

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2001-2

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When an attorney is contacted by a law-related commercial Web site company that offers to make available, in some manner, the attorney's name, address, phone number, area of practice, or other information to potential clients in exchange for the attorney providing compensation to the company, the attorney must be extremely cautious. Attorneys must discern the line between payment for legal advertising that is permitted under DR 2-101 and payment for a referral that is prohibited under DR 2-103(B) with specific exceptions. *Payments for advertisements* are generally distinguished as follows. The company will request the attorney to pay a fixed amount for a fixed period of time during which the attorney's information is available for public viewing. The company will provide the attorney's or law firm's information to the potential clients in a ministerial fashion. The company will make clear to the public that it is viewing an advertisement and not receiving a recommendation or referral by the company. *Payments for referrals* are generally distinguished as follows. The company will request that the attorney pay an amount of money based upon the actual number of people who contact or hire the attorney or an amount based upon a percentage of the fee obtained for rendering legal services. The company will provide services that go beyond the ministerial function of placing the attorney's or law firm's information into the public view. The company will not clarify that the information is an advertisement, but rather will make the information regarding the attorney appear as if the company is referring and recommending the attorney or that the attorney is part of the company's services to its Users.

When an attorney is contacted by a law-related commercial Web site company offering to make available online the attorney's name, address, phone number, area of practice, or other information in exchange for the attorney providing compensation to the company, the attorney should not participate in the Web site activities in any manner if the entity is engaged in the unauthorized practice of law. An attorney is not permitted to aid in the unauthorized practice of law and therefore must exercise professional judgment to determine whether the entity is engaged in the unauthorized practice of law. Whenever a law-related web site is offering services that go beyond merely a ministerial function of providing a legal form to Users, the attorney should be on alert that the company may be engaged in the unauthorized practice of law.

OPINION: This opinion addresses an attorney's or law firm's participation in a law-related commercial Web site.

When an attorney is contacted by a law-related commercial Web site company offering to make available online the attorney's name address, phone number, area of practice, or other information in exchange for the attorney providing compensation to the company, is it proper for the attorney to participate?

A commercial web site company is asking attorneys to participate in what the company refers to as an online attorney directory. The company offers attorneys and law firms the opportunity to purchase the exclusive rights to advertise to Web site visitors ("Users") from selected zip code areas. Here is how it works. Users on the commercial Web site's home page are prompted to enter a zip code and click "Search" to "Find an Estate Planning Attorney" in their area. Upon entering a zip code the User is directed automatically to the attorney's or law firm's exclusive listing. The listing contains such information as the law firm name, attorney name, address, phone number, and area of practice.

On this law related web site, Users have other choices as well. Users are prompted on the Web site home page to "Make Your Last Will & Testament Online Now" by clicking on "Start." Users are also prompted to "Find as Estate Planning Insurance Agent" by entering a zip code and clicking on "Search."

The company promotes the "online attorney directory" as an opportunity to generate clients. However, it is not a typical attorney directory. In fact, there is no directory listing of multiple attorneys from which a Web site user may choose. A Web site User will view only one attorney listing, namely, the listing of the attorney or law firm who has purchased the rights to the zip code area entered by the User.

Participation by an attorney in such a Web site raises several concerns under the Ohio Code of Professional Responsibility. Is the attorney participating in a permitted form of paid advertising or is the attorney providing compensation for a referral. Is an attorney assisting a law-related web site company in the unauthorized practice of law?

Paid advertisement versus compensation for a referral

It is sometimes difficult for an attorney to discern the line between payment for legal advertising that is permitted under DR 2-101 and payment for a referral that is generally prohibited under DR 2-103(B) with specific exceptions. It is helpful to review the rules.

Attorneys are permitted to advertise legal services, but subject to regulation. The Ohio Code of Professional Responsibility regulates legal advertising through its publicity rules, DR 2-101 to DR 2-105.

Different media may be used for advertising. DR 2-101(B) of the Code provides examples.

DR 2-101(B) Subject to the limitations contained in these rules:

- (1) A lawyer or law firm may advertise services through newspapers, periodicals, trade journals, “shoppers,” and similar print media, outdoor advertising, radio and television, and written communication.

While online advertising is not listed in the rule, its absence is not significant since the rule predates online advertising. The rule is illustrative of the broad range of media that may be used for legal advertising. Given the broad range of media that is acceptable under the rule, online advertising is a permissible form of advertising.

There is no rule in the Code of Professional Responsibility that prohibits an attorney from paying for an advertisement. Attorneys who advertise are already accustomed to paying for telephone directory advertising, television advertising and other types of advertising. Online advertisements, like other types of legal advertisement, have a price attached.

