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February 8, 1988

Mr. Patrick Ward
Chairman of Ethics Committee
North Dakota State Bar Association
P.O. Box 1695
Bismarck, North Dakota 58502

Dear Mr. Ward:

We are a mid-sized Denver-based law firm with clients both in Colorado and in other states, including North Dakota. Our firm is organized into "practice groups" which attempt to address legal problems and issues common to certain groups of clients. As part of their efforts to serve these clients and the community, certain practice groups within the firm have periodically published newsletters, which are mailed to both Colorado and out-of-state clients. A photocopy sample of one such newsletter is enclosed as an example.

In addition, certain practice groups began mailing newsletters to non-clients within the state of Colorado this past March, after the Ethics Committee of the Colorado Bar Association adopted Formal Opinion No. 74 in July 1986, permitting Colorado firms to do so. A copy of that opinion is enclosed for your information.

We are writing to inquire whether it is permissible to send a newsletter to companies or individuals in your state who are not currently clients of our firm.

Thank you in advance for your time and assistance. If you have any questions about this request, please do not hesitate to contact me at your convenience. [REDACTED] we are here during the usual business hours, Mountain Standard Time. In my absence, please ask to speak to [REDACTED].

We look forward to your response.

Very truly yours,

[REDACTED]

[REDACTED]

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June 2, 1988

[REDACTED]

Re: Ethics Question - North Dakota

Dear [REDACTED]

The Ethics Committee of the State Bar Association of North Dakota discussed your request for an opinion in your letter dated February 8, 1988, at its meeting held on June 1, 1988.

The Committee does not see any ethical problems arising under the North Dakota Code of Professional Conduct by your mailing of the newsletter so long as you do so in accordance with the Opinion No. 74 of the Colorado Ethics Committee which you provided.

Rule 7.1 of the North Dakota Rules of Professional Conduct permits such communications with both clients and non-clients so long as the information furnished is not false or misleading as those terms are defined in the rule.

We hope this letter is of some guidance to you in determining what course of conduct to pursue.

Sincerely,

Patrick J. Ward, Chairman,
Ethics Committee, State
Bar Association of North
Dakota

PJW:ch
[REDACTED]

ROTHGERBER, APPEL, POWERS & JOHNSON BANKING CLIENT NEWSLETTER

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VOL. 3—NO. 2

FALL 1987

HIGHLIGHTS OF THIS ISSUE

- Congress Passes Comprehensive Banking Bill
- Interstate Banking Soon in Colorado
- Reacting to a Takeover Bid
- Protecting Outside Directors
- Tax Reform Act of 1986 Changes ISO Rules
- Banking Briefs
- IRS Underreporter Backup Withholding Notices

CONGRESS PASSES COMPREHENSIVE BANKING BILL

The Competitive Equality Banking Act was signed in August 1987. The Bill is comprehensive and covers many aspects of the financial institution industry; the next issue of the Newsletter will contain a more detailed analysis of the Act, as more information becomes available. However, some of the highlights relevant to our readers are as follows:

- *Non-Bank Bank Expansion Prohibited.* The Bill prohibits companies which are not bank holding companies and own non-bank banks from further expanding their non-banking operations.
- *Agricultural banks will*, pursuant to regulations now being drafted by the federal regulators, be allowed to rebook certain charged-off or charged-down agricultural assets and amortize them over a period not to exceed seven years. This legislation could breathe new life into agricultural banks presently experiencing capital shortfalls brought on by economic problems.
- *Moratorium on the expansion of insurance activities by bank holding companies* through acquisition of insurance agencies or state banks.
- *Moratorium on the securities activities of bank holding companies and bank holding company affiliates.*
- *FDIC Bridge Banks Permitted.* To give the Federal Deposit Insurance Corporation additional tools with which to prevent bank failures, the FDIC now may, in certain cases, charter "bridge banks" which can bridge the gap between a closing of an existing bank and the purchase of the assets and/or the assumption of the liabilities of the failed bank by a new or existing institution.
- *FSLIC Bail-Out.* The Federal Home Loan Banks have been authorized to issue approximately \$10,500,000 in 100 percent U.S. Government-insured bonds for the purpose of shoring up the FSLIC deposit insurance fund. When issued, the bonds are to be paid back with assessments on FSLIC-insured institutions.
- *Fed Reporting Requirements.* Hopefully you are aware that non-banking parent companies which controlled non-bank banks on March 5, 1987 must have reported that fact to the Federal Reserve District Bank in their district on or before October 9, 1987. The Fed reports should have included the names, addresses and description of the activities of the banks controlled by those companies.

