Withdrawn/June 13, 2016
Committee Opinion
July 24, 1990

LEGAL ETHICS OPINION 1348

ADVERTISING AND SOLICITATION – LAWYER REFERRAL SERVICE: PROPRIETY OF NONLAWYER SCREENING CALLS AND REFERRING POTENTIAL CLAIMS TO ATTORNEY MEMBERS.

You indicate that your firm acts as local counsel for a not-for-profit corporation which intends to operate a cooperative advertising and (lawyer) referral program in Virginia. The corporation will employ advertisements which will be pre-screened and reviewed by any participating Virginia attorney and which will direct an injured party to a toll-free telephone number. As you have presented the facts, the caller will then be referred to one of the limited number of participating Virginia attorneys without any statement that any participating attorney is a recognized or certified specialist in a particular area of law.

You have further indicated that the number of attorneys permitted to participate in each area would depend upon the size of the area, but, hypothetically, 20 to 30 openings would be available for a particular metropolitan area. Each prospective member would be required to pay one-time enrollment and production fees, in addition to monthly administrative and media fees, with no correlation between the fees paid to the corporation and either the number of referrals received by a given attorney or the amount of the legal fees generated in any given case.

The facts stated in your March 9, 1990 inquiry indicate that the corporation will adhere to standards including admission criteria, malpractice insurance coverage, minimum experience and professional conduct levels, methods for determining client satisfaction, and procedures for suspension and removal of participating attorneys. As clarified in your May 11, 1990 letter, you indicate that non-lawyer staff members of the corporation will not make determinations as to the merits of any caller's case. Your May 11 letter also advised that, although the corporation currently does permit any one attorney or firm to acquire more than one opening in a particular metropolitan area, limited to a maximum of 20% of the regional openings, the corporation would consider making the (20%) cap more restrictive or otherwise limiting any single lawyer's access to no more than one opening.

Finally, you advise that the corporation is active to some degree in all other states with the exception of Iowa, has limited its activity in California and Michigan to the submission of an application for permission to operate in those states, while also actively seeking attorney participants in those states, and is engaged in litigation in Tennessee with regard to its status under that state's Disciplinary Rules.

Any determination as to the legality of the corporation's operations in Virginia obviously constitutes a legal question beyond the purview of this Committee. Based upon the facts you have provided, the Committee will consider the propriety of a Virginia State Bar member's participation in the corporation's activities in the Commonwealth.

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The appropriate and controlling Disciplinary Rules to the facts you have provided are DR:2-101, DR:2-103, DR:3-101(A) and DR:3-102(A). Disciplinary Rules 2-101(A) and (B) require respectively that a lawyer not use or participate in the use of any public communication which contains a false, fraudulent, misleading or deceptive statement or claim and that any such public communication utilizing electronic media shall be prerecorded, approved by the lawyer before it is broadcast, and a copy of the actual transmission shall be retained by the lawyer for a period of one year following the last broadcast date. Disciplinary Rule 2-103(D) permits a lawyer, who is precluded from compensating a person or organization to recommend or secure his employment, to pay for public communications which are permitted by DR:2-101 and to pay the "usual and reasonable fees or dues charged by a lawyer referral service," provided that the communication of the service is in accordance with the standards of DR:2-101. Finally, DR:3-101(A) precludes a lawyer from aiding a nonlawyer in the unauthorized practice of law and DR:3-102(A) prohibits a lawyer from sharing legal fees with a nonlawyer.

Since statements made in advertising by lawyer referral services may result in automatic disciplinary violations by participating attorneys, the Committee reiterates its earlier caution that proposed advertising should be examined by all attorneys involved in order to prevent the use of statements or claims that are false, fraudulent, misleading, or deceptive. (See LE Op. 910; see also Cleveland Bar Assoc. Opinion 89-4 (3/30/90), ABA/BNA Law. Man. on Prof. Conduct 901:6903; State Bar of Michigan Opinion RI-31 (10/3/89), ABA/BNA Law. Man. on Prof. Conduct 901:4768) In addition, under the circumstances you have described, the Committee is of the opinion that an advertisement for a lawyer referral service located outside the state, which advertisement is transmitted via the use of electronic media, should carry some minimum identifying data such as the name and address of at least one participating Virginia attorney or an in-state address, such as that of the corporation's registered agent, to which inquiries may be directed. (See Maryland State Bar Association Opinion 87-41 (3/23/87), ABA/BNA Law. Man. on Prof. Conduct 901:4309)

The Committee has earlier opined that it is not improper for an attorney to participate in a lawyer referral service which limits its referrals to a certain number of attorneys in a specific geographic location as long as this limitation does not result in public deception in violation of the applicable Disciplinary Rules. (See LE Op. 926) Thus, the Committee believes that, in accordance with the recommendations of the ABA regarding lawyer referral services, the corporation must maintain a minimum number of participating attorneys in each region in which it operates, and further, the Committee suggests that no referral service be operated in a region unless at least five attorneys participate.

The Committee is further of the opinion that, in order to avoid any deception to the public, no single lawyer should have access to more than a single opening (position) on the referral list in the lawyer's geographic region. The Committee suggests also that the avoidance of deception requires the disclosure, by the referral service's telephone operators/corporate agents, of the relationship between the corporation and the participating lawyers, i.e., that the lawyers have paid for the advertising, as well as of the relationship or affiliation or lack thereof among the participating lawyers. (See New York

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State Bar Ass'n Opinion 597 (1/23/89), ABA/BNA Law. Man. on Prof. Conduct 901:6106; Nebraska State Bar Ass'n Advisory Committee, Opinion 89-5 (undated), 6 ABA/BNA Law. Man. on Prof. Conduct (Current Reports) 76)

Under the facts as you have presented them, the Committee finds no impropriety under DR:3-101 or DR:3-102, presuming that (a) the advertising fees as stated are not in any manner contingent upon either the number of referrals to a particular lawyer or the value of any specific case; (b) the referrals are made in strict rotation and the corporation's telephone operators/corporate agents have no discretion as to the rotation; and (c) the operators make no evaluation of the merits of any case presented, no recommendations regarding legal action, and do not mislead the callers as to the operator's function.

The Committee's opinion regarding the propriety of the lawyer referral service you describe is predicated upon the assumption that all referrals will be made only in response to telephone inquiries as a result of the advertising campaign and that the corporation and its employees will not initiate contact with any prospective clients. (See North Carolina State Bar Ass'n Opinion 10 (7/24/86), ABA/BNA Law. Man. on Prof Conduct 901:6602)

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