Referrals and recommendations are governed under DR 2-103. Attorneys are not permitted to compensate or reward another for a referral, unless the compensation is to a DR 2-103(D) organization. DR 2-103(D) organizations are legal aid offices, public defender offices, military legal assistance offices, lawyer referral services that comply with DR 2-103(C), and bona fide organizations that recommend furnish or pay for legal services to its members or beneficiaries and register with the Supreme Court of Ohio and otherwise comply with DR 2-103(D)(4)(a) through (g).

DR 2-103(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer’s employment by a client, or as a reward for having made a recommendation resulting in the lawyer’s employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

DR 2-103(E) states that “[n]othing in this rule [DR 2-103--the Referral and Recommendation Rule] prohibits a lawyer from accepting employment received in response to the lawyer’s own advertising, provided the advertising is in compliance with DR 2-101.

Recently, the Board in Opinion 2000-5 addressed attorney participation in an online attorney referral service. In Opinion 2000-5, the Board advised as follows:

If an online lawyer referral service is in compliance with DR 2-103 of the Ohio Code of Professional Responsibility and with the Lawyer Referral and Information Services Regulations, an attorney may pay the lawyer referral service a membership or registration fee as well as a fee calculated on a percentage of the legal fee earned. DR 2-103(C)(2)(a), DR 2-103(C)(1)(c), DR 2-103(B), and DR 3-102(A)(4) expressly permit both the payment of a membership or registration fee to a lawyer referral service as well as a fee calculated on a percentage of the legal fee earned. Before participating in a lawyer referral service, an Ohio attorney should determine whether the referral service meets the requirements of DR 2-

103(C)(1)(a) through (j) and complies with the Lawyer Referral and Information Services Regulations.

What then distinguishes a payment for an advertisement and a payment for a referral? Several past opinions by the Board provide guidance. In Opinion 89-30, the Board advised upon the propriety of lawyers purchasing from a company the exclusive rights to receive all telephone calls from viewers in a certain zip code area who respond to an 800 number on a television commercial. The Board viewed this as an advertisement not a referral service because “[t]he toll free operators merely give callers the name of the attorney who purchased exclusive rights to callers from the particular geographic area.” The Board suggested “an additional safeguard, namely, having the operator inform the caller that it is not a referral or endorsement and that the named attorney has paid for the advertisement.”

In Opinion 92-3, the Board responded to a similar inquiry regarding the propriety of an attorney participating in a television advertising program in which designated marketing areas based on zip codes are assigned to participating attorneys. “When a consumer calls the 800 number on a commercial, the call originating from an assigned market area is electronically switched to the attorney’s office, but is never routed by humans.” The Board considered this permitted group legal advertising, but expressed concerns regarding activities of a company that go beyond the ministerial function of placing callers in contact with participating attorneys. In Opinion 92-3, the Board stated:

The Code of Professional Responsibility does not preclude Ohio lawyers from participating in televised group legal advertising. However, there are ethical concerns with regard to participation in some types of programs, particularly programs which go beyond the ministerial function of placing callers in contact with participating attorneys. Many of the ethical concerns related to improper screening and referral are eliminated in programs in which participating attorneys are assigned market areas based on zip codes, consumers are given an 800 number to call, and the calls originating from assigned market areas are electronically switched to the participating attorney’s office.

These opinions identify one distinction between a payment for an advertisement and a payment for a referral. When an attorney pays an entity to perform only the ministerial function of placing the attorney’s name, address, phone number, fields of practice, and biographical information into the view of the public that is considered payment for an advertisement, not payment for a referral, unless the context suggests otherwise. When an attorney pays an entity for activities that go beyond the ministerial function of placing an attorney’s name, address, phone number, fields of practice, and biographical information into the view of the public, the attorney may be paying for referral services. Such payments are improper unless the entity is a lawyer referral service in compliance with DR 2-103(C) of the Ohio Code of Professional Responsibility and with the Lawyer Referral and Information Services Regulations.

Upon further consideration, the Board suggests an additional distinction that may assist attorneys in distinguishing between a payment for an advertisement and a payment for a referral. When an attorney is asked to pay an entity a fixed amount of money for a fixed

period of time in which the attorney's name, address, phone number, fields of practice, and biographical information will be placed into the view of the public, that is considered payment for an advertisement. When an attorney is asked to pay an entity an amount of money based upon the actual number of people who contact or hire the attorney or based upon a percentage of the fee obtained from rendering legal services, that is considered payment for a referral. Such payments are improper unless the entity is a referral service in compliance with DR 2-103(C) of the Ohio Code of Professional Responsibility and with the Lawyer Referral and Information Services Regulations.

It would be prudent for attorneys to request that a commercial web site company mark the attorney's information as "Advertisement" or otherwise make clear that it is an advertisement. This would help clarify to the Users that the attorney is not being recommended or referred to the User by the Web site.

