorded message to be played for callers of the number.

4. A lawyer who prepares a message to be played for callers of a 900 number may share in profits generated by calls to the number.

² DR 3-102, which prohibits a lawyer from sharing legal fees with a non-lawyer, is not applicable, because it is not suggested that the owner of the 900 number share in any legal fees the lawyer receives from clients obtained through the 900 number.

