

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 91-7**

Issued April 12, 1991

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

*[Not current-subsequent rule amendments to DR 2-103, eff. Dec. 1, 1995; DR 2-101, eff. Jan. 1, 1993 and Aug. 16, 1993.]*

**SYLLABUS:** An attorney should not participate in a lawyer referral service that provides joint advertising of legal services to generate potential clients who are then screened and referred to attorneys who have paid for the service. Participation is unethical because the attorney compensates the services in violation of DR 2-103 (B) and such referral services are not approved organizations under DR 2-103 (D). It is also unethical if the participating attorney has not approved the advertisement prior to broadcast pursuant to DR 2-101 (D) and if the communication is misleading in violation of DR 2-101 (A).

**OPINION:** We have before us a number of requests for advisory opinions on whether it is ethical for an attorney to participate in a lawyer referral service that provides joint advertising of legal services to generate potential clients who are then screened and referred to attorneys who have paid for the service.

Ohio lawyers have notified the Board that they have been solicited by referral services utilizing various names but similar marketing and referral schemes. The services are usually marketed and sold to attorneys whose practices involve workers' compensation, personal injury, drunk driving or bankruptcy matters. The names of the services usually imply a functioning association of lawyers practicing in a specific area of law.

Mass advertising techniques are used to solicit clients injured or experiencing particular legal problems. The services advertise an 800 telephone number within a specific market. When a potential client calls the 800 number, facts are taken over the phone, a screening process occurs, and the caller is referred to an attorney who practices in the area related to the caller's problem and who has purchased that referral rotation. The telephone services operate 24 hours a day, seven days a week. Fees paid by the lawyers to the referral services cover enrollment, production, administration and monthly advertising. The referral services promise participating lawyers that they will receive a certain number of quality, screened referrals each month.

The Code of Professional Responsibility (Code), in permitting lawyers to advertise, requires compliance with the provisions of DR 2-101. While it is true that a lawyer is permitted to advertise fields of interest and solicit clients with particular legal needs, he or she must take care to insure that the advertising is in accord with DR 2-101 (A). There may be no false, fraudulent or misleading advertising. If a lawyer seeks to join others in a cooperative venture, the use of any organizational name and message must not mislead the public. Nor should the content of the advertising be false or misleading. In addition, DR 2-101 (D) specifically provides that "[i]f the advertisement is communicated to the public over radio or television it shall be pre-recorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer."

The Code also contains provisions regarding the use of referral services and organizations. DR 2-103 (B) provides that a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client unless it is a reasonable fee charged by an approved organization listed in DR 2-103 (D). Organizations approved under DR 2-103 (D) are: legal aid or public defender offices; military legal assistance offices; lawyer referral services operated, sponsored or approved by a bar association; and bona fide organizations meeting certain conditions.

This Board has previously stated that it is ethical to participate in a referral service where the service merely provides the caller with the name of a participating lawyer and does not act as the lawyer's agent or recommend or endorse the lawyer's employment. Ohio SupCt, Op. 89-30 (1989) The Board concluded that a lawyer could become a member of an "injury helpline," because toll-free operators merely gave callers the names of lawyers who purchased exclusive rights in a geographical area. Id. Similarly in Opinion 88-27, the Board stated that a lawyer could become a member of the Talking Yellow Pages, because a computer randomly pulled up the names of attorneys, thereby in essence eliminating the risk involved in allowing a person to select and thus recommend an attorney. Ohio SupCt, Op. 88-27 (1988).

Recently, the Cleveland Bar Association Professional Ethics Committee advised that a lawyer may not participate in private lawyer-referral services that go beyond a ministerial function of simply placing callers in contact with participating lawyers. Cleveland Bar Ass'n, Op. 90-2 (1990). Often such services make legal determinations of the callers' claims and refer bona fide claims to participating lawyers. The rationale was that the referral system violated DR 2-103 (B) and (D) by recommending, promoting, and securing employment for participating lawyers. Id.

The referral services, at issue in this opinion, appear to go beyond the mere function of placing callers in contact with participating attorneys and thus do not enjoy the protection offered by this Board's previous opinions. As proposed, the advertising services result in referral mechanism for the assignment, recommending and securing of services of a lawyer for particular kinds of legal problems.

Ohio lawyers violate DR 2-103 (B) when they pay a private organization for a referral or recommendation unless it is an approved lawyer referral organization. The referral services do not fall within any of the categories of approved organizations set forth in DR 2-103 (D). Further, the programs at issue do not conform to DR 2-101 (D) as there is no control by the attorney over the individual message that is communicated.

Further, the Board cautions Ohio lawyers to closely examine and investigate any program or marketing scheme or service to insure that it does not mislead consumers about any association, membership, nature of the legal services or costs involved, in violation of DR 2-101. The Alabama Disciplinary Commission in Ethics Opinion RO-90-49 (A) & (B) directly captured this ethical concern when it stated the following:

The names of these groups were not chosen by accident. Concepts such as strength through numbers, group support, focused legal skills and the like are all a part of the intended subliminal message conveyed by the names of these programs, and that makes the messages misleading.

The group concept, or associational implication, is valid only in a limited, economic sense. There are no other meaningful associational characteristics. The consuming public is lead [sic] to believe that, by calling a WATS number mentioned in a very slick, professional ad, they are being plugged into a network of caring, competent, highly experienced lawyers, selected and approved by some group or entity and presented to the public wearing the mantle of "association". In fact, few, if any, of these assumptions are justified, but the public has no way of knowing this from the information provided.

Alabama State Bar, Op. RO-90-49 (A) & (B).

Thus, prior to participation the lawyer must assure himself that the advertising, taken as a whole, is not false or misleading. DR 2-101 (A). We believe the proposed advertising, marketing and referral services may be misleading. In conclusion, because such services appear to violate DR 2-101 (D), DR 2-103 (B), (D) and DR 2-101 (A), Ohio lawyers should not participate in such referral schemes.

**This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.**