If you have any questions about the Act before the next issue of the Newsletter, please contact Tennyson Grebenar or Robin Kovash at (303) 623-9000.

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INTERSTATE BANKING SOON IN COLORADO

At the annual convention of the Colorado Independent Bankers September 19 in Beaver Creek, Colorado, the Independent Bankers passed a resolution supporting nationwide interstate banking in Colorado. Because all segments of the Colorado banking industry have now voiced support for some type of interstate banking for Colorado, it seems certain that interstate banking will be passed in the next Colorado legislative session.

The final version of a bill, whether it is regional, reciprocal or immediate full interstate, is still in doubt but most observers now believe that it will be impossible for the legislature not to pass an interstate banking bill.

* * *

REACTING TO A TAKEOVER BID

An earlier Newsletter discussed "Shark Repellent" methods which banks and bank holding companies might use to make themselves less attractive as takeover candidates. "Shark Repellents" are generally articles of incorporation and bylaws provisions which make control of an entity more difficult and/or costly for an unfriendly bidder. But many times the "Sharks" are not repelled. The "Shark" will approach management and the board of directors of its target in hopes of pressuring them into supporting a "friendly" takeover and thereby avoiding the repellent provisions. This "bear-hug" approach can be intimidating, especially when, during his presentation, the "Shark" describes the potential liabilities for the directors if they do not support the offer and shareholder litigation is instituted.

While litigation cannot always be avoided, it can be won if the directors are careful in exercising their discretion when turning down an offer for corporate control. For years, directors have been protected by the so-called "business judgment rule," which insulates directors from liability for decisions made by them unless bad faith, self-dealing or gross overreaching are shown. Boards are presumed to have used sound business judgment and courts have been reluctant to overturn their decisions if they can be attributed to any rational purpose.

In the takeover and tender offer context, the business judgment rule has been used to condone defensive tactics undertaken by a target's management. However, to claim the protection of the business judgment rule, recent cases have added some new requirements. The Delaware Supreme Court in the Van Gorkom case (Smith v. Van Gorkom, 488 A. 2d 858 (Del. 1985)) has held that there is no protection for directors who fail to inform themselves of all reasonably available information before making a decision. This requires investigation, fact-finding and data gathering, and well-documented, thoughtful deliberation before a decision is made. In meeting these standards, the board should use outside experts—accountants, investment bankers and attorneys—to help gather information and evaluate the offer. Often, investment bankers are hired to render an opinion as to the "fairness" of the offer. These fairness opinions, though often extremely costly, have been given considerable weight by courts when determining whether directors have met the standard of care required before rejecting or accepting offers.

In addition, if directors decide to defend against an offer, they must be able to demonstrate that the primary purpose for refusing the offer or defending against it is other than to entrench management and preserve their positions as officers and directors. Primary purposes could include maximizing value to shareholders, preserving corporate assets or insuring that customer, depositor or community needs are met. To this end, a committee of the board comprised of non-employee directors should be formed to independently consider and make recommendations about the offer. This committee should also consider employing their own advisors and/or legal counsel. When such independent committees, after appropriately informing themselves as required by Van Gorkom, have rejected an offer, the courts have been exceedingly reluctant to challenge the decision.

After the business judgment to refuse an offer and defend against it has been made, there are many defensive tactics that can be undertaken. "Poison Pills" are essentially dividends to shareholders of preferred stock or other securities for which high dividends or conversion rights kick in, in the event of a change of control.

