

# 83

## LAWYER ADVERTISING, SOLICITATION AND PUBLICITY

Adopted November 18, 1989.

Addendum issued July 24, 1993.

### *Introduction*

The Committee has received a substantial number of inquiries from the bar regarding ethical issues relating to advertising, solicitation and publicity by lawyers. While some constitutional issues regarding lawyer advertising, solicitation and publicity remain undecided, the law has crystallized to the point where the Committee believes that a general ethical guide to lawyer advertising (including group advertising), solicitation and publicity would be helpful to the Colorado Bar.

### *Scope of This Formal Opinion*

The first substantive part of this Opinion will discuss the rules generally applicable to all lawyer advertising, solicitation and publicity. The second substantive part of this Opinion will discuss specific types of advertising, solicitation and publicity. That part is not a complete catalog of all types of advertising, solicitation and publicity; rather, the Committee has elected to address those types of advertising, solicitation and publicity which appear to raise the most substantial (and frequent) ethical questions.

### *Rules Applicable to All Types of Lawyer Advertising, Solicitation and Publicity*

#### *A. Advertising vs. Solicitation vs. Publicity*

The first task for the lawyer considering taking steps to publicize his or her services is to determine whether the proposed device constitutes “advertising,” “solicitation” or “publicity” or some combination of these concepts. “Solicitation” is a defined term in the Colorado Code of Professional Responsibility (“Code”). “Advertising” and “publicity” are not. Solicitation is defined in the Code as:

Any unrequested communication to a non-lawyer, directly or indirectly, initiated by a lawyer which indicates or implies that it is transmitted for the purpose of seeking or obtaining professional legal employment for the lawyer, the lawyer’s partner or the lawyer’s firm. “Solicitation” does not include advertising in or through any public communication. Code, Definitions, ¶ 11.

The reason that one should distinguish between advertising, solicitation and publicity is that solicitation is governed by more restrictive rules than advertising and publicity.

Usually it is easy to determine the category into which the proposed device falls. There is no question that written advertisements published in newspapers or magazines of general circulation or radio and television broadcasts are advertising. It is equally clear that promotional videotapes mailed to accident victims constitute solicitation. Publicity includes other mechanisms which put the lawyer’s name before the public.

#### *B. The General Rule*

DR 2-101(A) contains the basic regulation of all types of advertising, solicitation and publicity. DR 2-101(A) provides:

(A) A lawyer shall not, on behalf of himself, his partner, associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of advertising, solicitation or publicity containing a false, fraudulent, misleading, deceptive, or unfair statement or claim. No solicitation shall be transmitted in any manner involving undue influence, intimidation, invasion of privacy or harassing or vexatious conduct.

Generally, individual lawyer or law firm advertising is permitted if the advertising does not contain a false, fraudulent, misleading, deceptive or unfair statement or claim, and otherwise complies with all of the other requirements (mainly procedural in nature) of DR 2-101. Group advertising, however, poses special problems, discussed below. Most types of “publicity” generally are permitted, provided they do not contain a false, fraudulent, misleading, deceptive or unfair statement or claim, but certain substantive restrictions are contained in DR 2-101(J), DR 2-103, DR 2-104 and DR 7-107.

The Code takes a different approach to “solicitation.” Unless expressly authorized in the Code, solicitation is prohibited. DR 2-101(E). See discussion of solicitation rules, *infra*.

1. *Statements Prohibited on a Per Se Basis.* Certain types of statements are prohibited by the Code on a *per se* basis whether those statements are contained in advertising, solicitation or publicity. DR 2-101(B). Prohibited is any statement which:

- (1) Contains a material misrepresentation;
- (2) Omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;
- (3) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate any disciplinary rule or other law;
- (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by rules of the Colorado Supreme Court;
- (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal or other public body or official;
- (6) Contains a representation or implication that is likely to cause a reasonable person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive.

