

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1995/96-1
Mailings To Potential Clients Who May Have Need Of Legal Services
October 11, 1995

RULE REFERENCES:

- *Rule 7.2
- *Rule 7.3(c)
- *Rules Preamble - Terminology

CODE REFERENCES:

- *DR 2-101(A)

SUBJECTS:

- *Advertising and Solicitation

ANNOTATIONS:

FACTS:

The inquiring attorney is a member of the local chamber of commerce, and has access through services provided by the Chamber to the identity of persons seeking to relocate to the area. The chamber does not charge a fee for such information. Since people relocating to an area may have need of legal services, such as title examinations and closings, establishment of businesses, etc., the attorney would like to take advantage of the information released by the chamber of commerce and mail a letter to the potential client, advertising the availability of legal services. The letter is simple - merely welcoming the addressee to town, and indicating that in the event that one needs legal services, this attorney is available for consideration. The letter does not contain any advertisement of fees, rates, areas of practice, qualifications, etc., or any information that could be considered false, misleading or deceptive. However, the inquiring attorney does not wish to run afoul of professional conduct rules governing advertising or the solicitation of potential clients.

QUESTION PRESENTED:

May an attorney mail introduction letters to persons who may have need of legal services?

ANALYSIS:

New Hampshire Professional Conduct Rules

The threshold question in this inquiry is whether the activity proposed by the attorney constitutes general advertising, which is governed by Rule 7.2 of the New Hampshire Supreme Court Rules of Professional Conduct or solicitation, which is governed by Rule 7.3(c). Rule 7.3(c) provides that:

"A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The terms "solicit" and "solicitation" include contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but do not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might, in general, find such services useful."

Based on the definition of "solicit" and "solicitation", a majority of the Committee believes that the activity in question is general advertising and not solicitation. The conclusion is reached because the attorney does not have actual knowledge that the persons to whom the letters are addressed are, in fact, in need of legal services. While we concede that in some instances, a person relocating to an area would have need of the services of an attorney, Rule 7.3(c) allows such general mailings if the recipients are not "known" to need legal services. And while the New Hampshire Supreme Court has not adopted the ABA Comments to the Rules, the inquiring attorney may receive some comfort in recognizing that the term "known" is defined as denoting actual knowledge. See ABA Model Code Comments in the "Terminology" Section of the Rules of Professional Conduct. In this inquiry, the Committee believes that the recipients are, at best, so situated that "they might in general find such services useful". Rule 7.3(c).

Therefore, Rule 7.2 governs the inquiry, which requires that a copy of the advertisement or communication be kept for two (2) years after its last dissemination, along with a record of where and when it was used. It also prohibits the attorney from providing anything of value to any person, such as the chamber of commerce, who recommends the lawyer's services, except the payment of the reasonable expenses of advertising or written communication. Finally, the communication must identify the name of at least one lawyer responsible for its content. Rule 7.2.

The Committee has reached similar conclusions about such activity in the past. In Opinion 83-4/15, the Committee opined that use of advertising circulars or similar materials distributed through a mass mailing, and not specifically targeted at persons known to need legal services was permissible under Disciplinary Rule 2-101(A), the predecessor to the present Rule 7.3(c). A similar result was reached in Opinion 1986-87/14(a) in which an attorney wished to mail pamphlets about real estate to addressees not otherwise known to be in need of legal services. In 1990, this Committee also opined that a general mailing by a New Hampshire attorney to other New Hampshire and Massachusetts attorneys, advertising the availability of his services in the area of criminal law was permissible, on grounds that the mailing was simply advertising not directed to those known to have need of legal services. The mailing was specifically found not to constitute a solicitation, under the definition set forth in Rule 7.3(c). See Opinion 1990-91/8. Finally, in Opinion 1992-1993/6, this Committee declared that the practice of placing a supply of business cards indicating the lawyer's fields of law in areas where people who may be in need of legal services might see the cards did not constitute solicitation.