Many defenders look for "White Knights," or friendly competing tender offerers, to come in and bid against the unfriendly offerer. Sometimes, the management bid group becomes the "White Knight." In such cases, the courts have required that the outside directors in essence become auctioneers temporarily in possession of the bank or company. The directors must assure that the highest price available is obtained for the shareholders and that management not be given an unfair advantage in the bidding. A third alternative is for a holding company or an ESOP to be its own "White Knight" by buying up shares itself to keep them out of the offerers' hands.

One of the most aggressive defenses is the "Pac-Man" defense, where the original target in turn makes an offer for the shares of its "Shark." Future editions will discuss these defensive measures in more detail. If you have any questions on this topic, please contact Bill Johnson or Woody Davis.

* * *

PROTECTING OUTSIDE DIRECTORS

The directors and officers liability insurance crisis and increased shareholder litigation have certainly taken the glamour out of being a corporate or bank director. Recently, many banks and holding companies have found it increasingly difficult to find willing outside non-management directors. Directors have been lured not only with higher fees, but also by offers of more benefits and protections. Many banks and corporations have made

corporate assets available to outside directors to let them hire their own independent legal counsel and other advisors.

With this outside help, the outside directors can ensure that they have maximum benefits under statutory and corporate indemnification provisions, that insurance claim procedures are followed and that they receive independent counseling on matters in which there is the potential of a conflict of interest for management directors. Such independent counsel can itself draft management employment agreements, thereby assuring independence and can be familiar with the bank or company and available to counsel and independent committees of the board, if and when a bid is made by either a third party or a management-led group for the bank. Please contact Tennyson Grebenar, Woody Davis, or Scott Swenson for further information.

* * *

TAX REFORM ACT OF 1986 CHANGES INCENTIVE STOCK OPTION RULES

Incentive stock options ("ISOs") have been a popular compensation device used to attract and motivate talented employees. An employee who receives a qualified ISO is not taxed on the grant or exercise of the option and is taxed at capital gains rates when the stock received from the exercise of the option is sold. This tax treatment is only available if, among other requirements, the ISO and the ISO plan meet the requirements of the Internal Revenue Code. The Tax Reform Act of 1986 (the "Act") modified two important requirements that must be met by an ISO and the ISO plan, offering increased flexibility to corporate employers to grant options and making ISOs attractive to corporate employers who may have not previously considered ISOs as a compensation device.

In order for a plan to qualify as an ISO plan, under the law prior to the Act, an employee could not receive in the same year options for stock with an aggregate value (determined at the date of the grant) of more than \$100,000 under all plans of the employer corporation, its parent and subsidiary corporation. Under the Act, an employee may not receive options which are first exercisable in the same year for stock with an aggregate value of more than \$100,000 (determined on the date of the grant). As a result, because an ISO may be exercisable for up to ten years from the date of the grant, an employer is able to offer increased amounts of options.

The new limit applies to options granted after December 31, 1986. The Internal Revenue Service has recently stated that existing ISO plans are not required to be amended to provide for the new limit at this time. If, however, ISOs are granted for any year in excess of the new limit, a special rule may apply to determine which options will not be qualified for ISO tax treatment.

The Act also repealed the sequential exercise rule. Under the prior law, in order to qualify as an ISO under the Internal Revenue Code, the option must have been exercisable in the order granted, making ISOs unavailable to corporate employers which have experienced a decline in stock prices. The Act repeals that requirement. As a result, ISOs may be available as a real benefit to corporate employers which have experienced a decline in stock prices.

The repeal of the sequential exercise rule applies to any ISO granted after December 31, 1986. For this reason, ISOs granted before January 1, 1987 may not be modified to delete the sequential exercise requirement. With respect to existing ISO plans, the amendment of these plans to delete the sequential exercise rule for options granted after 1986 is not mandatory. If, however, an employer does not amend an existing ISO plan to delete the sequential exercise rule continuing to grant ISOs after 1986, certain problems may be experienced if the employee to whom the option is granted wishes to exercise the option before exercising an earlier granted option taking advantage of the new law. For further information on this topic, please contact Ray McCall or Jan Steinhour.

* * *

BANKING BRIEFS

Regulation Z Revisions

The Federal Reserve Board has published the final changes to the Official Staff Commentary to Regulation Z under the Truth-in-Lending Act. The revisions became effective on April 1, 1987, but compliance became mandatory October 1, 1987. Two of these changes deserve mention.

