

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 92-19

December 21, 1992

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

The question presented is whether an attorney may utilize direct mail to contact prospective clients.

As we understand the situation, a money judgment was entered against certain defendants in a prior lawsuit. You currently represent one of these judgment debtors and were successful in having the judgment vacated due to insufficiency of service of process. You are contemplating contacting other similarly situated judgment debtors, informing them of the vacated judgment you obtained for your client and asking them to contact your office if they would like to find out if you can help them. In your letter of November 24, 1992, you included your proposed direct mail letter.

I. North Dakota Rule

Rule 7.1 of the North Dakota Rules of Professional Conduct provides in part as follows:

A lawyer shall not make a false or misleading communication about the lawyer, a person professionally associated with the lawyer, or their services. A communication is false or misleading if it:

- (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
- (2) Contains an assertion that cannot be substantiated.

* * *

The comment to this rule provides in part that the rule permits public dissemination of any information that might invite the attention of those seeking the assistance of a lawyer, except information that is false or misleading. However, communications that describe the amount of a damage award or the lawyer's record in obtaining favorable verdicts, unless suitably qualified, may mislead by creating an unjustified expectation that similar results can be obtained for others. In addition, communications comparing the lawyer's services with those of other lawyers are false or misleading if the claims cannot be substantiated.

The comment to the rule also contains a specific section on "Direct Mail" which provides in part as follows:

A lawyer's mailed communication to a potential client suggesting or recommending that the lawyer be employed is in form not different from a public advertisement, but the circumstances of its receipt-particularly with respect to so-called "targeted" mailings- can pose problems similar to those created by in-person contact... 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.

Thus, pursuant to Rule 7.1, direct mail solicitation is permitted.

II. American Bar Association Rules

The ABA rules concerning advertising (including direct mail) go substantially beyond the North Dakota rule. ABA Rule 7.1 on "Communication Concerning a Lawyer's Services" provides in part as follows:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

* * *

- (b) is likely to create an unjustified expectation about results a lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) compares the lawyer's service with other lawyers' services, unless the comparison can be factually substantiated.

The comment to this rule states that the concern in subparagraph (b) is that such information could create unjustified expectations that similar results could be obtained for others without reference to specific factual and legal circumstances.

ABA Rule 7.2 on "Advertising" provides in part that subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written or recorded communication, which communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

ABA Rule 7.3 on "Direct Contact With Prospective Clients" provides in part as follows:

* * *

- (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by (a), if:
 - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- (c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

The comment to ABA Rule 7.3 goes on to provide that if after sending a letter or other communication to a client as permitted by the rule and the lawyer receives no response, any further effort to communicate with the perspective client may violate the provisions of Rule 7.3(b).

III. ABA Practice Guide on the "Constitutional Framework" of Advertising and Solicitation

The Practice Guide provides in part as follows:

Lawyer advertising, a type of commercial speech, is protected first amendment speech and may not be proscribed absolutely. However, states may constitutionally impose reasonable regulations upon lawyer advertising. A state may prohibit advertisements that fall outside commercial speech protection, such as advertisements concerning unlawful activities or false, misleading or deceptive statements. A state may also place reasonable restrictions upon the time, place and manner of advertising, as long as the content or the speech is not regulated.

Current constitutional law was summarized to the effect that advertising is protected speech if it pertains to a lawful activity and is not misleading.

IV. ABA Practice Guide on "Results Obtained, Comparisons" of Advertising and Solicitation

If the advertisement makes reference to results obtained in prior lawsuits or comparisons with other attorneys, the Practice Guide provides as follows:

Statements about past damage awards, favorable verdicts obtained, or client endorsements tend to create unjustified expectations about the results the lawyer can achieve and are not permitted in lawyer advertising unless they can be carefully framed to avoid misleading impressions and comparisons.

The background to this Practice Guide notes that North Dakota omits Model Rules 7.1(b) and (c), and that our rule states that lawyer advertising is considered false or misleading if it contains an assertion that cannot be substantiated. North Dakota's rules were further distinguished as follows:

Model Rule 7.1(b) prohibits lawyer advertising that is likely to create an unjustified expectation about results a lawyer can achieve. The Comment to the rule specifies that Rule 7.1(b) precludes advertisements that include statements such as the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or client endorsements. All states that have adopted the Model Rules, except Delaware and North Dakota, have included a provision similar to Model Rule 7.1(b).

To summarize, while it appears that the ABA rule would prohibit your making any reference to your success in vacating the judgment, the North Dakota rule has no such express prohibition.

V. ABA Practice Guide on "Direct Mail"

The Practice Guide in this respect provides in part as follows:

Lawyers may advertise their services by mail both generally to the public at large and specifically to potential clients known to need particular legal services. The U.S. Supreme Court has made clear that states may not ban either direct or targeted mail advertising outright, but it has also indicated that certain forms of regulation are permissible.

The ABA Model Rule on the subject forbids lawyers to mail advertising to prospective clients who have made known their desire not to receive such communications, or to

engage in conduct that involves coercion, duress, or harassment. In addition, targeted mailings must include the words "Advertising Material" on the envelope.

The United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988), held that states may not categorically prohibit targeted mail advertising. The term "targeted advertising" refers to letters or written communications based on a specific incident or occurrence affecting the recipient of the communication and aimed at obtaining employment for the lawyer based on the recipient's immediate need for legal services. The issue in the case was whether the letter to the individuals known to be in need of the legal services offered, posed a serious threat that lawyers would exploit these individuals' susceptibility to overreaching and undue influence.

