

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 664 - 6/3/94 (60-93)

Topic: Advertising; Use of 900 Telephone Number; Lawyer Referral Service

Digest: A lawyer may give legal advice during the course of a single telephone call on a "900 number," provided the lawyer discloses the extent of the advice offered and the extent of the attorney-client relationship created during the telephone conversation.

Code: EC 2-2, EC 2-5, DR 2-101(A), DR 2-101(F), DR 2-103(C), DR 2-106, DR 2-106(A), DR 2-107(A), DR 3-101(B), DR 3-102(A), EC 6-1, DR 6-101 (A)(1), DR 6-101(A)(2)

QUESTION

May a lawyer (1) offer a service in which lawyers admitted to practice in New York give legal advice to callers by telephone on certain legal topics, (2) charge for such service by means of a "900 number," in which charges are assessed by the hour and billed by the telephone company, (3) charge \$3 per minute, or \$180 per hour, for legal advice, (4) advertise such service on radio stations, and (5) in cases where the lawyer or law firm does not have the requisite expertise, refer the call to another law firm?

OPINION

Federal law regulates services offered through 900 numbers. See Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. §5711(a)(2) and regulations adopted thereunder. This committee does not answer questions of law. We assume, therefore, that the service complies with all legal requirements, including proper disclosure of the fees charged and the opportunity for the caller to terminate the call before incurring charges. We also assume that the 900 number does not involve any fee splitting with the telephone company in violation of DR 3-102(A), and that if the service may take calls in more than one state, the lawyer will not practice law in a jurisdiction where doing so would violate the regulations of the profession in that jurisdiction. DR 3-101(B).

Advice by Telephone.

In N.Y. State 625 (1992), we held that an attorney may prepare a recorded message containing general information about the law of a particular subject matter to be played on a 900 number owned by another person. That opinion involved general educational material, and, consistent with EC 2-5, we held that the lawyer should refrain from appearing to give a general solution applicable to all apparently similar individual problems, and should caution listeners not to attempt to solve individual problems on the basis of the information contained in the tape.

In N.Y. State 597 (1989), we discussed a group advertisement, in which a group of lawyers placed a television advertisement aimed at those with particular types of legal problems. Viewers needing legal assistance in a particular geographical area were asked to call an 800 number, and a lawyer would respond to the call by telephone. Our opinion discussed several ethical issues raised by the inquiry, but did not discuss any problem with the fact that advice was to be, in whole or in part, by telephone.

Like N.Y. State 597, this inquiry does not involve taped advice, but rather advice from a "live" lawyer. Consequently, it raises the question whether it is ethical to give individualized legal advice using a 900 telephone number.

One of the guiding principles of the Code of Professional Responsibility is that the lawyer must act competently. DR 6-101(A)(1); EC 6-1. The lawyer may not handle a legal matter without preparation adequate in the circumstances. DR 6-101(A)(2). Consequently, the service must have available competent attorneys to handle calls in all areas of law that are advertised by the service. *Cf. Matter of Zimmerman*, 79 A.D.2d 263 (4th Dept., 1981) (lawyer may not advertise concentration in all fields).

Even where the lawyers who respond to telephone inquiries are competent in their fields of practice, it often will be inappropriate to give more than general legal advice in the course of a single telephone call. Competent representation in a particular matter may require a conflicts check, legal research, review of documents or evidence, and consideration of the issues raised, among other things, which cannot be done in the context of a single telephone conversation. Consequently, a lawyer who purports to give legal advice during the course of a single telephone call should provide disclosure of the extent of the advice being offered and the extent of the attorney-client relationship created during the telephone conversation. For example, the attorney should inform callers (1) that some legal issues may be too complex to result in clear, concise and complete responses by telephone, (2) whether the lawyer will restrict his or her representation to advice of general applicability or whether the advice will be sufficiently tailored to the specific facts at hand to constitute complete legal advice, (3) the arrangements that will be made if competent representation would require legal research, review of documents and advice that cannot be provided during the initial telephone call, and (4) whether the representation is limited to telephone advice or also encompasses other steps (such as review or preparation of legal documents or involvement in litigation).