The first change addresses open-end lines of credit which were previously exempt from Regulation Z because the commitment under the open-end plan exceeded the sum of \$25,000. Because of the recent tax revisions, many borrowers have attempted to assure deductibility of interest payments by securing high-credit-limit plans such as these with a deed of trust on their principal residence.

Adding a deed of trust in this fashion causes the previously exempt plan to suddenly become a covered transaction under Regulation Z. The revised commentary explains that this event will trigger the lender's requirement to deliver a disclosure statement to the borrower reflecting the current account terms. Moreover, the lender must begin complying with other open-end credit requirements under Regulation Z. For example, the right of rescission notice must be delivered to the borrower at the time the deed of trust is added to the plan.

The other noteworthy change relates to credit card indebtedness and the right of offset. Under Regulation Z, credit card issuers may not set off a cardholder's indebtedness under a credit card plan against funds maintained by the cardholder on deposit with the credit card issuer. There is an exception to this rule for a card issuer which holds a legitimate security interest in the deposit funds. Many card issuers routinely insert language in the cardholder agreement which attempts to grant a security interest of this nature to the card issuer. In the event of default, the card issuer then seizes the deposit funds under the theory that it is a bona fide secured creditor with a valid security interest in the deposit funds.

The Board has wrestled with this problem for many years. Consumers have consistently complained that the boilerplate language in the cardholder agreement is nothing more than the functional right of offset. Believing that it must stem this abuse, the Board has now revised the commentary to provide that routine language of this nature will no longer be sufficient. The consumer must instead be made aware that he or she is granting a security interest in a deposit account. The revised commentary gives examples of the kinds of procedures which would pass muster. The Board has suggested that the consumer could sign or initial a specific portion of the agreement dealing with the security interest, or the security agreement could be placed on a separate page. Another method mentioned by the Board would permit the card issuer to make reference in the agreement to the customer's deposit account number or to a specific amount of funds on deposit.

Any of these methods will require a revision of the basic cardholder agreement and the implementation of new procedures. Bankers will have to weigh the expense and inconvenience of doing this against the benefits to be achieved. In today's economy, however, an enforceable security interest in deposit account funds may prove exceedingly valuable. Information contact: Norm Helwig, Robin Kovash.

* * *

FDIC Suspension of Bank President Held Unconstitutional. The Federal District Court of the Northern District of Iowa has held that, under certain circumstances, the post-suspension process under 12 U.S.C. § 1818(g) is unconstitutional. Federal banking regulators are authorized, under section 1818(g), to suspend bank directors and officers of FDIC-insured banks if the bank official is indicted in connection with the commission of a crime involving dishonesty or a breach of trust, and the federal regulator believes that the continued services of that officer may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the institution.

The issue in the case of Mallen v. FDIC (decided February 17, 1987), was whether a president of an insured bank could be suspended as a result of the indictments charging the president for making false financial statements and for failing to disclose personal business interests in connection with loans made by his bank. FDIC regulations found at 12 C.F.R. Part 308, which are promulgated under section 1818(g), permitted the FDIC to delay an administrative hearing on the suspension for up to 95 days and allowed oral evidence at the administrative hearing only at the discretion of the hearing officer. Due to these weaknesses—the fact that there is no provision for a full hearing permitting oral evidence and a prompt disposition—the court found that the post-suspension hearing provided under the statute is meaningless. The statute was declared unconstitutional as violating a bank officer's rights to procedural due process of law under the Fifth Amendment to the United States Constitution.

A finding that the continued employment of the president constituted a property interest of the bank and the individual which was entitled to protection under the due process clause was based on the particular facts involved in that case. Although the application of the court's ruling may be limited as a result, the decision is applauded as a reminder that constitutional protections are available to strike down administrative overreaching. Information contact: Tennyson Grebenar, Robin Kovash.

* * *

Branch Banking Update. In the last issue of the Newsletter, we reported a new Mississippi case which held that national banks could branch in a state where savings and loan associations could branch if the operations of the savings and loan associations were such that they fell within the definition of "bank" under the National Bank Act. We incorrectly gave the name of that case. The name of the case is Department of Banking and Consumer Finance of Mississippi v. Clarke.