DR 2-101(B) makes it clear that these listed prohibitions are by way of example only and do not constitute the only false or misleading statements.<sup>1</sup>

Moreover, DR 2-101(C) provides further restrictions on advertising, solicitation and publicity, prohibiting any statement which:

- (1) Is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
- (2) Contains statistical data or other information based on past performance or prediction of future success;
- (3) Contains a testimonial about or endorsement of a lawyer;
- (4) Contains a statement or opinion as to the quality of the lawyer or of the lawyer’s services which cannot be factually substantiated; or
- (5) Appeals primarily to fear, greed, desire for revenge or similar emotion.

#### C. *Permitted Statements – The “Safe Harbor”*

DR 2-101(D) provides a “safe harbor” of the types of disclosure that *are* permissible. Like the list of proscribed conduct contained in DR 2-101(B) and 2-101(C), this list is illustrative only, and does not preclude other truthful, non-deceptive statements.<sup>2</sup>

#### D. *“Dignified Manner” Requirement*

DR 2-101(D) also contains a requirement that advertising and publicity (but curiously, not solicitation) which is otherwise permitted by the Code be “presented in a ‘dignified manner.’” “Dignified manner” is not a defined term in the Code, and no satisfactory definition of that term is available elsewhere. The constitutionality of the “dignified manner” requirement was placed in doubt by the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), where the Court stated:

More fundamentally, although the state undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. However, neither the U.S. Supreme Court nor any state supreme court has expressly declared a "dignified manner" requirement unconstitutional and at least one court has upheld it from a constitutional attack. In enacting the Model Rules of Professional Conduct, the American Bar Association discarded the "dignified manner" requirement stating in the Comments: "Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment." Model Rule 7.2, Comments (1983).

Nevertheless, the "dignified manner" requirement remains part of the Colorado Code. Perhaps the best guidance that can be given as to what constitutes "undignified" advertising or publicity is Justice Stewart's statement with respect to obscenity: "I know it when I see it."

### ***Special Rules Applicable to Solicitation***

#### *A. Targeted Direct Mail Solicitation*

In June 1988, the United States Supreme Court issued its opinion in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed 2d 475 (1988). The Court held that the States may not, consistent with the First Amendment, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. Because it then became clear that the portion of DR 2-101(E) prohibiting truthful, targeted, direct-mail solicitation was unconstitutional, the Colorado Supreme Court appointed a Committee to study the matter and recommend to the Supreme Court changes to bring it into compliance with *Shapiro*. Based on the report of that Committee, the Colorado Supreme Court approved amendments to DR 2-101(E) which became effective January 1, 1990. Amended Rule 2-101(E) reads as follows

(E) Unless expressly authorized in these rules, solicitation is prohibited. Where pecuniary gain is a significant motive for the solicitation, a lawyer may engage in solicitation if the solicitation is in writing, OR IS A RECORDED COMMUNICATION. Solicitation is permitted, and need not be limited to written OR RECORDED solicitation, if pecuniary gain is not a significant motive for the solicitation. EVERY WRITTEN OR RECORDED COMMUNICATION FROM A LAWYER SOLICITING PROFESSIONAL EMPLOYMENT FROM A PROSPECTIVE CLIENT KNOWN TO BE IN NEED OF LEGAL SERVICES IN A PARTICULAR MATTER SHALL INCLUDE THE WORDS "ADVERTISING MATERIAL" ON THE OUTSIDE ENVELOPE, ON THE FIRST PAGE OF ANY WRITTEN COMMUNICATION, AND AT THE BEGINNING AND ENDING OF ANY RECORDED COMMUNICATION

Thus, beginning January 1, 1990, DR 2-101(E) permits recorded as well as written solicitations and certain previously prohibited targeted direct mail solicitations are permitted. Presumably, the Colorado Supreme Court concluded that recorded communications could be stopped or turned off by a recipient just as easily as a recipient could drop a solicitation letter in the waste basket. The risks of overreaching lawyers badgering prospective clients by means of a recorded or written message would seem to be minimal. Moreover, all solicitations, whether written or recorded are subject to the strictures of DR 2-101(A) both as to the substance of the message and the manner in which the message is expressed.<sup>3</sup>

Accordingly, beginning January 1, 1990, as long as the written or recorded solicitation is truthful and non-deceptive, conforms to DR 2-101(A), (B) and (C), and includes the required description of the solicitation as "Advertising Material," the fact that the prospective clients are known to be in need of legal services in a particular matter will no longer bar written or recorded communications from a lawyer soliciting professional employment from prospective clients. If the mailing or recording is not targeted to recipients known to be in need of legal services in a particular matter, the labeling of the solicitation as "Advertising Material" is not required.

