

# Advisory Opinion 1993-1

As business and economic practices become more wide ranging, members of the bar face increasing pressures to seek out innovative approaches which can enhance their practices and generate business. The Advisory Opinions Committee has received inquiries from lawyers who have asked about non-traditional advertising and business arrangements. The questions presented are:

1. May a lawyer participate in a for-profit lawyer referral service where the lawyer pays a fee to the service, and the service advertises to the general public and makes referrals to the lawyer members of its panel on a rotating basis?
2. May a lawyer associate with a network of independent professionals who refer business to one another as a means of providing a comprehensive service to their clients, where each professional in the network bills separately for his or her services? If so,
3. May a professional network which includes a lawyer among its members advertise its services, using a trade name and also identifying each professional by his or her profession?

## LAWYER REFERRAL SERVICE

In response to the first question, the Committee concludes that participation by a lawyer in the described for-fee lawyer referral service would be unethical. The rules on advertising and solicitation govern this question.

C. Payments for referrals. A lawyer shall not give anything of value or otherwise provide a benefit to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of the advertising or the reasonable cost of preparing the communication which is permitted by this rule and may pay the usual charges for a not-for-profit lawyer referral service or other legal service organization.

SCRA 1986 16-702, published in 31 N.M. Bar Bull. 485 (May 14, 1992) (effective Aug. 1, 1992).

The mandate of Rule 16-702(C) is that a lawyer "is not permitted to pay another person for channeling professional work." Model Rules of Professional Conduct Rule 7.2(c) cmt. (1983). The exceptions allow payment of fees to not-for-profit referral services and "other legal service organization[s]." The meaning of "other legal service organization[s]" is not explained in the Rule or in the ABA Comment. Some insight into the phrase may be derived from the comparable provisions of the now superseded Model Code of Professional Responsibility, the precursor to the Model Rules of Professional Conduct from which the current New Mexico rules are drawn. 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 [or her] employment . . . except that he [or she] may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)." DR 2-103(D) refers to a legal aid office, a public defender office, a military legal assistance office, a lawyer referral service operated, sponsored, or approved by a bar association, and any other non-profit organization "that recommends, furnishes, or pays for legal services to its members or beneficiaries. . . ." The last category seems to refer to organizations such as group legal service plans.

Similar issues were addressed by the Committee in Advisory Opinions 1983-1 and 1987-7. In those opinions the Committee concluded that a lawyer who participated in a private, for-fee, referral service would be engaging in unethical conduct. A concern, under the Code and under the current rule, is that the lawyer's participation in a fee-based service might interfere with the lawyer's professional judgment on behalf of his or her client.

The advertising rules attempt to reconcile the public's need, and right, to know about legal services within the construct of a profession which has traditionally held that a lawyer should not solicit business. The Advisory Committee of the Nebraska State Bar Association, in Opinion 89-3 (undated), determined that a lawyer may participate in a for-profit lawyer referral program if the lawyer does not give anything of value to the service in return for recommending his or her services. The Nebraska Committee would permit the participating lawyer to offer reduced fees, or a free consultation, but would not allow payment for the promotion or advertising of legal services. In an earlier opinion, Opinion 87-2 (undated), the Nebraska Committee also expressed concern that the lawyer involved with such a service take adequate measures to protect the client's confidentiality. This Committee agrees with the position taken by its Nebraska counterpart.

In the event that a lawyer were to participate in a referral service, the lawyer, not the service, would remain responsible for compliance with the advertising rules. Thus, for example, SCRA 1986 16-701(B), among other things, prohibits an advertisement or solicitation which does not disclose the name or names of the lawyer, lawyers or law firm whose services are being advertised. Naming a person responsible to the bar and subject to its disciplinary rules assures that communications concerning lawyers' services will comply with the detailed provisions of the advertising rules. The State Bar Task Force Comments suggest accountability by urging that New Mexico "promote more disclosure rather than less disclosure and substance over style." 31 N.M. Bar Bull. 490 (May 14, 1992). Given the independence of the described referral service, it is unlikely that the lawyer's name would be included in the service's advertising or that he or she would have the requisite control over the advertising content.