However, the Committee also recognizes that the attorney's activity creeps ever closer toward solicitation. The dissemination by a chamber of commerce staff member of facts or background about a recipient may provide the attorney with sufficient knowledge that the mailing may constitute solicitation. Thus, our analysis continues.

Notwithstanding the general prohibition against solicitation in Rule 7.3(c), the New Hampshire version of the rule significantly departs from the American Bar Association rule, in stating that:

"The prohibition in paragraph (c) shall not apply to (1) a written solicitation of professional employment to a prospective client in connection with business or commerce carried on or anticipated to be carried on by such client A lawyer shall retain a copy of any written solicitation and mailing list for a period of two years. All mailings will clearly be labeled 'Advertising'."

In continuing with the analysis, the Committee makes two observations. First, it is assumed that the inquiring attorney is motivated in significant part by pecuniary gain, in seeking to contact such persons. Second, this opinion is limited to mail solicitation, and does not consider other forms of solicitation covered by the Rule. That being the case, Rule 7.3(c) permits the inquiring attorney to contact a prospective client by mail in connection with "business or commerce" carried on or anticipated to be carried on by such client. Therefore, the rule allows contact in an instance where the attorney knows that a person is seeking to relocate his/her business or trade to the area.

However, the rule bars the attorney from soliciting professional employment from persons who may have need of legal services other than those related to that person's "business or commerce". Thus, contacting persons by mail who are known to need assistance with a closing, a new will, a personal injury or other form of non-commercial legal service is prohibited.

We therefore find that under Rule 7.3(c), contacting persons through the use of targeted mail who are known to need legal services related to their "business or commerce" is permissible. Ironically, such solicitation must be labeled as "advertising" and retained in accordance with the Rule. However, targeted mail solicitation of persons who are known to be in need of other types of legal services is prohibited.

United States Supreme Court Rulings

Our analysis does not end with the findings in the previous paragraphs. In 1988, the United States Supreme Court ruled on the constitutionality of prohibitions against targeted direct mail solicitation of persons known to be in need of legal services. In Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988), the Court declared that states may not categorically prohibit targeted mail advertising. In that case, a Kentucky lawyer proposed to mail letters to potential clients who were facing mortgage foreclosure proceedings. Founding its analysis on the First Amendment and in particular, the doctrine of commercial speech, the Court ruled that such letters did not present the same dangers of over-reaching or undue influence that in-person solicitation posed. See Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). The majority dismissed the argument that individuals in certain kinds of legal trouble might be particularly vulnerable to a lawyer's written communication. Instead, it stated that the policy of dissemination of information about legal services and rights favored such communications. With other controls available, such as the requirement to keep letters on file and the prohibition against the dissemination of false, misleading or deceptive information in the letter, the Rule was not tightly tailored to overcome First Amendment concerns.

While Shapero remains good law, it is of some note that in the past term, the Court upheld a Florida rule requiring attorneys to wait thirty (30) days following an accident or disaster before sending targeted mail solicitations to victims or their families, or from accepting a referral from a lawyer referral service in violation of such a limitation. Florida Bar v. Went For It, Inc., ___ U.S. ___, 63 U.S.L.W. 4644 (1995). In its opinion, the majority signaled some distaste for the Court's past lawyer advertising cases; although Shapero continues to be valid.

As a result, despite the ban described above which appears to be created by New Hampshire RPC 7.3(c), it would likely be difficult to enforce a violation of the Rule as it is presently written. While the New Hampshire rule does contain an exception not written into the Kentucky rule - one for potential clients who may have need for legal services related to their "business or commerce" - the exception probably is not sufficient to justify a total prophylactic ban on targeted mail solicitation of potential non-business clients, given the Court's reasoning in Shapero and the practice which the Court upheld - sending letters to persons facing foreclosures.

Finally, it should be noted that in the wake of Shapero and its progeny, new rules to govern solicitation of potential clients and intended to comport with the United States Supreme Court's rulings on commercial speech/lawyer advertising have been presented to the New Hampshire Supreme Court. No action has been taken to date.