ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 5.4, 7.1, 7.2, 7.3, and 8.4. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 97-06
January 23, 1998

Topic: Advertising; solicitation of business; non-lawyers

Digest: It is not professionally improper for a lawyer to operate a prerecorded telephone advertisement where a fee is charged to the caller; sharing of such fees with a non-lawyer for preparation of the recording and written advertisement is permissible; sharing of legal fees with a non-lawyer in either a partnership or corporate setting is improper.

Ref.: Illinois Rules of Professional Conduct, Rules 5.4, 7.1, 7.2, 7.3 and 8.4
ISBA Advisory Opinion Nos. 94-11, 96-04 and 96-10
Annotated Model Rules of Professional Conduct, 3rd Edition, ABA

FACTS

A licensed Illinois lawyer wishes to create a 900 or 976 telephone service through a local telephone company. He would explain on a recording, "Information on how to handle my area of practice." Apparently, this lawyer will charge $15 for a five minute recording of information which applies only to Illinois law. This lawyer would purchase advertising in local newspapers giving the phone number to reach this recording and would provide a notice that each call will cost $15. He envisions that the ad would request that readers with certain type of legal problems call the recorded line for additional information.

At the end of the recorded message, the lawyer would extend an invitation to call him at a supplied voice mail number if the caller desired to pursue a specific set of facts. The lawyer would then check his voice mail messages daily and return calls. The lawyer claims that there would be no charge for the initial consultation as all his fees are charged on a contingent basis.

This Illinois lawyer and a non-lawyer are the only shareholders of an Illinois corporation which executes contracts with the phone company and others for providing the recording. The non-lawyer's voice does not appear on the recording nor is he an employee or otherwise related to the lawyer's firm. The non-lawyer assists with paperwork and handles the contracts with the telephone companies. The non-lawyer has no contact with any caller or prospective client and does not give advice, legal or otherwise. The non-lawyer receives salary and dividends equal to those received by the lawyer.

QUESTION

The inquiry concerns whether the telephone concept is improper and whether the inquirer is prohibited from having a non-lawyer as a shareholder in the proposed corporate organization.

OPINION

In our Opinion No. 94-11, the Committee considered whether a law firm could participate in a cellular telephone service offering "live legal counsel via your car phone" and concluded that such engagement was professionally improper and violative of various Rules of Professional Conduct. In that opinion, there was no indication in the facts submitted concerning whether any consideration was paid by the law firm for participation in the "legal advice" program, or how the per-call charge of $25 was billed an collected. In the instant case, likewise, there is no indication as to whether the lawyer will receive any portion of the $15 presumably charged to the caller by the telephone company for the five minute recording of "information." The Committee is unable to say that the proposed venture allowing individuals to pay $15 for receipt of general legal information is violative of the Illinois Rules of Professional Conduct. The First Amendment still applies to lawyers. Lawyers may write and sell books, if they so wish, to the general public. The Committee does not see any difference between a book offered for sale, an audio or "books-on-tape" version of that book and a prerecorded message offered for a price.

The difference between the proposed setting and that discussed in Opinion No. 94-11 is that it is not a one-on-one discussion and the caller may disregard any of the information offered. Of course, it should go without saying that the advertisement for the recording should be in compliance with Rules 7.1, 7.2 and 7.3. Under the proposed scenario, the recording would extend a unilateral invitation to call the lawyer at a supplied voice mail number if the caller desired to discuss a specific set of facts. In the event a one-on-one interview ensued, it would then be incumbent upon the lawyer to make a proper conflicts analysis.

If the proposed recording did not include an obvious solicitation to call the lawyer for an initial consultation, there would probably not be any ethical question raised. However, once solicitation is broached, an analysis must be made to determine if it is violative of the Rules of Professional Conduct.

Rule 7.2(a) provides in pertinent part that "...a lawyer may advertise services through public media, such as telephone directories, legal directories, newspapers or other periodicals, billboards, radio or television, or through written communication not involving solicitation as defined in Rule 7.3,..." Rule 7.3(a)(2) specifically allows contact for the purpose of solicitation "by letters or advertising circulars, providing that such letters and circulars and the envelopes containing them are plainly labeled as advertising material."

