

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion 1990-91/8
Solicitation/Advertising
February 19, 1991

RULE REFERENCES:

- *Rule 7.1
- *Rule 7.2
- *Rule 7.3
- *Rule 7.3(c)
- *Rule 7.4

SUBJECTS:

- *Advertising & Solicitation

ANNOTATIONS:

A letter mailed generally to other attorneys advising them of the availability of the inquiring attorney for specific types of cases is permissible so long as: a) it complies with the requirements of Rule 7.1 concerning false or misleading statements; b) the lawyer retains a copy of any written solicitation and mailing list for period of two years, and c) the mailing is clearly labeled advertising.

While the proposed mailing to other attorneys does not constitute "Solicitation" as defined, it is recommended that it be clearly labeled "Advertising", to comply with the spirit of Rules 7.2 and 7.3. (Rule 7.2; Rule 7.3; Rule 7.3(c)).

Any advertisement should avoid improperly stating or implying that the lawyer is a specialist in a particular field, even though it is permissible to list areas of practice or non-practice. (Rule 7.1; Rule 7.4)

FACTS:

The Committee was asked to evaluate a proposal by the inquiring attorney to send a form letter and resume to a number of attorneys in Massachusetts and New Hampshire. The purpose of the letter is to advise these attorneys that the inquiring attorney is available for assisting them and their clients in New Hampshire criminal cases. The letter advises the recipients that the inquiring attorney has been involved in practice in the area of criminal law for a number of years and that he presently accepts only criminal cases. The letter encloses a brief personal resume.

QUESTION:

May the inquiring attorney distribute the letter and resume without violating any rules of professional conduct.

RESPONSE:

Rule 7.2 states as follows:

Rule 7.2 Advertising

- a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.
- b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
- c) A lawyer shall not give anything of value to person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.
- d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

The letter and enclosed resume anticipated by the inquiring attorney is advertising, and therefore subject to the provisions of Rule 7.2. It is noted that the United States Supreme Court has held in Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) that lawyer advertising, when presented in a truthful and non-deceptive manner, is constitutionally protected commercial speech. This decision raises a question as to whether Rule 7.2 would survive constitutional challenge. However, assuming that Rule 7.2 remains valid, the rule requires that the communication may not make false or misleading statements about the lawyer or the lawyer's services. (See Rule 7.1.) The communication must comply with Rule 7.1 in all respects. Thus, it may not (among other things): a) contain a material misrepresentation of fact or law or omit facts necessary to make the statement not materially misleading, b) create an unjustified expectation about results the lawyer can achieve, or c) compare the lawyer's services with another lawyer's services. (See NH Op 83-4/15 - Mass Mailed Circulars or Brochures.)

Additionally, the written communication is limited by Rule 7.3 in that it may not involve "solicitation" (cf. Shapero, supra, which suggests that some forms of written solicitation are also protected.) Solicitation is defined in Rule 7.3(c) "...as 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 the particular matter, but who are so

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situated that they might in general find such services useful...". In light of this definition, the mailing anticipated by the inquiring attorney is not a solicitation. (See NHÊOp 83-4/15, supra.)

An ambiguity exists between Rule 7.2 and 7.3. Rule 7.2 regulates advertising but does not require that advertisements be specifically labeled as such. On the other hand, Rule 7.3 regulates solicitation and requires [in Section 7.3(c)] that solicitation mailings which are not prohibited by the Rule must be "clearly labeled 'Advertising'". Although the mailing under discussion here is not a solicitation, we believe that it should nevertheless be labeled "advertising" to comply with the spirit of Rules 7.2 and 7.3 despite the ambiguity in the language of the Rules.

It is noted that communications, such as the one proposed by the inquiring attorney, may violate the provisions of Rule 7.4 if such communications improperly state or imply that the lawyer is a specialist in a particular field. Under Rule 7.4, a lawyer may present or list areas of practice or non-practice. However, the lawyer may not state or imply that the lawyer is a "specialist", unless the lawyer is certified in a particular field by the New Hampshire Supreme Court. (See NH Op 82-3/22 - Advertising Out-of-State Firm - Lawyer Directed Advertising in New Hampshire.) The recent United States Supreme Court decision in the case of Peel v. Attorney Registration and Disciplinary commission of Illinois, 54 US Law Week 4684 (1990) has raised a question as to whether Rule 7.4, in its present form, is consistent with the principles set forth in Peel. Nevertheless, even under Peel, it seem clear that an attorney may not simply claim to be a "specialist" without indicating an appropriate certification.

CONCLUSION:

In conclusion, the communication presented by the inquiring attorney, which consists of a form letter and attached resume, is permissible as long as it complies with the provisions of rule 7.2 (which incorporates by reference the provisions of Rule 7.1 and 7.3) and does not state or imply a specialization in violation of Rule 7.4. In accordance with Rule 7.2, a copy or recording of an advertisement or written communication should be kept for two years after its last dissemination along with a record of when and where is was used. The mailing should be labeled "Advertising".