The State of Mississippi recently attempted to appeal the decision to the United States Supreme Court, but the Supreme Court declined to review. This means that the decision will stand in Mississippi, and it will also provide precedent for litigation in other non-branching states such as Colorado. Indeed, a legal battle has already erupted in Texas over this issue.

We feel this new attack on unit banking will gain momentum. The Comptroller of the Currency will undoubtedly continue his policy of expanding the authority of national banks to branch, even in non-branch states. We will keep you informed.

* * *

Enforcement Action Disclosure Killed. For several years the FDIC and the OCC have been proposing, adopting and then postponing the implementation of regulations that would make public information about regulatory enforcement actions against banks which have the FDIC or OCC as their primary federal regulator. After being besieged by negative comments from the banking industry, both agencies finally relented and announced recently that the policy statement of the FDIC, which was to take effect July 1, 1987, will be withdrawn. Instead, a joint policy of the OCC and the FDIC would require that banks make available to customers and bank stockholders certain information from call reports for the two previous years. That information would include balance sheet data, income statements, allowances for loan losses data on non-performing loans and some other types of data. Banks would also be allowed to discuss some of the call report information to prevent public or shareholder misunderstanding of such information, particularly negative information.

It is proposed that such banks be required to post notices of the availability of this information in their lobbies and that the information be updated at the beginning of each year. Information contact: Tennyson Grebenar, Robin Kovash.

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Capital Forbearance For All. All banks, not just agricultural and energy banks, are now eligible for capital forbearance as a result of recent guideline changes made by the Federal regulators. Under the new guidelines, the application deadline for capital forbearance has been extended one year to December 31, 1988 with the expiration of the period for capital forbearance extended until January 1, 1995. The minimum capital requirement for capital forbearance eligibility has been eliminated; however, as a matter of regulatory policy, an applicant might still be required to demonstrate an ability to maintain primary capital at 4 percent of assets.

We will continue to monitor regulatory policy in this area and keep you informed as new developments occur.

* * *

Bank Holding Company Obligations to Subsidiaries. In April, the Federal Reserve Board made clear what it said was its long-established policy that bank holding companies should be a source of strength to their bank subsidiaries. The Fed did so in the Hawkeye Bancorp. decision which charged Hawkeye with committing an unsafe and unsound banking practice because it did not inject \$1,350,000 to save and recapitalize its subsidiary bank, the State Bank of Allison, in Allison, Iowa.

Later, the Fed dropped its unsafe and unsound banking charges against Hawkeye and it issued new policy statements on bank holding company obligations to support subsidiary banks.

In a policy statement issued April 24, 1987, the Federal Reserve Board stated that bank holding companies which fail to provide financial assistance to failing or troubled subsidiary banks will be considered to be in violation of Regulation Y and to be engaging in unsafe and unsound banking practices.

* * *

OCC News

In Office of the Comptroller of the Currency Interpretive Letter No. 378 issued March 24, 1987, the OCC found that issuing collateralized mortgage obligations ("CMOs") was not a violation of the Glass-Steagall Act.

This interpretive letter finds that "CMOs" are merely a way of funding national banking operations by issuing debt or debt securities.

See Section 16 of the Glass-Steagall Act for further information.

* * *

CAMEL Ratings. While many state banks receive their CAMEL ratings disclosed in their examination report, national banks have not. The OCC now has indicated it will soon notify all national banks of their composite CAMEL rating. While the FDIC has been disclosing these ratings since 1982, the OCC and the Federal Reserve have not disclosed these ratings. The OCC pointed out that examiners were not to discuss the ratings with the banks, that the rating is not negotiable and that disclosure of the rating by bank officers or directors will be a violation of 12 C.F.R. 4 and subject to penalties in 18 U.S.C. 641.

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FINANCIAL INSTITUTIONS DEPARTMENT NEWS

Because our attorneys are always working to keep themselves current in new legal developments, and sharing their expertise in order to serve our clients better, we thought a report on some of those activities might be of interest to our readers.