For the ABA, the central issue is not whether the particular communication could be termed advertising or solicitation; rather, it is whether the form of communication presents a substantial likelihood of harm to the consumer.

In summarizing the Shapero decision, it was stated that while a total ban on in-person solicitation was justified because it occurs in private, away from the scrutiny of the lawyer's peers as well as the general public; that the difficulties of obtaining reliable proof of fraud or other abuses is not present with respect to targeted mail as the letter itself provides a record of the interaction.

A summary of various state approaches to lawyers' targeted mail advertising is set forth in the Practice Guide. It is interesting to note that most of the states do require such direct or targeted mail to be labeled as "advertising" in some form.

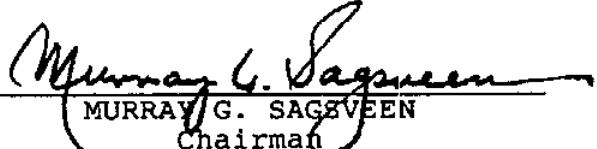
VI. Conclusion

The goal of the ABA in adopting its rules is to prohibit communications which present a substantial likelihood of harm to the consumer. Although North Dakota's rule is more generic, this committee believes this is also the goal of North Dakota's Rule 7.1. The comment to the rule provides that a communication concerning the lawyer's record in obtaining favorable verdicts, unless suitably qualified, may mislead by creating an unjustified expectation similar results can be obtained for others. With the exceptions noted below, your proposed letter does appear to be so suitably qualified.

The Ethics Committee requests that the reference in your proposed letter to a specific law firm be deleted, and that in addition you delete the sentence in which you state that you believe you have a good chance of being successful on the merits. This latter statement could create an unjustified expectation in potential clients that similar results can be obtained for them.

However, it must be understood that the Ethics Committee does not in any manner endorse your proposed letter, or by issuance of this opinion imply that it has verified the statements contained therein. It is your obligation to ensure that communication is truthful and not misleading.

This opinion was drafted by Brian R. Bjella and unanimously approved by the Ethics Committee on _____.


MURRAY G. SAGEVEEN
Chairman

[REDACTED]

November 24, 1992

Murray G. Sagsveen
Attorney At Law
P.O. Box 1695
Bismarck, North Dakota 58502-1695

Re: Solicitation Letter

Dear Mr. Sagsveen:

During our telephone conversation on November 23, 1992, I expressed my need for an opinion from the Ethics Committee concerning solicitation of business. I am sending you this letter for your committee's consideration and response.

I represent a farmer/grower from South Dakota, who had entered into a contract with [REDACTED], to supply produce for an ethanol plant that was to have been built in [REDACTED], North Dakota. I got the case after Judgment had been entered against my client in the United States District Court for North Dakota for \$75,551.96, plus additional interest.

I discovered my client had never been personally served or signed any acknowledgment or receipt of service. A law firm in [REDACTED] had made a totally unauthorized appearance for my client, put in an Answer and Counterclaim, and waived insufficiency of service of process by not asserting it. Down the line, when the law firm billed my client and he did not pay, the firm withdrew, but did not tell the Court that the firm was never authorized to represent my client.

I brought a motion about a year and half ago to vacate the Judgment for lack of personal service. After depositions by the Plaintiff, and an all day evidentiary hearing, we finally prevailed. The Magistrate's recommendation is to vacate the Judgment against my client. I expect that Judge [REDACTED] will confirm that recommendation.

I know that there were approximately twenty-five other farmer/growers that the [REDACTED] law firm withdrew from representing for lack of payment of fees. I have good reason to believe many of these farmers would be in the same situation as my client, having had a substantial judgment entered against them where there were insufficient service of process and an unauthorized representation by the same [REDACTED] law firm. Some of these farmer/growers may be able to take advantage of the remedy that I

[REDACTED]

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have found for my client. I would not expect them to have any idea that they could vacate a judgment against them. If they have seen an attorney, which many of them probably would not do, I would expect their attorney likewise might not know that the Judgment could be vacated against them. A defense on the merits would likely be successful.

Therefore, I believe there are number of farmers in North and South Dakota who may have a remedy they should be told about. I propose sending them the following letter to inform them of a possible remedy:

Re: [REDACTED]

I have information that were one of the "growers," who entered into a Grower's Agreement many years ago with the now defunct [REDACTED], and that you may have been sued by [REDACTED], the loan guarantor for [REDACTED]. I also have information that the [REDACTED] in [REDACTED], North Dakota, put in an appearance for you in that lawsuit. I also have reason to believe that [REDACTED] may have a money judgment against you which it may be attempting to collect from you.

I have been able to help a "grower" in such a situation. We were successful, in his case in getting the judgment vacated. This means that we have cancelled the judgment and now will defend the lawsuit on the merits. We believe we have a good chance in being successful on the merits.

The facts of your case may be different from my client's, so I cannot say with any certainty whether I could help you. But, I believe I might be able to. If you would like to find out if I can help you, please contact my office for a personal or telephone appointment so we can explore the possibility.

I would appreciate a letter from your committee giving me direction.

Sincerely,
[REDACTED]
[REDACTED]
[REDACTED]