OPINION 90-2
CLEVELAND BAR ASSOCIATION
PROFESSIONAL ETHICS COMMITTEE

HEADNOTE
A lawyer may not participate in a so-called group “advertising program” that exercises discretion and makes legal judgments by screening calls to “insure” that a participating lawyer receives “quality referrals.” This kind of program is not performing a purely ministerial function of referring respondents to the advertising to participating lawyers, but rather is operating a referral system that violates DR 2-103(B) and (D) by recommending, promoting, and securing employment for participating lawyers.

STATEMENT OF FACTS
A lawyer has been solicited to participate in an advertising, marketing, and referral program (“The Program”) directed at personal injury trial lawyers in order to increase their personal injury client base. The Program is one among many that have solicited lawyers in various areas of practice. Some assert or imply compliance with the Code of Professional Responsibility. The Program utilizes various mass media advertising to help personal injury lawyers receive maximum exposure as a group without the high cost of individual advertising. The Program’s advertising and marketing techniques include: personal injury brochures, practice brochures, direct mailings, outdoor advertising, association marketing, radio advertising, print advertising, yellow pages advertising, press releases, and extensive television advertising on network affiliate stations and cable television systems nationwide.

In conjunction with its advertising and marketing services, The Program also operates a referral service. Lawyers purchase “positions” or “rotation slots” on The Program’s referral lists that correspond to the individual lawyer’s particular geographical market. The Program handles referrals on a rotation basis. Thus, a lawyer is eligible for a referral when his name appears next on the referral list. A lawyer may purchase additional positions or slots on his market’s referral list to increase his percentage of referrals.

The referral system works in the following manner. An individual sees The Program’s advertisement and calls The Program’s “800” number. Operators nationwide, who are available 24 hours a day, 7 days a week, “carefully screen” the call and refer the caller to the nearest Program office. A “legal specialist” or “referral assistant” will “answer questions regarding [caller’s] injury,” record the facts behind the injury, and “screen” the call a second time. Then, a “shift supervisor” screens the call a third time before The Program refers the matter to one of its participating lawyers.

Throughout this extensive “screening” process, The Program’s operators, legal specialists or referral assistants, and shift supervisors determine whether the referral is “bona fide.”
According to The Program, the referral is “bona fide” if “there has been injury due to negligence;” “there is insurance coverage;” and “there is no attorney involved.” In its advertisements to prospective participating lawyers, The Program prides itself on these “bona fide,” “quality, screened referrals.”

The Program also offers, without extra cost to participating lawyers, referrals in other areas of the law - worker’s compensation, divorce, oil and gas, traffic DWI, tax, criminal, bankruptcy, immigration, real estate, and any other area in which the lawyer expresses an interest. Thus, if a caller requests a referral outside the personal injury context, The Program will refer the caller to a participating lawyer who expressed an interest in that area. These other referrals supplement, but do not displace, a participating lawyer’s personal injury referrals. For these referrals, The Program undertakes a similar “screening” process and refers callers to participating lawyers on a similar rotation basis.

**QUESTION PRESENTED**

Is participation in The Program prohibited under the disciplinary rules regulating lawyer referral services?

**DISCUSSION**

A lawyer is permitted to search out known or unknown clients by hiring an advertising firm to put forth his message. Further, a lawyer is allowed to become a member of a group advertising plan pursuant to a common interest he shares with other lawyers in a particular field of law, such as personal injury. Consequently, if The Program’s group advertisements themselves are not “false, fraudulent, misleading, or deceptive” under DR 2-101(A), a lawyer may join The Program for such advertising purposes. However, The Program goes beyond advertising and is essentially a referral service. A lawyer’s participation in this referral service creates an ethical problem.

A lawyer may not employ a third-party referral service to recommend or promote him to a prospective client. This proposition is set forth in DR 2-103(B), which provides:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client. . .

and DR 2-103(D), which provides:

> A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm. . .

Consequently, a lawyer cannot compensate a person or service to act as his agent to search for possible clients, unless that person or service fits within one of the exceptions to DR 2-103(B) and (D) - the organization is a legal aid or public defender office; military legal assistance office; lawyer referral service operated, sponsored, and approved by a bar association; or any other public service referral agency whose object is to direct clients in need of legal representation to willing lawyers. These exceptions do not apply to The Program, whose enrollment, production, monthly administrative, monthly advertising, and position fees clearly set it apart.

Recently the Cleveland Bar Association opined that there is a distinction between “allowable advertisement and prohibited referral.” Cleveland Bar Association Committee
In Opinion 89-4, we opined that an “injury-helpline” constituted a permissible advertising service, and not an impermissible referral service, because the helpline’s operator merely provided the caller with the name of a participating lawyer in the caller’s geographical area and did not act as the lawyer’s agent or recommend or endorse the lawyer’s employment. In short, the operator’s function was “purely ministerial”; the operator took the caller’s name, city, zip code, telephone number, and the television station the caller was watching and merely matched the caller with the participating lawyer who bought the rights to calls from the caller’s zip code. Thus, Opinion 89-4 opined that this service and the lawyer’s membership therein did not violate DR 2-103(B) and (D), because the operator did not “recommend,” “promote,” or “secure” the lawyer’s employment. See also, Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 89-30 (1989) (lawyer could become a member of “injury helpline”, because toll-free operators merely gave callers the names of lawyers who purchased exclusive rights in a geographical area); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 88-27 (1988) (lawyer could become a member of the Talking Yellow Pages, because a computer randomly pulled up the names of attorneys, thereby eliminating “the risk involved in a person determining which attorneys’ names to give.”)

In contrast, The Program does not merely operate a permissible advertising service or match callers with lawyers in a detached and random way. Rather, The Program operates a referral service specifically marketed to callers and lawyers as such. The Program is not acting ministerially but with a great deal of discretion.

The Program employs this discretion through a “screening” system. With respect to The Program’s personal injury referral rotation, operators, “legal specialists” or “referral assistants,” and shift supervisors, among others, rather than lawyers, pick and choose which calls are included in the referral rotation. Through this screening process, The Program makes legal determinations on such things as whether a caller’s claim sounds in negligence and is otherwise “bona fide.” With respect to The Program’s supplementary referral rotation, The Program “screens” callers who have potential claims in other areas of law. The Program makes the same legal determinations as to which cases it will accept or reject for referral. If it accepts a case, then it decides the legal area to which that case applies and refers it to a lawyer next on the rotation for that area.

The Program’s advertising boasts of its “quality, screened referrals”. Presumably, The Program’s participating lawyers, when their names come up next in the referral or supplementary referral rotation, prefer that the cases referred to them are worth taking or of “quality.” Accordingly, The Program’s screening process attempts to “insure” that participating lawyers receive these “quality” cases. These “quality” determinations may result in the possibility that The Program will reject cases as legally insufficient without giving participating lawyers the opportunity to make this judgment. The Program is, in effect, recommending, promoting, endorsing, and securing employment for participating
lawyers for certain cases only. Consequently, a lawyer’s participation in The Program would be in violation of DR 2-103(B) and (D).

**CONCLUSION**

A lawyer or law firm may not, under the Code of Professional Responsibility, participate in a program of group advertising if the program performs more than the ministerial function of placing respondents in contact with participating lawyers. In this situation, for example, The Program screens calls to make legal determinations or judgments, or decides whether a particular call or claim is “bona fide” before referring the caller to a participating lawyer.