Thus, the Board advises that when an attorney is contacted by a law-related commercial Web site company that offers to make available, in some manner, the attorney's name, address, phone number, area of practice, or other information to potential clients in exchange for the attorney providing compensation to the company, the attorney must be extremely cautious. Attorneys must discern the line between payment for legal advertising that is permitted under DR 2-101 and payment for a referral that is prohibited under DR 2-103(B) with specific exceptions. *Payments for advertisements* are generally distinguished as follows. The company will request the attorney to pay a fixed amount for a fixed period of time during which the attorney's information is available for public viewing. The company will provide the attorney's or law firm's information to the potential clients in a ministerial fashion. The company will make clear to the public that it is viewing an advertisement and not receiving a recommendation or referral by the company. *Payments for referrals* are generally distinguished as follows. The company will request that the attorney pay an amount of money based upon the actual number of people who contact or hire the attorney or an amount based upon a percentage of the fee obtained for rendering legal services. The company will provide services that go beyond the ministerial function of placing the attorney's or law firm's information into the public view. The company will not clarify that the information is an advertisement, but rather will make the information regarding the attorney appear as if the company is referring and recommending the attorney or that the attorney is part of the company's services to its Users.

Aiding in the unauthorized practice of law.

The proposed Web site offers Users an option to make a will online. On the Web site home page, a User is prompted to click "Start" to "Make Your Last Will & Testament Online Now!" Should an attorney participate on such Web site either through advertising or otherwise?

Before participating with any law-related commercial Web site, an attorney must familiarize himself or herself with the content of the Web site and the services being offered to Users. Business corporations are not authorized to practice law in Ohio. The practice of law is permitted by a "person [who] has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules." Ohio Rev. Code Ann. § 4705.01 (West 1998). "The unauthorized practice of law is the rendering of

legal services for another by any person not admitted to practice in Ohio under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio.” Gov. Bar R. VII §2(A).

There is case law to assist an attorney in determining what acts constitute the unauthorized practice of law. Cases in the area of estate planning/trusts/financial services include the following: *Richland County Bar Ass’n v. Clapp*, 84 Ohio St. 3d 276 (1998); *Trumbull County Bar Ass’n v. Hanna*, 80 Ohio St. 3d 58 (1997); *Akron Bar Ass’n v. Miller*, 80 Ohio St. 3d 6 (1997), *Mahoning County Bar Ass’n v. The Senior Services Group, Inc.*, 66 Ohio Misc. 2d 48 (1994); *Cleveland Bar v. Yurich*, 66 Ohio Misc. 2d 22 (1994); *Ohio State Bar Ass’n v. Martin*, 66 Ohio Misc. 2d 15 (1994).

Upon review of this case law, the Board suggests that if a web site is offering services that go beyond merely providing a legal form to Users, the attorney should be on alert that the company may be engaged in the unauthorized practice of law. However, attorneys should be aware that whether or not the mere act of making legal forms available to the public is the unauthorized practice of law is not a question for this Board to opine upon. This Board is not the advisory authority for what constitutes the Unauthorized Practice of Law, that authority lies within the Board of Commissioners on the Unauthorized Practice of Law. This Board does offer advice upon activities of an attorney that *aid in the unauthorized practice of law* under the Board’s authority to advise upon the questions regarding the Ohio Code of Professional Responsibility. *See* Gov.Bar R. V§2(C). DR 3-101(A) of the Ohio Code of Professional Responsibility states that “[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law.”

In past Opinion 92-15, this Board advised that “it would be improper for a law firm to assist a business corporation in marketing legal forms when the sale of such forms includes issuance of advice and counseling, preparation and drafting, and instructions on proper execution of the legal documents.” The underlying facts were that a business corporation would advertise to solicit mail and telephone orders for wills, living wills, and powers of attorney. A law firm was asked to assist in writing, producing, and appearing in an educational videotape explaining the legal forms available for wills, living wills, and powers of attorney. The videotapes were to be sent to consumers who responded to the advertisements. The attorneys were to be available to answer consumers’ questions either by mail or telephone. The corporation paid the law firm for providing these services, including an hourly fee for each document prepared. In the Board’s view the proposed conduct by the law firm assisted the corporation in the unauthorized practice of law.

Thus, the Board advises that when an attorney is contacted by a law-related commercial Web site company offering to make available online the attorney’s name, address, phone number, area of practice, or other information in exchange for the attorney providing compensation to the company, the attorney should not participate in the Web site activities in any manner if the entity is engaged in the unauthorized practice of law. An attorney is not permitted to aid in the unauthorized practice of law and therefore must exercise professional judgment to determine whether the entity is engaged in the unauthorized practice of law. Whenever a law-related web site is offering services that

go beyond merely a ministerial function of providing a legal form to Users, the attorney should be on alert that the company may be engaged in the unauthorized practice of law.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.