

The background of the cover is a painting of several umbrellas in various shades of green and brown, set against a textured, yellowish-green background. The umbrellas are scattered across the frame, some fully open and some partially visible. The overall style is impressionistic and somewhat somber.

# Georgia Bar Journal

June 2009 ■ Volume 14 ■ Number 7

What Does ERISA Have  
To Do With Insurance?

# Notice of Filing Formal Advisory Opinion in Supreme Court

**Second Publication of Proposed  
Formal Advisory Opinion Request No. 06-R1  
Hereinafter known as  
“Formal Advisory Opinion No. 09-1”**

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after June 15, 2009.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia.** The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through

the Office of the General Counsel of the State Bar or Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

## Second Publication of Formal Advisory Opinion 09-1

STATE BAR OF GEORGIA  
ISSUED BY THE FORMAL ADVISORY OPINION BOARD  
PURSUANT TO RULE 4-403 ON APRIL 3, 2009  
FORMAL ADVISORY OPINION NO. 09-1

**QUESTION PRESENTED:**

Is it permissible for an attorney to compensate a lay public relations or marketing organization to promote the services of an attorney through the advertising

means listed in Rule 7.2 of the Georgia Rules of Professional Conduct?

**SUMMARY ANSWER:**

Yes. An attorney may utilize a lay public relations or marketing organization to promote the services of the attorney through the advertising means listed in Rule 7.2 of the Georgia Rules of Professional Conduct if:

- (1) The attorney pays a flat or fixed fee (unrelated to the actual number of people who contact or hire

the attorney and unrelated to a percentage of the fee obtained for rendering legal services) for the rights to receive communications from potential clients generated by the marketing;

(2) The communication of the lay public relations or marketing organization is not false, fraudulent, deceptive or misleading;

(3) The fees paid by the attorney to the organization are the usual and reasonable fees charged by the organization; and

(4) The organization does not go beyond the ministerial function of placing callers in contact with participating attorneys based upon the attorney's geographical location.

#### **OPINION:**

Rule 7.3(c) of the Georgia Rules of Professional Conduct addresses the permitted role of lay public relations or marketing organization in promoting an attorney's services. The Rule provides in part:

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

...

(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.

It is sometimes difficult for an attorney to discern the line between payment for legal advertising that is permitted under Rule 7.1 and payment for a referral that is prohibited under Rule 7.3(c), especially in the context of television and internet media. Rule 7.3 outlines the exception for an attorney to advertise utilizing a lay public relations or marketing organization; however, the role of a lay public relations or marketing organization is not defined by the Georgia Rules of Professional Conduct. Group advertising such as provided by lay public relations or marketing organizations has been addressed by the American Bar Association and several states with regard to certain television group advertising "800" numbers (e.g. "Injury Helpline").

Opinion 2001-2 of the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline draws the distinction between a payment for an advertisement and a payment for a referral by analyzing the services provided by the organization.



## Ideal for Attorneys:

Conference Rooms  
With an Hourly Billing Rate.

A la Carte Offices & Conference Rooms

Complete Receptionist Services

Mediation and Deposition Rooms

Prestigious Business Address

Copy, Scan, Fax, Internet Access

Package Receipt

Notary and Witnessing

Private Locked Mailboxes

24-Hour Access to Offices



**Intelligent Office®**

For more information or to schedule a tour  
of our Roswell or Atlanta location,  
call 678-353-3200 or visit [www.ioatlanta.com](http://www.ioatlanta.com).

When an attorney pays an entity to perform only the ministerial function of placing the attorney's name, address, phone number, fields of practice, and biographical information into the view of the public that is considered payment for an advertisement, not payment for a referral, unless the context suggests otherwise. When an attorney pays an entity for activities that go beyond the ministerial function of placing an attorney's name, address, phone number, fields of practice, and biographical information into the view of the public, the attorney may be paying for referral services.

The case of *Alabama State Bar Assn. v. R.W. Lynch Co., Inc.*, 655 S. 2d 982, 984 (1995) is insightful, as it articulates some of the distinct characteristics of group advertising as compared to a referral service. Gleaning from a 1989 report drafted by the American Bar Association Standing Committee on Lawyer Referral and Information Service, the Alabama Supreme Court noted that group advertising commercials have several distinct characteristics and they are as follows:

- (1) The commercial expressly informs the public that it is a paid advertisement for the listed attorneys;
- (2) The calls are in no way screened by the answering service;
- (3) The caller's potential legal needs are not evaluated in any way, shape or form;
- (4) No representation is made to the caller regarding an attorney's experience or skill;
- (5) A caller is forwarded to an attorney only on the basis of the geographical area in which the caller lives;
- (6) The attorney is contractually obligated to provide a consultation to the caller who resides in the attorney's geographical area;
- (7) The attorneys who pay for the advertisement are the only persons who speak with the caller concerning the caller's legal situations; and
- (8) The attorneys who participate in the advertising program pay a flat-rate fee for the advertising which is unrelated to the number of calls or types of calls that are forwarded to the attorney.

The 7.3(c)(4) "usual and reasonable fees" charged by a lay public relations or marketing organization must be unrelated to the number of calls actually submitted to

the attorney or fees generated in that the organization is paid by the attorney for the right to receive all calls from potential clients who live in a designated area.

Further, the lay public relation or marketing organization must not screen calls in an effort to make any judgment or evaluation of the needs of the caller so that all the organization does is perform the ministerial function of providing the contact information to the attorney and potential client.

Therefore payments for services that go beyond the ministerial function would be improper unless the entity is a lawyer referral service pursuant to Rule 7.3(c) of the Georgia Rules of Professional Conduct. Additionally, payments to a lay public relations or marketing organization based upon the actual number of people who contact/hire the attorney or payments based upon a percentage of the fee obtained from rendering legal services are considered payment for a referral and as such are prohibited.

Essentially, there is no real difference between a lawyer placing an advertisement on a billboard, in a phonebook or on television which lists the attorney's area of practice and contact information (as permitted by Rules 7.1 and 7.2) from a lawyer using a marketing organization to assist in the lawyer's advertising effort; however, the fees paid must not be dependent upon the actual number of potential clients forwarded to the attorney or fees generated and the organization must have no discretion in sending potential clients to the attorney which is generally based upon the geographical location of the attorney. Whenever a law-related marketing or advertising company offer services that go beyond merely a ministerial function of providing the attorney's information and/or requires payment calculated on a per call or volume-based formula, the attorney should be aware that payment to the company will be considered an improper referral fee under Rule 7.3(c).

## Endnote

1. Some of the states which have addressed this question are Alaska, North Carolina, Texas, Washington, Florida and Ohio. With the exception of Florida, all of these states, as well as, the American Bar Association, have concluded that such advertising is group advertising and is permissible.

**PLEASE NOTE:** 2009-10 dues notices were mailed May 22, and payments are due by July 1, 2009. Payments can now be made online with a credit card or you can print an invoice online for mailing a check. Visit [www.gabar.org/news/pay\\_bar\\_dues\\_online\\_or\\_print\\_invoice/](http://www.gabar.org/news/pay_bar_dues_online_or_print_invoice/). Please note that membership is unable to process credit card payments via fax. If you have any questions, please contact the membership department at 404-527-8777.