Inherent in the first alternative is the conclusion that a lawyer may restrict his or her representation to the provision of general advice on legal problems that frequently arise. *Cf.* EC 2-2 (lawyers should participate in educational and public relations programs with reference to legal problems that frequently arise.) This Committee has held that a lawyer may limit the scope of the lawyer's services to a client as long as the lawyer makes full disclosure to the client of the effects of such limitation, including the fact that a successor lawyer may have to go over much of the same ground as the initial lawyer (which may be an inefficient way to handle the matter), the scope of the representation is sufficient to render practical service to the client, that the limited representation not be prejudicial to the administration of justice (and thus must cover a discrete matter or a stage of a matter and not terminate before the completion of that stage), and that the limited representation not materially impair the client's rights. See N.Y. State 604 (1989) (criminal representation limited to grand jury proceedings). If it is appropriate to provide such limited representation, the lawyer should make clear to the caller that the representation is limited to giving such general advice, and that the client may have to hire another lawyer to provide full representation in the matter.

Even with the disclosures required by N.Y. State 604, a client may wish to obtain general advice from a lawyer. Many lay people lack a basic knowledge of the laws that affect their daily lives. They may fear engaging a lawyer for a complete representation because they do not know how simple or complicated their problems are, and how costly hiring a lawyer may be. Such people may appreciate (1) a discussion of general areas of law that are more tailored to their particular situation than a book or article might be, or (2) a quick identification of the legal issues involved, even if the discussion is general, and does not provide any answers to the issues raised. Thus, the telephone advice program is consistent with the admonition of EC 2-2 to help the public to recognize legal problems.

Referring Certain Calls to Another Law Firm.

Lawyers often refer clients to other lawyers who are better able to serve their clients. Such referrals normally raise ethical questions only when the lawyer to whom a prospective client is sent has requested the referral or the referring lawyer is compensated for the referral. See DR 2-103(C) (a lawyer shall not request another to recommend the use of the lawyer's services other than by permitted advertising or publicity or by certain organizations including a lawyer referral service operated, sponsored or approved by a bar association); DR 2-107(A) (a lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate except in the enumerated circumstances).

Since the law firm in this instance is not receiving a referral fee from or engaging in fee-splitting with other lawyers, the provisions of DR 2-103(C) and DR 2-107(A) technically are not applicable. If the firm expects to refer a significant number of cases, however, two other issues are raised. First, DR 2-101(K) states that all advertisements of legal services must include the name, office address and telephone number of the attorney or law firm whose services are being offered. Where a significant number of cases will be referred to another attorney, this provision may be violated. In addition, we

believe that, if a significant number of cases will be referred to lawyers in other jurisdictions or to lawyers in certain areas of practice, there should be

disclosure of whether callers will be charged for discussions with the attorney running the 900 number leading up to the recommendation to hire a different attorney.

We also note that the practice of soliciting clients to charge them for fact-finding with a view to referring them to more appropriate lawyers, under circumstances where the forwarding lawyer does not remain jointly liable for the representation, raises public policy issues, since there are no governmental, court or bar association 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).

Charging for Legal Services Via a 900 Number.

DR 2-106 provides that a lawyer may not charge or collect a fee in excess of a reasonable fee. One factor to be considered in determining the reasonableness of a fee is the time and labor required. Where the lawyer uses a 900 number, time is the only factor used in determining the fee. None of the other factors listed in DR 2-106 (A), including the difficulty of the questions involved and the results obtained, is weighed. Although billing on an hourly basis has been criticized in recent years, since it may reward inefficiency, lawyers often use hourly billing as the principal determinant of legal fees. We have been informed that the service involved in this inquiry charges \$3 per minute, or \$180 per hour, and that the average telephone conversation lasts 7 minutes. Whether \$180 per hour is reasonable depends upon the standards in the legal community, and whether the services charged for are individualized legal attention or more general pre-prepared educational pieces.

Radio Advertising.

The Code permits advertising on radio and television as well as in the print media, as long as the advertising is not false, deceptive or misleading and does not cast reflection on the legal profession as a whole. DR 2-101(A). Any ad that is broadcast, including one broadcast by radio, must be prerecorded or taped and approved before broadcast by the lawyer, and a recording of the actual transmission must be retained by the lawyer in accordance with DR 2-101(F).

CONCLUSION

Subject to the qualifications discussed above, the question is answered in the affirmative.
