

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 92-15

November 23, 1992

The Ethics Committee received a request for an opinion from [REDACTED]
[REDACTED], Attorney at Law, [REDACTED], North Dakota:

The question posed is whether an attorney may use direct mail targeted to former clients and potential clients to advise them of her new licensure in another state and of an expansion of her firm.

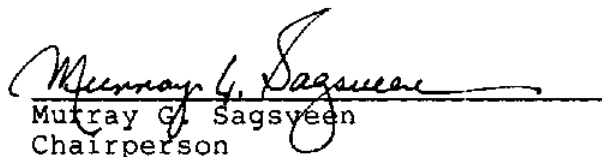
When they were first adopted, the Model Rules of Professional Conduct treated targeted mailings as solicitation rather than regulation. At the time the rules were adopted in North Dakota, there was considerable controversy among courts and disciplinary authorities throughout the country regarding regulation of direct mail contact targeted to prospective clients. The comments to N.D.R. Prof. Conduct 7.1 note that, "At the business meeting of the State Bar Association of North Dakota at which these Rules were adopted, a part of the resolution of adoption recognized that direct mail contact might ultimately be determined to be beyond detailed regulation, but at the same time recorded as the Association's position that it does not endorse, support, or favor direct mail contact with potential clients." While the comments are intended as guides to interpretation, it is the text of each rule which is authoritative. Subsequent to North Dakota's adoption of the rules, the Supreme Court addressed targeted mailings in Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). Whatever

authority might otherwise have been interpreted from the SBAND resolution and comment to N.D.R. Prof. Conduct 7.1 appears to have been rendered moot by the Supreme Court's Shapero decision.

In Shapero, the Supreme Court held that a Kentucky rule (which was virtually identical to Model Rule 7.3 as it existed at the time) prohibiting all targeted direct mailings for an attorney's pecuniary gain was in violation of the First Amendment. In response to the Shapero decision, Model Rules 7.2 and 7.3 were amended so that targeted mailings were no longer prohibited, but were instead regulated as a form of advertising. North Dakota has never adopted Model Rule 7.3, though North Dakota does distinguish between advertising (Rule 7.1(a)) and solicitation (Rule 7.1(b)). North Dakota has chosen not to regulate targeted mailings to the extent that Shapero would allow.

In light of Shapero, the only constitutionally permitted regulation of an attorney's targeted mailings is that they not make false or misleading statements. The targeted mailings to former and prospective clients as described in the request for opinion would not be prohibited by North Dakota's Rules of Professional Conduct, so long as those mailings are not false or misleading.

This opinion was drafted by Alice R. Senechal and unanimously approved by the Ethics Committee on November 18, 1992.


Murray G. Sagsveen
Chairperson

opinion: ~~Q-15~~

92-15

October 9, 1992

Murray Sagsveen
Chair, Ethics Committee
State Bar of North Dakota
316 North 5th Street
PO Box 1695
Bismarck, ND 58502

Re: Direct Mailings

Dear Mr. Sagsveen:

I tried to phone you but learned your are out until next week. As chair of the Ethics Committee, I would like to pose a question to you regarding direct mailings.

I will soon be admitted to the State Bar of [REDACTED] and would like to send letters to my former clients advising them that I will be licensed in [REDACTED]. I would also like to write my former clients and tell them that I will be joined in the practice of law by my husband, [REDACTED], and that I am expanding my legal services in that regard.

Further, I would like to write potential clients in targeted areas of practice to advise them of my [REDACTED] license and my firm expansion.

I notice in Rule 7.1 of the North Dakota Rules of Professional Conduct, that there is no language about direct mailings per se. The comments to the Rules do state that "Disciplinary authorities and the courts have not agreed on the principles applicable to direct mail contact; some have thought it advertising and thus within the lawyers absolute constitutional right so long as not false or misleading, while others have determined it subject to the more detailed regulation permitted over in-person contact." The comment goes on to state that the State Bar Association of North Dakota recorded its position that it does not endorse, support, or favor direct mail contact with potential clients.

Murray Sagsveen
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I further note that Rule 7.1 does not adopt all of the provisions regarding direct mail contact in advertising as set forth in Model Rules of Professional Conduct, particularly Model Rule 7.2 and 7.3(a) and (c). Those omitted Rules purported to address advertisement through written communication.

In reviewing the North Dakota Rule 7.1, there appears to be nothing that prohibits my direct mail, especially to former clients. As to future clients, it appears that I may contact them by direct mail so long as my communication is not false or misleading, and so long as I do not contact individuals who have made it clear they do not want to be contacted for that purpose.

I would appreciate your review of my inquiry and your opinion regarding the same. If you have any further questions please advise.

Sincerely,

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