HEADNOTE

A lawyer's participation in a group television advertising program whereby the lawyer purchases from the advertising company the exclusive right to receive referrals from telephone calls to an "800" number from a particular geographical area generated by advertisements that the company produces and places in local media is not prohibited by the Code of Professional Responsibility. The program is not prohibited as a lawyer referral service inasmuch as the company does not act as the lawyer's agent in any substantive way in recommending the lawyer's employment. The fees paid by the lawyer are in the nature of an advertising fee and the agency does no more than identify to a caller the name of a lawyer in a geographical area who has sponsored the advertisement. The lawyer must approve the content of the advertisement in advance to assure that the content is not false or misleading. The advertisement may not raise any implication of special competency beyond a willingness to accept clients in a particular area of the law.

STATEMENT OF FACTS

Lawyer wishes to increase his personal injury client caseload by contracting with an advertising firm for a television message promoting a so-called "injury helpline." In this arrangement ("Program"), lawyers purchase the exclusive rights to the referral of all viewer calls generated from the geographical zip code area or areas selected by the attorney at the time of the contract. It is expected that a number of different lawyers will participate in any major media market, each with his or her own zip codes assigned. When the viewer calls the advertised "800" number, the answering service takes his name, city, zip code, telephone number and television station the caller is watching. A computer program identifies the attorney or law firm that bought the right to calls from the caller's zip code. All other contacts are directly between the lawyer and the potential client.

For this service, the lawyer pays a fixed monthly fee depending upon the zip code(s) chosen. The advertising agency requires that the lawyer be in good standing, licensed to practice law in the state where the commercials are to be aired, practice in the personal injury field of law, and carry professional liability insurance of at least $250,000.
QUESTION PRESENTED

Is participation in the Program prohibited under disciplinary rules regulating either lawyer advertising (DR 2-101) or lawyer referral services (DR 2-103)?

DISCUSSION

The structure of the Program does not fall exclusively into either the category of lawyer advertising, normally permitted under certain conditions (DR 2-101), or the category of a for-profit lawyer referral service, normally prohibited with certain exceptions (DR 2-103). In fact, the Program partakes of both group advertising and a referral service. In such a case, a resolution of the question can only be found by examining the policies lying behind the regulations in DR 2-101 and DR 2-103.

I. Group Advertising

EC 2-1 of Canon 2 states:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Television advertising is increasingly recognized as one way of assisting the public in recognizing legal problems and the importance of seeking legal assistance. EC 2-7 recognizes that the "selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means and others who have little or no contact with lawyers."

Since television advertising is expensive, the group advertising approach is a cost effective means of informing the public of the availability of legal counsel. The Preamble to the ABA's Commission on Advertising Goals states:

When properly done, advertising can also be a productive way for lawyers to build and maintain their client bases. Advertising and other forms of marketing can enable lawyers to attain efficiencies of scale which may help make legal services more affordable.
The generalized nature of the content of group advertising in no way lessens the obligation of the lawyer or law firm, pursuant to DR 2-101(A), to determine that the television advertisement does not contain a false, fraudulent, misleading or deceptive statement or claim. See Zauderer v. Disciplinary Counsel (1985) 471 U.S. 626. A communication is false and misleading under DR 2-101(C) if it (i) contains a "material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not materially misleading"; or (ii) "is likely to create an unjustified expectation about results the lawyer can achieve."

Where, as here, callers are referred to a particular lawyer merely because the lawyer has purchased exclusive rights to the caller's zip code location, any implication in the advertisement to a special competency of the lawyers who participate in the Program may very well be "likely to create an unjustified expectation about results the lawyer can achieve." DR 2-101(C)(2). This does not preclude the lawyers from indicating in the advertisement a common interest in representing clients in a particular field of the law, such as personal injury.

When a group of lawyers uses advertising merely to inform the public of a need for legal services in a particular area of the law (and the advertisement is not false or misleading), and indicates a method whereby a potential client can locate an interested firm or lawyer in a geographical area -- whether it be by telephone, or by a geographical listing in another form, such as the Yellow Pages -- then DR 2-101(C)(2) would not be violated.

