

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2003-2**

Issued April 11, 2003

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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:** It is improper for a lawyer or law firm to provide statistics to attorneys, business clients, and potential business clients regarding the number of intellectual property matters won, lost, and settled by the law firm because it is both misleading and self-laudatory.

It is improper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters. Money-back guarantees violate DR 5-103(B) because the lawyer acquires a prohibited proprietary interest in the cause of action or subject of litigation. Money-back guarantees also create a conflict of interest between the lawyer and the client under DR 5-101(A), because when the agreed upon outcome is not reached the lawyer has a strong financial incentive to claim that the client did not comply with conditions of the guarantee and is not entitled to a refund. Money-back guarantees also create an unjustified expectation under DR 2-101(C)(2) that the lawyer has improper control or influence over the legal system.

**OPINION:** This opinion addresses a lawyer's or law firm's use of statistics regarding past results obtained and a lawyer's or law firm's offer of money-back guarantees to clients.

1. Is it proper for a lawyer or law firm to provide statistics to attorneys, business clients, and potential business clients regarding the number of intellectual property matters won, lost, and settled by the law firm?
2. Is it proper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters?

A law firm would like to provide attorneys, business clients, and potential business clients with statistics as to the number of intellectual property matters won, lost, and settled by the law firm. The law firm's statistics would include all results, unfavorable as well as favorable, for the last eleven years for intellectual property matters. The statistical report would include a statement that the statistics are historical data, not predictors of the future outcome of any particular case. The law firm would provide the statistics in face-to-face meetings with the attorneys, business clients, or potential business clients; or, would send the information upon request to attorneys, business clients, or potential business clients.

Additionally, the law firm would like to offer money-back guarantees to clients in intellectual property matters. For example, if based on its statistics the law firm believes there is a sixty five percent or greater chance of winning an intellectual property matter, the law firm will offer a money-back guarantee to the client. If based upon its statistics the law firm believes that a trademark will be registered, the law firm will offer a money-back guarantee if the law firm does not register the trademark.

*Question One*

Is it proper for a lawyer or law firm to provide statistics to attorneys, business clients, and potential business clients regarding the number of intellectual property matters won, lost, and settled by the law firm?

The Ohio Code of Professional Responsibility does not ban the use of statistical information by law firms, but the statistics must be verifiable and the use must not be misleading, self-laudatory, or unfair.

DR 2-101(A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that:

1. Contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement;
2. [Omitted];
3. [Omitted];
4. Contains any claim that is unverifiable;
5. [Omitted].

Previously, this Board advised that the listing of settlement and verdict amounts in past cases is improper under the advertising rules. In Opinion 2002-7, this Board advised that “[i]n advertising legal services, it is improper under DR 2-101(A)(1) and (4) for an attorney or law firm to list settlement or verdict amounts obtained in past cases. Statements such as ‘Trip/Fall sidewalk-brain injury, \$1,000,000 verdict’ or ‘Dog bite, \$50,000 settlement’ are misleading, self-laudatory, and may be unfair. In addition, confidential settlement amounts are unverifiable.”

Now, the Board advises that the proposed listing of statistics as to the number of intellectual property matters won, lost, and settled by a law firm, is also improper under the advertising rules. First, the reporting of “wins” and “losses” in intellectual property is misleading. Such statistics imply that wins and losses depend solely upon the law firm's skill and expertise, without regard to the merits that may more heavily influence the outcome. Second, the proposed use of the statistics is self-laudatory. Although, the statistical report clearly states that the data is historical data and not a predictor of future

outcome of a particular case, the report creates unjustified expectations that the law firm is able to control the outcome of cases.

Thus, the Board advises that it is improper for a lawyer or law firm to provide statistics to attorneys, business clients, and potential business clients regarding the number of intellectual property matters won, lost, and settled by the law firm because it is both misleading and self-laudatory.

### *Question Two*

Is it proper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters?

Years ago, an Ohio lawyer ran an advertisement stating that his law firm would represent defendants in drunken driving cases and that the “[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING.” *Zauderer v Office of Disciplinary Counsel*, 471 U.S. 626, 629-30 (1985) (footnote omitted). The Office of Disciplinary Counsel filed a complaint against the lawyer with regard to the 1981 drunken driving advertisement (and with regard to a 1982 Dalkon Shield Advertisement). The complaint alleged that the drunken driving advertisement “violated Ohio Disciplinary Rule 2-101(A) in that it was ‘false, fraudulent, misleading, and deceptive to the public’ because it offered representation on a contingent-fee basis in a criminal case—an offer that could not be carried out under Disciplinary Rule 2-106(C).” *Id.* at 631 (footnote omitted). The Supreme Court of Ohio, inter alia, adopted the finding of the Board of Commissioners on Grievances and Discipline “that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) and be liable for attorney’s fees (because they had not been convicted of drunken driving).” *Id.* at 634-35. The Supreme Court of Ohio issued a public reprimand to the attorney. The United States Supreme Court affirmed the judgment of the Supreme of Ohio to the extent it was based on the drunken driving advertisement (and affirmed and reversed judgment to the extent it was based on the Dalkon Shield advertisement). *Id.* at 626, 655-56.