### B. *In-Person Solicitation*

In-person solicitation of non-lawyers where pecuniary gain is a significant motive for the solicitation continues to be prohibited by DR 2-101(E). In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912 (1978), the United States Supreme Court upheld over a First Amendment challenge a blanket prohibition of in-person solicitation by lawyers. *Ohralik* remains in full force after *Shapero*.

In-person solicitation of *lawyers*, as opposed to non-lawyers, is not prohibited by DR 2-101(E) nor is it prohibited by the amended rule because by definition such communications do not constitute “solicitation” under the Code.

One part of the Code expressly permits in-person solicitation and discussion of a prospective client’s need for legal services. DR 2-104(A) provides:

(A) A lawyer who has given unsolicited advice orally to a non-lawyer that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that a lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

### C. *Telephone Solicitation*

Telephone solicitation in which a lawyer seeking legal work personally calls a non-lawyer is prohibited by the Code. Although the Code does not expressly address telephone solicitation, the framework of DR 2-101(E) is that all solicitation is prohibited except as expressly authorized by the Code. Nothing in the Code authorizes live telephone solicitation, and a strong argument can be made that live telephone solicitation is sufficiently similar to in-person solicitation to justify the prophylactic ban upheld by the Supreme Court in *Ohralik*. The Model Rules of Professional Conduct expressly prohibit live telephone solicitation. Rule 7.3(a) (1989).

### D. *Manner of Solicitation*

DR 2-101(A) prohibits any solicitation which is “transmitted in any manner involving undue influence, intimidation, invasion of privacy or harassing or vexatious conduct.” It seems clear that if a recipient of a solicitation advises the lawyer that he or she does not want to receive any further communications from the lawyer, the lawyer’s failure to comply would violate DR 2-101(A). It is equally clear that targeted direct mail solicitation which is permitted by the *Shapero* decision cannot be prohibited on a *per se* basis under DR 2-101(A).

### E. *Solicitations in Which Pecuniary Gain Is Not a Significant Motive*

Solicitation is expressly authorized and need not be limited to general or written or recorded messages if pecuniary gain is not a significant motive for the solicitation. *See* DR 2-101(E) in both its present and amended forms. Thus, where pecuniary gain is not a significant motive, the communication may be made to lawyers and non-lawyers alike, may be written, recorded, in-person by telephone or face to face. Again, however, the substance of the communication as well as the manner in which it is delivered must conform to the requirements of DR 2-101(A), (B) and (C). In the Committee’s view, pecuniary gain will be a significant motive in most cases in which the lawyer charges a fee.

## ***Application of the Rules to Specific Types of Advertising, Solicitation and Publicity***

### A. *Seminars and Brochures*

Legal seminars, the audiences of which include prospective clients, can be viewed as both a form of public speaking and solicitation. As noted above, DR 2-101(E) prohibits “in-person” solicitation where “pecuniary gain is a significant motive.” Although “pecuniary gain” may be the ultimate goal of many seminar speakers, seminar speaking is permitted and would not be deemed to be in-person solicitation barred by DR 2-101(E) provided the requirements of DR 2-104(B) are met. DR 2-104(B) requires that:

- (1) The lawyer does not emphasize his own professional experience or reputation or that of his firm or any other lawyer affiliated with him; and
- (2) The lawyer does not undertake to give individual advice.

The manner in which the seminar is conducted, therefore, will be critical to whether the lawyer has complied with the Code. If the requirements of DR 2-104(B) are not complied with, the seminar presentation may constitute in-person solicitation still prohibited by amended DR 2-101(E).