It is the opinion of the Committee that it would be unethical for a lawyer to participate in a lawyer referral service unless the service were not-for-profit, or, if for-profit, the lawyer paid no fee to the service, and, in either case, the professional independence of the lawyer and the confidentiality of the clients were preserved and the advertising were in compliance with the rules.

### **PROFESSIONAL NETWORK**

In response to the second question, the Committee concludes that it would not be ethical for a lawyer to associate with a network of independent professionals, if the intent is for the lawyer to provide legal services as a part of the network or to use the network as a means of developing new clientele. The example posed by the questioner posits an estate and financial planning network where the lawyer's services would be combined with those of a certified public accountant and a financial planner.

SCRA 1986, Rule 16-504, among other things, prohibits a lawyer from sharing legal fees with a non-lawyer, from forming a partnership with a non-lawyer where "any of the activities of the partnership consist of the practice of law," or from permitting another to influence the lawyer's professional judgment, such as, for example, one who recommends the lawyer to render legal services. A lawyer is clearly prohibited from forming any sort of business association or partnership with other non-lawyer professionals, where the lawyer will practice law as part of the services to be provided by the group. The rule does not directly address the question posed, where time and services of each of the professionals will be billed separately to the clients and the lawyer and non-lawyers do not share their fees with one another, but where the members of the group will refer business to one another. Advisory Opinion 1986-8 considered a situation in which a lawyer sought to join a group whose members would meet and exchange business cards and they would then refer business prospects to their fellow members. The Committee determined that the practice constituted an impermissible recommendation or referral of the lawyer's services in violation of DR 2-103(C) of the predecessor Code. Similarly, the Committee believes that an agreement to refer business among the members of the described network of professionals in the estate and financial planning area would impinge upon the lawyer's independence of judgment, in violation of Rule 16-504(C), and would involve receipt of value in exchange for recommendation of the lawyer's services, in violation of Rule 16-702(C). The New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 657 (undated), see 8 ABA/BNA Lawyer's Manual on Professional Conduct 105, has recently considered circumstances under which it may be permissible for a lawyer to refer clients to related business enterprises with which the lawyer is affiliated. The New Jersey Committee saw problems where the subject matter of the legal representation is related to the service to be provided to the client. In such situations the client reposes trust in the lawyer's independent exercise of judgment on the client's behalf, and the referral introduces an extraneous and potentially conflicting motive for the lawyer. That Committee determined that the lawyer may refer the client to a business in which the lawyer has an interest only if 1) disclosure is made in writing, acknowledged by the client, of the lawyer's precise interest in the business and the client is advised that he or she may obtain the same services elsewhere, and 2) the client is given oral and written advice concerning the opportunity to seek independent counsel (and a reasonable period in which to do so), and 3) the lawyer keeps the law practice entirely separate, including a physically distinct location, no joint advertising and avoids other demonstration of relationship between the two. See also Ethics Advisory Committee of the South Carolina Bar, Opinion 90-16 (October, 1990). The Colorado Bar Association's Ethics Committee, Opinion 87 (July 14, 1990), in a published summary, stated that a lawyer may not participate in arrangements with non-lawyers involving the preparation and marketing of estate planning documents (e.g., living trusts) if the arrangements involve the unauthorized practice of law, fee-splitting or partnership with a non-lawyer, improper solicitation, compromised professional judgment, or breach of client confidentiality.

This Committee has similar concerns about the mutual referrals contemplated by the network consisting of a lawyer and other non-lawyer professionals. In addition to the violations of Rules 16-504(C) and 16-702(C), and the other potential problems discussed above, the Committee is concerned that the lawyer may wield undue influence over the client, such

that the client's' own judgment may be impaired with respect to the lawyer's referrals to other members of the network. There is an increased potential for conflicts of interest also, since participants in the network could well represent clients with mutually conflicting interests. SCRA 1986, 16-107(B) prohibits a lawyer's representation of a client if representation of that client may be materially limited by the lawyer's responsibilities to a third person. The ABA Comment to the rule notes that "[a] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest." The foundation upon which the conflicts rules rest is that of the lawyer's duty of loyalty to his or her client. The Committee believes that the lawyer's loyalty may be compromised were he or she to participate in a network with non-lawyer professionals. Also, a network with multiple participants raises serious prospects that client confidentiality would be compromised.