Thus, a lawyer’s advertisement of a refund to a client if convicted of drunk driving was improper under Ohio’s rules. However, is a lawyer’s offer of a money-back guarantee in an intellectual property matter also improper?

A money-back guarantee is a promise by a lawyer or law firm to refund a client’s money when a certain outcome does not occur. A guarantee between a law firm and a client would explicitly or implicitly place conditions upon the client, such as cooperation with the law firm, provision of necessary documents, and truthful representations.

An offer of a money-back guarantee in an intellectual property matter gives the lawyer a proprietary interest in the cause of action or subject of litigation. A proprietary interest in a cause of action is prohibited under DR 5-103(A) unless there is an applicable exception.

DR 5-103 (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may:

1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
2. Contract with a client for a reasonable contingent fee in a civil case.

Neither of the exceptions in DR 5-103(A)(1) and (2) applies. A money-back guarantee is not a lien granted by law to secure the lawyer's fee or expenses. A money-back guarantee is not a contract with a client for a reasonable contingent fee in a civil case. A money-back guarantee is not a true contingent fee. A money-back guarantee has characteristics of both a fixed fee and a contingent fee. Like a fixed fee, there is an agreed upon amount to be paid by the client to the lawyer for the services. Like a fixed fee, the money is paid to the lawyer in advance or upon the performance of legal services. Like a contingent fee, there is a risk that the lawyer will earn no money. Unlike a contingent fee, the money comes from the client before representation begins, rather than arising from the successful resolution of a legal matter.

A money-back guarantee appears to be a win-win situation for a client, but it is not. The money-back guarantee creates a conflict of interest under DR 5-101(A)(1) between the client and the lawyer. If the agreed upon outcome is not reached, the lawyer has a financial interest to prove that the client did not hold up his or her end of the guarantee, for example, by not cooperating, by not providing necessary information and documents, or by failing to be truthful.

DR 5-101(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

Further, a money-back guarantee creates unjustified expectations under DR 2-101(C)(2) regarding the results a law firm can achieve. A money-back guarantee implies that the lawyer has improper influence or control over the legal system.

DR 2-101 (C) A communication is false or misleading if it satisfies any of the following:

1. [Omitted];
2. Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Code of Professional Responsibility or other law;
3. [Omitted].

Money-back guarantees did not receive approval in another state. The Association of the Bar of the City of New York in Formal Opinion 1986-1 considered whether it was

ethically proper to provide clients with a form guaranteeing a permanent visa and a refund of all legal fees if the lawyer fails to obtain a permanent visa. The guarantee was based on representations from the client that: “he/she has not lied to the American Consul or other U.S. Government official;” “he/she has told [the attorney] the truth;” and “conditions as they exist today will remain the same.” Ass’n Bar of the City of New York, Formal Opinion 1986-1.

The New York advisory committee concluded the proposed conduct was inconsistent with the Code of Professional Responsibility. According to the advisory committee: “the ‘guarantee’ may mislead clients as to the attorney’s qualifications or experience;” “the guarantee may be misleading because it purports to provide a ‘money back guarantee’ without disclosing that the client is liable for costs even if the lawyer is unsuccessful;” and the “guarantee may suggest the appearance of impropriety to the extent that factors other than the justice of the claim will determine the result of the client’s case.” Furthermore, the committee stated that not only might the language of the guarantee be misleading; its proposed contingent fee arrangement may lead to a serious conflict of interest. The guarantee is based on representations that the client will tell the truth. If the lawyer is unsuccessful, he has a financial interest in proving that his client lied. “This conflict strikes at the heart of the attorney-client relationship, for it weakens the mutual trust and confidence that the relationship is designed to foster.” Ass’n Bar of the City of New York, Formal Opinion 1986-1.

In closing, this Board advises that it is improper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters. Money-back guarantees violate DR 5-103(B) because the lawyer acquires a prohibited proprietary interest in the cause of action or subject of litigation. Money-back guarantees also create a conflict of interest between the lawyer and the client under DR 5-101(A), because when the agreed upon outcome is not reached the lawyer has a strong financial incentive to claim that the client did not comply with conditions of the guarantee and is not entitled to a refund. Money-back guarantees also create an unjustified expectation under DR 2-101(C)(2) that the lawyer has improper control or influence over the legal system.

**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.**