Brochures are ethically permissible, provided they comply with the requirements of DR 2-101 and 103. *See also, Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985). *See Colorado Bar Association Ethics Committee Formal Opinion No. 74* (1986) which discusses lawyer newsletters.

#### B. Testimonials and Endorsements; Solicitations by Third Parties

1. Testimonials and Endorsements. The Code expressly prohibits the use of any form of advertising, solicitation or publicity which “[c]ontains a testimonial about or endorsement of a lawyer.” DR 2-101(C)(3).

Testimonials and endorsements are prohibited because they tend to mislead the recipient into believing that similar results can be achieved for them. *ABA/BNA Law. Man. Prof. Conduct*, ¶ 81:304. Endorsements and testimonials are also likely to contain “information based on past performance or prediction of future success,” which is expressly forbidden by DR 2-101(C)(2). Finally, testimonials and endorsements may involve unverifiable claims about the quality of the lawyer’s legal services. *ABA/BNA Law. Man. Prof. Conduct, supra*.

2. Solicitation by Third Parties. Generally a lawyer may not request another person or organization to solicit prospective clients. DR 2-103(C). Nor may a lawyer pay a third party to make referrals, or reward a third party for making a recommendation that results in employment. *See, In re Perl*, 407 N.W.2d 678, 682 (Minn. 1987) (payment of referral fees to non-lawyer employees was unethical even in the absence of over-reaching, deception, or harassment of vulnerable persons).

A few exceptions to this prohibition have been specified in the Code. The exceptions allow a lawyer to obtain referrals from a referral service operated, sponsored or approved by a bar association, from legal aid and public defender offices, military legal assistance offices, and, under certain circumstances, organizations which recommend, furnish or pay for legal services for their members (prepaid legal service plans). DR 2-103(C) and (D).

Even if third parties, such as approved lawyer referral agencies, are utilized by a lawyer, their solicitation of prospective clients must comply with the requirements and restrictions of DR 2-101. DR 2-103(D). Thus a lawyer cannot avoid the prohibition against in-person solicitation by hiring a non-lawyer to do what the lawyer himself or herself may not do. *Ohralik v. Ohio State Bar Ass’n, supra*, at 464, n. 22. *See, DR 1-102(A)(2)*, which disallows circumvention of a disciplinary rule through the actions of another. Thus, because in-person solicitation of prospective clients by a lawyer is not permitted (DR 2-103(A), DR 2-101(E), DR 2-104(A)), third parties may not engage in such solicitation on behalf of the lawyer.

#### C. Professional Notices, Signs, Publications and Talk Shows

1. Professional Notices and Signs. Professional notices, such as lawyer announcements, business cards, signs, letterheads, telephone directory listings, law lists and legal directory listings, are subject to the requirements of DR 2-101(A), (B) and (C). DR 2-102(A).

Professional notices containing a trade name, or a name which is misleading as to the identity of the lawyers practicing under the name, are prohibited. DR 2-102(B). The names of deceased or retired members of the firm or of a predecessor firm in a continuing line of succession may be used.

The name of an attorney who assumes a judicial, legislative, or public executive or administrative post may not remain in the name of the firm or be used in professional notices of the firm “during any significant period in which he is not actively and regularly practicing law as a member of the firm.” *Id.*

Nevertheless, an attorney returning from government practice may indicate his or her immediate prior government position in an announcement which otherwise meets the requirements of DR 2-101(A) through (C).

A firm may be identified as a “legal clinic” only if it meets each of the criteria listed in the definitions to the Code. DR 2-102(B).

Partnerships between attorneys licensed in different jurisdictions are permitted, but only if all listings of the members and associates of the firm on letterhead and other permissible listing “make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions . . . .” DR 2-102(D).