- Several of our attorneys participated in Colorado Bankers Association seminars. In April, Robin Kovash and Norm Helwig spoke at the CBA's Legal and Compliance Annual Seminar on "Consumer Protection in Electronic Fund Transfer Transactions" and on "Financial Privacy and Currency Transaction Reporting - an Update", respectively.

The CBA's May event, the 1987 Agricultural Banking Conference, featured RAP&J attorneys Tennyson Grebenar, Robin Kovash and Keith Block lecturing on "Bank Regulatory Action, Bank Examinations and Loan Documentation" and Jane Frey and Michael Guyerson reporting on "New Statutes Affecting Agricultural Lending."

- Senior Partner Bob Appel attended a seminar on federal estate and gift tax, presented by the University of Miami (Florida) Law School.

- Senior Partner Bill Johnson was co-chair of the Banking Law Institute's annual meeting, held in Washington, D.C. in April. Bill also addressed the Independent Bankers Association of America Convention, the Pennsylvania Bankers Association, the IBAA Bank Ownership Seminar and the Arkansas Bankers Association.

- Ray McCall gave a presentation on "Tax Considerations in Loan Workouts" to the Financial Institutions Section of the Colorado Bar Association in April. In addition, he was a faculty member for a Continuing Legal Education program, "The Revolution in Agricultural Law and Creditors' Rights" for which Michael Guyerson served as Program Chairman.

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INTERNAL REVENUE SERVICE UNDERREPORTER BACKUP WITHHOLDING NOTICES

Recently equipped with new guidelines provided by the Treasury Department, the Internal Revenue Service has been issuing notices to banks to begin backup withholding under the underreporter backup withholding rules enacted by Congress in 1983. The underreporter backup withholding notices are issued by the Service on either a regular notice form, Form CP 543, or in a form letter, numbered 2254.

If a bank receives an underreporter backup withholding notice, you should follow any instructions provided in the notice carefully. If a bank fails to withhold or to properly withhold with respect to a client/payee listed in a notice received from the Service, the bank may be subject to various penalties for such failures and may also be liable for the tax required to be withheld. The bank should also be aware of the requirements imposed by the law on the bank to discover from the bank records any and all accounts at the bank of a client/payee listed in an underreporter notice which might be subject to underreporter backup withholding. Finally, the bank should be extremely careful not to use or disclose in an unauthorized manner information obtained about a client/payee in a notice received from the Service.

If you have any questions about underreporter backup withholding requirements, please contact Ray McCall or Jan Steinhour.

* * *

This Newsletter is provided by Rothgerber, Appel, Powers & Johnson to share news of interest with our clients and friends. It does not constitute legal advice or an exhaustive analysis of a particular topic. Readers should consult with counsel to determine applicability of proposed or new developments in the law to their specific situations. For more information on any item discussed in this Newsletter, please contact Rothgerber, Appel, Powers & Johnson at (303) 623-9000.

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74 Lawyer Newsletters

Adopted July 26, 1986

Introduction and Scope

The Colorado Bar Association Ethics Committee ("Committee") is aware that a number of lawyers in Colorado are sending newsletters to their existing clients and to other persons. The Committee also has received a number of inquiries from lawyers seeking the Committee's informal views as to the propriety of the sending of particular newsletters. In addition, recent decisions of the U.S. Supreme Court under the First Amendment and amendments to the Colorado Code of Professional Responsibility ("Code") have raised questions as to what a lawyer may and may not do in this area.

The purpose of this opinion is to provide guidance in the area of lawyer newsletters. This opinion does not address any special limitations or constraints applicable to communications broadcast by electronic forms of communication (television and radio). We also do not address what specific disclaimers may be appropriate in a lawyer newsletter.

Definitions

For the purpose of this opinion, the following terms have the following meaning:

1. *Newsletter or lawyer newsletter*—A lawyer newsletter means a written communication distributed by a lawyer that contains information on current developments in the law or items of general interest concerning legal matters. A lawyer newsletter may be periodic (*i.e.*, published monthly or quarterly) or it may be published at irregular intervals. It may be limited to particular areas of the law, or it may cover more than one area of the law.