The distinction that needs to be drawn between the written communications allowed by the rules and the other forms of advertising is the distinction between public media and private communication. Bluntly stated, letters and advertising circulars are not a public media in the same sense as radio, television, newspapers, etc. In our ISBA Opinion No. 96-10, we analogized an internet web site or home page as the electronic equivalent of a telephone directory "yellow pages" entry and other material to be the functional equivalent of firm brochures and similar materials commonly prepared for clients and prospective clients. The Committee believes there is little dispute that the internet is a public medium. Conversely, the Committee believes that lawyer participation on a one-on-one basis with internet users via electronic bulletin boards, chat groups or similar services might implicate Rule 7.3 governing direct or private solicitation.

The question then becomes whether a recorded telephone message is the equivalent of a letter or advertising circular which is permissible solicitation under Rule 7.3(a)(2). If so, then the recording would need to be plainly labeled as "advertising material."

Comparison with ABA Model Rule 7.2 is instructive. The ABA Model Rules of Professional Conduct were adopted on August 2, 1983. In 1989, Model Rule 7.2(a) was amended to add "recorded" communication to the list of permitted advertising media and now reads, "... or through written or recorded communication...." The Comments to the Annotated Model Rules of Professional Conduct, 3rd Edition, ABA, contains a subsection under Rule 7.2 entitled "Telephone Contacts: Live v. Prerecorded." In explanation of the above 1989 amendment, the subsection states in pertinent part:

> This means that prerecorded telephone advertisements are permitted. They are generally considered as non-invasive as written advertisements, because the recipient of the call can terminate the communication simply by hanging up.

The Committee is unable to state that the Illinois Rules of Professional Conduct intended to ban prerecorded telephone advertisements or prerecorded telephone factual/legal summaries just because the word "recorded" was not adopted. It is the opinion of the Committee that such prerecorded telephone advertisements are not, per se, violative, but, rather, require an analysis of the general rules applicable to written advertisements. The members of the bar should be mindful of the following paragraph of the preamble to the Illinois Rules of Professional Conduct:

> Legal services are not a commodity. Rather, they are the result of the efforts, training, judgment and experience of the members of a learned profession. These rules reflect the sensitive task of striking a balance between making available useful information regarding the availability and merits of lawyers and the need to protect the public against deceptive or overreaching practices. All communications with clients and potential clients should be

consistent with these values.

The Committee would be remiss if it did not strongly caution that the proposed activity has a high potential for abuse. Rule 8.4, which addresses lawyer misconduct, specifically requires that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(a)(1). Without a review of the content of the recorded information, it is difficult to speculate that it would be worth $15 to the average consumer for five minutes. If the information is merely a preamble to the obvious solicitation to call a lawyer, the endeavor may well be seen as an overreaching and deceptive practice violative of Rule 8.4.

While the Committee believes that it is not the unauthorized practice of law to create either a written or recorded communication in combination or association with a non-lawyer, the inquirer must be especially vigilant to avoid sharing potential legal fees with the non-lawyer. Inasmuch as the creation of a written or recorded advertisement is not the unauthorized practice of law, the non-lawyer may share in any profits realized from the proceeds of individuals subscribing to or listening to the prerecorded message. Rule 7.2(b) specifically allows a lawyer to pay the reasonable costs of advertising or the written communication permitted under Rules 7.1 and 7.2, including the fees of personnel preparing such advertising or communication. Accordingly, the proposed corporate endeavor with the non-lawyer for the stated purpose does not violate the Rules.

Finally, Rule 5.4(a) prohibits the sharing of legal fees with a non-lawyer and Rule 5.4(b) prohibits the formation of a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. The Committee believes that, depending upon the billing and collection arrangement between the lawyer and the telephone carrier, the lawyer may share the recording fees with the non-lawyer for that portion of their endeavor. When, however, a client calls back and enters into a professional relationship with the lawyer, all fees should flow to the lawyer's law firm. A lawyer who practices law in the name of a corporation partly owned by a non-lawyer would be improperly aiding the non-lawyer in the unauthorized practice of law in violation of Rule 5.5(b). See ISBA Opinion No. 96-04.

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