Professional notices may state the fields in which an attorney or law firm practices or that the practice is limited to one or more fields of law. DR 2-101(D)(3). A lawyer may also permit his name to be listed in lawyer referral services offices according to fields of law in which he will accept referrals. DR 2-105(A)(2). An attorney may not, however, hold him or herself out publicly as a “specialist” unless he or she has been so certified by the Colorado Supreme Court. DR 2-105(A)(4).<sup>4</sup> Attorneys who are admitted to practice before the U.S. Patent Office, and attorneys who are engaged in trademark or admiralty practice, may, however, designate themselves as a “patent attorney,” “trademark attorney,” or “admiralty lawyer” (or use slight variations of these titles as prescribed in the Code), without violating the restriction against holding oneself out as a specialist. *See* DR 2-105(A)(1).

2. Publications and Talk Shows. An attorney is not prohibited from authoring or editing articles on the law or appearing as a host or guest on a radio or television program. DR 2-104(B) provides, however: A lawyer may accept employment that results from speaking publicly, writing for a publication on legal topics, or participating in activities designed to educate non-lawyers to recognize problems, to make intelligent selection of counsel, or to utilize available legal services, whether or not such activities are sponsored by the lawyer or the lawyer’s firm, if (1) the lawyer does not emphasize his own professional experience or reputation or that of his firm or any other law firm affiliated with him, and (2) the lawyer does not undertake to give individual advice.

The attorney may be identified as an attorney but must not imply or suggest that he or she is a specialist in the area which is the subject of the article or the discussion, except to the extent permitted by DR 2-105.<sup>5</sup>

Because a careful and accurate legal analysis of any situation is dependent upon review of numerous facts, including documents, which are usually unavailable to an attorney acting as a host or a guest on a live, broadcast, or recorded audience participation program, and because of the limited amount of time generally available to discuss a particular audience member’s specific legal problem, an attorney should always caution that his or her remarks are generalizations of the law, and that an individual with a specific legal problem related to the general area of discussion should not rely upon the general discussion to evaluate his or her particular situation, but rather should consult with an attorney in private.

#### D. *Complaint Filing Publicity*

Oftentimes publicity surrounds the filing of a civil or criminal complaint, or the return of a criminal indictment. On many occasions an attorney forwards the complaint or the indictment to the press. As a general guideline it has been suggested that an attorney should not provide a complaint or indictment to the media unless specifically requested by the media. ABA Comm. on Ethics and Prof. Resp., Informal Ops. 1172 (1971), 1230 (1972) and 1345 (1975).<sup>6</sup>

#### E. *Group Advertising*

The Code contains no blanket prohibition on group advertising by lawyers. However, there are several potential violations of the Code which must be avoided by a lawyer engaging in group advertising.

For purposes of this Opinion, a “group” is defined as two or more lawyers (or law firms) who are not partners or otherwise associated in practice, who share the cost of an advertising program in

which responses to the advertisements are directed to a person or entity other than the advertising attorneys themselves.

“Group advertising” is defined as an advertising mechanism or program whereby the members of the “group” pay some third party to prepare and place the ads, receive and/or screen responses and direct potential clients to some member of the group.

1. Disciplinary Rules That Are Applicable to Group Advertising. A number of disciplinary rules are applicable to group advertising. Among the disciplinary rules that must be considered by a lawyer engaging in group advertising are DR 2-103(D) (restrictions on lawyer referral services); DR 3-101 (practice of law by a lay person); DR 3-102(A) (sharing of legal fees with non-lawyer); DR 2-103(B) (compensating a person or organization to recommend or secure employment for lawyer prohibited); DR 4-101 (lawyer must preserve the confidence of client); and DR 2-101(B) (lawyer may not practice under a trade name).

While the variations on group advertising are probably limitless, the Committee has selected three prototypes of group advertising to illustrate the applicability of these disciplinary rules.

#### 2. Group Advertising Prototypes.

(a) A for-profit third-party, non-lawyer (individual or other entity) promotes group advertising by lawyers within a given community. Attorneys may designate one or more areas of concentration and are assigned a designated geographic area (by zip code or otherwise). A general advertisement solicits calls from prospective clients who are in need of legal services. The lawyer participants are not identified in the ads, but prospective clients are advised in the ad that they will be put in touch with a lawyer who can provide assistance with a particular problem.