2. *Sending lawyer*—A sending lawyer means the lawyer or law firm that sends the lawyer newsletter to the recipient, irrespective of who actually prepares or publishes the newsletter.

Syllabus

A lawyer may send a newsletter to existing clients and persons other than existing clients (including other lawyers and prospective clients) provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim, and provided that it conforms in all respects to the applicable provisions of DR 2-101(A), (B) and (C).

It is unethical for a lawyer (or law firm) to send a newsletter to clients or others which has been prepared by someone other than the sending lawyer

without disclosing on the face of the newsletter the fact that the sending lawyer did not author the newsletter.

Opinion

1. The first issue to be addressed is whether lawyer newsletters are ever permissible under the Code. Lawyer newsletters serve the salutary function of providing the recipient with current information on changes and developments in the law. EC 2-1 recognizes that one of the important functions of the legal profession is to educate laymen to recognize their legal problems and to assist in making legal services fully available.

Lawyer newsletters, by their nature, also may have advertising and solicitation components that cannot be ignored. It is, of course, possible that some lawyer newsletters have *no* solicitation or advertising component. For instance, a newsletter prepared by a lawyer-employee (or volunteer) of a public interest group may not have any advertising or solicitation components. Such newsletters are not subject to the advertising or solicitation rules set forth in the Code and would be subject to full First Amendment protection. See, *Zauderer v. Office of Disciplinary Counsel, Supreme Court of Ohio*, 85 L.Ed.2d 652, 664, n. 7 (1985). However, the Committee believes that it will be the rare lawyer newsletter, sent by a lawyer in private practice, that is devoid of any advertising or solicitation component.

The Code defines "solicitation":

... "Solicitation" means any unrequested communications to a nonlawyer, 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.

Definition 11 of the Code (adopted Nov. 15, 1984, effective April 1, 1985)

Following the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Colorado Supreme Court made major changes to DR 2-101 to bring it into compliance with the U.S. Supreme Court's interpretation of the First Amendment. DR 2-101 (E) provides:

... 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, is general in nature and is not directed to a specific claim or matter involving the recipient of the solicitation. Solicitation is permitted, and need not be limited to general or written solicitation, if pecuniary gain is not a

significant motive for the solicitation.

There are three possible categories into which a newsletter may fall. First, it may not constitute a solicitation at all, such as where a lawyer-employee of a non-profit public interest group publishes a newsletter. Such newsletters are not subject to the solicitation limitations of the Code. Second, the motivation behind the sending of the newsletter may be primarily for pecuniary purposes. If so, the solicitation may be engaged in if it is writing, is general in nature, and is not directed to a specific claim or matter involving the recipient of the solicitation. Third, if pecuniary gain is not a significant motive for the solicitation, the solicitation does not have to be limited to one of a general nature or a written solicitation.

Since, by definition, the newsletter is a general treatment of current developments in the law, the sending of a newsletter to a client would not normally be "directed to a specific claim or matter involving the recipient of the solicitation." See DR 2-101(E). However, in certain circumstances, the sending of a newsletter could be deemed to be "directed to a specific claim or matter." For a discussion of this subject, see, *Matter of Von Wiegen*, 101 App. Div. 2d 627, 474 N.Y.3d 147, modified, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), cert. denied, 105 S.Ct. 2701 (1985) (holding that New York state's blanket prohibition against lawyer's direct mail solicitation of accident victims violated the First Amendment).

Every ethics committee in the United States that has considered the issue after the Supreme Court's decision in *Bates* has determined that it is proper for a lawyer to send a newsletter regarding current developments in the law to existing clients, provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim and provided that the newsletter does not contain self-laudatory statements or testimonials regarding the sending lawyer.¹ See, DR 2-101.

At least two courts have addressed the issue in the context of reviewing disciplinary action imposed against a lawyer for sending a newsletter. *In re Ratner*, 194 Kan. 362, 399 P.2d 865 (1965) (decided prior to *Bates* on ground that newsletter sent to clients was not a "solicitation"; *In re Madsen*, 68 Ill.2d 472, 370 N.E.2d 199 (1977) (decided after *Bates*, noting that after *Bates* a question existed whether a lawyer may be disciplined for mailing a "tip sheet" to his clients).