## **ADVERTISING THE NETWORK**

In response to the third question, it is the opinion of the Committee that, assuming some sort of professional network were ethically developed, the professional network may not advertise its joint services.

SCRA 1986 16-701 requires that any communications concerning a lawyer's services shall not be misleading. The Committee on Professional Ethics of the Association of the Bar of the City of New York, Opinion 1987-1 (Feb. 23, 1987), found that a lawyer who shared office space with a non-lawyer mediator could not permit the mediator to advertise that she did business from the lawyer's office. The New York Committee thought it would give the appearance that the lawyer operated, endorsed, or supported the mediation service and was, therefore, misleading. It was improper for a lawyer to let the lawyer's professional name enhance a non-lawyer's practice or to give any appearance that they were in business together. This Committee believes that it similarly would be misleading for the network to advertise its members' services jointly, and that there is a substantial likelihood that the public would be led to think that there was a partnership or other joint business arrangement.

Under a predecessor rule, Canon 27 of Canons of Professional Ethics, the New Mexico Supreme Court determined that it was unethical for an attorney to use common advertising for his law office, realty company and other related businesses. In *re Avallone*, 83 N.M. 189, 490 P.2d 235, cert. denied, 404 U.S. 906 (1971). The use of common or joint advertising also has the potential to mislead concerning the lawyer's field of practice or area of specialization, Rules 16-701(A)(5) and 16-704, and concerning results the lawyer may be able to achieve, which is not permitted pursuant to Rule 16-701(A)(2). The Committee further notes that use of a trade name by a lawyer or a law firm may be permissible, subject to the constraints on advertising discussed herein, pursuant to Rule 16-705(A), and refers to Advisory Opinion 1983-3 for further discussion of the use of trade names.

In summary, in the judgment of the members of the Advisory Opinions Committee, under the rules presently in effect, it would be unethical for a lawyer to participate in a lawyer referral service of the type described; and it would be unethical for a lawyer to join a network with other non-lawyer professionals, or to advertise that network.

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1 The advertising rules, SCRA 1986 16-701 through 704, and 706, 707, have been extensively revised and were adopted by the New Mexico Supreme Court on April 30, 1992. They were published in 31 N.M. Bar Bull. 485-490 (May 14, 1992) (effective Aug. 1, 1992). Rules 16-701 and 16-704 subsequently underwent technical amendment. 31 N.M. Bar Bull. 799-800 (Aug. 27, 1992) (effective Oct. 1, 1992). Unless otherwise noted, subsequent references to the advertising rules are to the revised and amended rules and will omit the Bar Bulletin citation.

2 Unless otherwise noted, references to state or local ethics opinions may be found in the ABA/BNA Lawyer's Manual on Professional Conduct.

3 The Committee notes that the District of Columbia is the only jurisdiction in which the Model Rule has been amended to permit non-lawyer professionals to work with lawyers in delivering legal services to the lawyer's clients without being relegated to the role of an employee or retained consultant. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991). Under the D.C. version of the rule an economist would be permitted to be a working partner in an antitrust law firm, or a CPA could work and share fees within a firm of tax lawyers.

4 It has been suggested that ethics problems may be avoided if the lawyer establishes the venture and employs the non-lawyers as independent contractors. See Pennsylvania Bar Ass'n Ethics Opinion 90-65 (1990). The nature of such a business, and whether it would pass ethical muster in New Mexico, is beyond the scope of this opinion. The ABA has considered, and for a brief period had actually adopted, a new Model Rule 5.7 which was designed to govern lawyers engaging in ancillary businesses. See ABA/BNA Lawyer's Manual on Professional Conduct 91:407-408, 91:413-418 (discussion and text of rule); and 8 ABA/BNA Lawyer's Manual on Professional Conduct 261 (discussions concerning the ABA House of Delegates vote to rescind the Model Rule).