Calls are screened by the employees of the advertising entity according to the service needed and referred to the appropriate attorney who has contracted from that geographic area. Lawyers pay: (a) a flat fee for participation and/or (b) a flat fee per case referred and/or (c) a contingent percentage of the fee generated by the case.

Perceived ethical considerations relating to Prototype A fall into three categories. First is whether the operation constitutes a legal referral service contrary to the provisions of DR 2-103(D).

Second is whether the information which the prospective client must transmit to the advertising entity to allow the referral impinges upon the confidential attorney-client relationship as considered under DR 4-101. Also of concern is whether the screening process constitutes the practice of law by a lay person in violation of DR 3-101.

The third problem relates to DR 3-102 which prohibits sharing legal fees with a non-lawyer.

The Committee believes that the for-profit advertising entity or similar entities are, in effect, referral services. As such, they would require appropriate bar association approval or sponsorship. *See* DR 2-103(D). Measures should be taken to meet the goals of EC 2-8.

To the extent that lay persons are conducting the screening of potential clients for referral purposes, the participating attorneys are responsible for assuring that such personnel are properly trained to perform the work and that they do, in fact, comply with the DR 4-101 requirements. Any improprieties or errors are the attorney’s ultimate responsibility. *See* EC 3-4.

Because the described entity is for profit, DR 3-102(A) is implicated. None of the exceptions appear to apply to the group advertising situation outlined under Prototype A. While the payment of a flat fee for participation in the advertising/referral program might well avoid the pitfalls of DR 3-102(A), the per case payments (flat fee or contingent) are, in the opinion of the Committee, ethically improper. *See* EC 3-1, EC 3-2 (which implicates DR 5-101), DR 2-103(B) and Formal Opinion 38.

Recently the Alabama Bar Association in its Opinion 89-18, adopted February 17, 1989, has determined that “Injury Helpline” and operations similar to that described in Prototype A are not ethical. Other jurisdictions have expressed prohibitions or reservations about such operations.

A recent Cleveland Ethics Opinion (87-1, July 31, 1987) interpreting DR 2-103(D)(3) held that a lawyer may participate only in Bar sponsored referral services and only if there is no interference with the lawyer’s independent judgment.

ABA Formal Opinion 87-355 precludes lawyer participation in for-profit prepaid legal service plans which involve telephone or in-person solicitation by plan representatives. The opinion also states that a participating lawyer must assure that all advertising is accurate and does not mislead or create unjustified expectations.

South Carolina Opinion 86-13(B) (October 9, 1986) holds that a lawyer cannot participate in a lawyer referral service operated by a private corporation for profit.

Nebraska Opinion 87-2 allows private referral service participation only if there is no fee paid for the referral.

Alabama Opinion 86-78 (August 14, 1986) authorized participation in a referral service created by the legislature which was a non-profit operation.

While opinions from other jurisdictions appear to permit either flat per case fees or even contingent fees to referral services, these are invariably bar-sponsored services, with the funds tied directly to operational expenses. *See e.g.:*

- (i) ABA Informal Opinion 1076 (1968);
- (ii) California Bar Opinion 1983-70 (1983);
- (iii) Kentucky Bar Opinion F288 (1984);
- (iv) Maryland Bar Opinion 81-11(1980);
- (v) Maru 12116 (NJ Bar Opinion 393, 1978); and
- (vi) Maru 10914 (Ill. Bar Opinion 506, 1975).

A question may arise under DR 2-102(B) as to whether the use of a “trade name” in the advertising violates the DR. The Committee does not believe that the use of a trade name in the group advertising without more, is violative of the DR, unless the lawyers or firms otherwise practice under the trade name.

In summary, while the Committee would not rule out the possibility of the concept embodied in Prototype A being permissible, the ethical problems inherent appear to make such schemes unethical and impermissible under the Code.