The American Bar Association's Committee on Professional Ethics decided in Formal Opinion No. 213 (1941) that it was not improper for a patent firm to circulate to its regular clients a *Law News Bulletin* which included significant features of current legislation, administrative rules and important decisions in the patent field.

Based upon these authorities, we conclude that if all rules relating to solicitations are met, a lawyer may send a newsletter to existing clients pro-

vided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim.

II. The question as to whether a lawyer may send a newsletter to persons other than existing clients is more difficult. This is so because the solicitation component when dealing with a lawyer's existing clients is minimized, while it is substantially increased when non-clients or prospective clients are involved. In addition, any communication by a lawyer to a non-client carries with it an increased risk that the communication may be deemed to be intimidating or an invasion of privacy. DR 2-101(A).

The ethics committees and bar associations that have considered the issue are split. Some have concluded that it is unethical to distribute a newsletter to prospective clients; others have held that it is permissible. *See, ABA/BNA Lawyers Manual of Professional Conduct* 801:1319-801:9105. Our analysis must again begin with the Colorado Code.

Even though there is a much greater likelihood that the lawyer's motivation for sending the newsletter to non-clients is for pecuniary gain, DR 2-101 does not prohibit solicitations merely because the solicitation component is strong. Indeed, DR 2-101 provides special rules for solicitations in which pecuniary gain is a significant motive. Therefore, in the Committee's view, the sending of lawyer newsletters to non-clients cannot be prohibited on the ground that such solicitations are more likely to be motivated by considerations of pecuniary gain.

However, the sending of a newsletter to non-clients does carry with it risks and problems that exceed those relating to the sending of a newsletter to an existing client. For example, a newsletter sent to a non-client may be deemed by the recipient to be intimidating and an invasion of the recipient's privacy. DR 2-101(A). It is established that certain types of in-person solicitation by lawyers may constitutionally be prohibited. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). *See, ED 2-3; ABA Model Code of Professional Conduct* § 7.3 (1983).

While the sending of a newsletter to a non-client's home or office arguably may be considered more invasive than the advertisement which the Supreme Court held was protected conduct in *Zauderer*, the Committee believes that the invasive potential of a newsletter is minimal at least in comparison to the invasive characteristics of in-person solicitations. The recipient of the unwanted lawyer's newsletter may immediately dispose of it. It simply does not carry with it the same pressures and dangers as an in-person solicitation.

Therefore, we conclude that under the Code, a lawyer may send a newsletter to non-clients, even if pecuniary gain is a significant motive for the sending of the newsletter, provided that the solicitation limitations of DR 2-101 are observed.

III. The final issue to be addressed by this opinion is whether it is ethical for a lawyer to send to his or her clients (and others) a newsletter which has not been written by the lawyer, but rather has been obtained from a third party by the sending lawyer.

The question presented is whether it is misleading or deceptive to pass off another author's work as the work of the sending lawyer. To the extent that a client or prospective client reads a newsletter sent to him and concludes that any aspect of the newsletter reflects favorably upon the sending lawyer, it obviously is misleading if, in fact, the sending lawyer had nothing to do with the preparation of the newsletter. Accordingly, we conclude that it is a violation of DR 2-101 of the Code for a lawyer to send a newsletter to any person without clearly identifying on the newsletter the actual author.

Note

1. In 1968, the Ethics Committee of the Colorado Bar Association issued Formal Opinion 42 which concluded by stating that:

If the communication goes to persons other than regular clients of the lawyer, or if it contains information not strictly applicable to the interests of the recipient, though he be a regular client of the lawyer, it would constitute an advertisement in violation of Canon 27. A periodic bulletin containing general information about statutes, decisions, etc. disseminated to a number of clients having different interests, even though through regular clients, would violate Canon 27.

As a result of the later decisions of the U.S. Supreme Court in *Bates* and *Zauderer, supra*, and the amendment to the Code which became effective in 1978 and 1985, the Committee believes that portions of Formal Opinion 42 are no longer viable. Accordingly, Formal Opinion 42 is withdrawn.