II. Lawyer Referral

If law firm "A" hired an agency to create and broadcast an advertisement that suggested that potential clients contact "A" for legal advice, that form of client "referral" or "solicitation" would be proper under DR 2-101 and DR 2-103(A). If law firms "A," "B" or "C" similarly hired an agency to produce a joint advertisement that suggested that potential clients in Cleveland contact firm "A," that potential clients in the eastern suburbs contact firm "B," and that potential clients in the western suburbs contact firm "C," that form of advertisement would similarly seem not to conflict with the Code of Professional Responsibility.

Under the Program the only difference is that the caller must inquire of a third person in order to obtain the name of the lawyer in his area who has sponsored the advertisement. That formal difference implicates the prohibition in DR 2-103(B) 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 the organization under DR 2-103(D) is
one of a number of designated public service referral agencies whose
object is to direct clients in need of legal representation to willing
lawyers. None of those exceptions applies here.

Under current interpretations of the Code of Professional
Responsibility, a lawyer may search out known or unknown clients by
various arm's length means, including hiring an advertising firm to put
forth his message. He may not utilize a person as an agent to go on a
search for possible clients unless that agent is a bona fide legal
assistance organization or a bar association referral service or other
appropriate body.

One evident purpose of the prohibition on use of for-profit referral
services is to prevent attorneys from accomplishing through agents what
they could not do themselves. Another purpose is to ensure
accountability, which would be difficult where the attorney engages
agents who may be unknown to the prospective clients.

The key differences between allowable advertisement and prohibited
referral are the lawyer's direct connection with the message and the
generalized nature of the solicitation. No third party would deal in
any substantive way with the potential client in an advertising
situation. A lawyer may not hire an agent to go out and seek individual
clients. He may, however, hire a person to place the lawyer's own
advertisement so as to reach potential clients.

In the Program a third party does indeed "refer" a caller to a lawyer in
a designated area. But the third party is not an agent in the sense
that DR 2-103(B) contemplates. The telephone operator's function is
purely ministerial, and the operator may do no more than provide the
caller with the name of the advertising lawyer in his area. In that
sense, the operator neither "recommends" nor "secures" the employment of
the lawyer by the client as prohibited by DR 2-103(B). For his part,
the lawyer must approve each advertisement before it is broadcast.
Although the lawyer's name does not appear in tandem with the other
sponsoring attorneys on the face of the advertisement, his control over
its content is required to be the same as in ordinary advertising
contracts. Accordingly, while this program has aspects of a referral
service, the limited role of the third party in the referral and the
control of the attorney over the message communicated by the third party
avoid the problems that DR 2-103(B) seeks to address. The referral
aspects of this Program should not cause it to be in violation of the
Code of Professional Responsibility.
CONCLUSION

Therefore, a lawyer or law firm may, under the Code of Professional Responsibility, participate in such a program of group advertising, provided that

1) the advertisement is not false or misleading, and in particular, it raises no implication of special competence;

2) the lawyer maintains control over and approval of the content of the advertisement;

3) the agency does not seek out potential clients outside of the medium of the lawyer approved advertisements.  

Because the attorneys' names are not apparent in the advertisement, attorneys who participate should be especially conscious of their duty to cooperate fully in any investigation of the propriety of the advertisements.

Similar if not identical programs have been reviewed by four other ethics bodies. Three have approved the Program. Maryland State Bar Ass'n Committee on Ethics, Opinion 88-78 (1988) (program "is a form of group advertising rather than a traditional lawyer referral service."); Virginia State Bar Ass'n Standing Committee on Legal Ethics, Opinion 910 (1988) (program approved, provided lawyer reviews all advertisement copy); Supreme Court of Ohio Board of Commissioners and Grievances and Discipline, Opinion 89-30 (1989) (program not precluded by DR 2-101). The New York State Bar Association Committee on Professional Ethics opined that the Program was prohibited, but could be cured if the lawyer's own name and address appeared on the advertisement, "as well as a telephone number of an agent who will refer clients to the lawyer or to another lawyer participating in the agent's advertising program." Opinion 599 (1989).