(b) A group of lawyers sharing the same area of concentration combine to advertise. The ads are prepared by a separate company and directed to persons in need of services related to the area of concentration. Callers responding to the ads (which include a “trade name”) are referred to participating lawyers on a rotating basis, without screening or matching of the client with a particular lawyer.

Cost for participation is a flat fee.

The same ethical considerations discussed above apply to this prototype. However, if there are no per case fees, and if the costs of participating in the program are related directly to the costs of advertising, and if there is to be no profit distribution among the participating attorneys, then it would appear that the program may avoid the ethical pitfalls of Prototype A.

Since the group all share the same area of concentration, and participation is based upon concentration in the field the provisions of EC 2-8 and EC 2-15 would appear to have been complied with.

To the extent that the concept may be identified as a referral service, appropriate bar association approval should be sought. The Committee does not, in this Opinion, purport to define what constitutes a Bar Association as contemplated by DR 2-103(D).

The same concerns regarding client confidences and the same lawyer responsibility under DR 4-101 apply to this Prototype, but it would appear that compliance would be easier due to the more limited inquiry to be made of the prospective client, *i.e.*, is the problem within the scope of the participants’ area of concentration.

In summary, the Committee believes that careful structuring of the concept can bring it within all applicable rules.

(c) A group of lawyers share the actual cost of advertising which lists their separate names, addresses, phone numbers and advertising copy, otherwise consistent with DR 2-101. Incoming calls are accepted by a receptionist or answering service paid by the firms or lawyers involved.

The Committee believes that the type of advertising contemplated under this Prototype C meets existing ethical guidelines. It allows a prospective client to make a decision based upon acceptable information (*see* DR 2-101) as to who the lawyer will be.

There is no third party referral involved, no actual or potential fee splitting and no potential breach of client confidence involved, since the receptionist will merely be rerouting a call to the lawyer selected by the client.

While certain forms of group advertising can be structured to meet all current ethical requirements, there are some, primarily related to Prototype A above, which raise serious and probably insurmountable ethical obstacles for potential participants. Attorneys in Colorado should explore participation in such programs with extreme caution.

### **1993 Addendum**

On January 1, 1993, the Colorado Rules of Professional Conduct took effect, replacing the Code of Professional Responsibility cited in this opinion. Although there are some distinctions between the exact language of the rules relating to Information about Legal Services, Rules 7.1 through 7.5, and the Code provisions cited in this opinion, the Ethics Committee considers this opinion to continue to provide the principles to guide attorneys in the area of lawyer newsletters, lawyer advertising guidelines, lawyer advertising, solicitation and publicity.

## **NOTES**

1. On July 3, 1989, the United States Supreme Court granted certiorari to review the Illinois Supreme Court's decision that Illinois' disciplinary rule (like Colorado's) that prohibits a lawyer from holding himself out as a specialist does not violate the First Amendment. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 57 L. W. 3851 (U.S. 1989).

2. The language of DR 2-101(D) possibly can be read to say that these statements are the only ones that can be made. So construed, DR 2-101(D) probably is in conflict with the First Amendment. The Committee is informed by the draftsperson of DR 2-101(D) that it was intended as a "safe harbor," and not an exhaustive listing of permissible statements.

3. And, like written and recorded advertisements, all written or recorded solicitations must be maintained by the lawyer for three (3) years and must be produced on five (5) days' notice to the Colorado Supreme Court, a justice thereof, or the Grievance Committee. DR 2-101(F). The lawyer also must maintain a record and "retain in written form for a period of three (3) years information describing the method of transmittal of all solicitations and the name and address of each person solicited." DR 2-101(F).

4. The Colorado Supreme Court has prescribed no rules permitting an attorney to be certified as a specialist. *See*, note 1, *supra*.

5. Colorado Bar Association Ethics Committee Formal Opinion 3 and Informal Opinion M express a contrary view. They were issued prior to the United States Supreme Court's constitutional decisions regarding lawyer advertising. They cannot be squared with current law and they hereby are withdrawn.

6. Trial publicity, which is extensively regulated by DR 7-107, is beyond the scope of this Formal Opinion.