

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

Opinion No. 97-11
November 11, 1997

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The Ethics Committee has received a request for an opinion from a lawyer which raises the following questions regarding communications concerning the services of a lawyer. Two issues are raised by the request:

- 1) Whether a lawyer may advertise in the reception area of a chiropractor or physician through the placement of the lawyer's business card or brochure which details the lawyer's practice and expertise in the area of personal injury; and
- 2) Whether the Ethics Committee will pre-approve a lawyer's brochure for appropriateness as to content and form.

First, the Ethics Committee is asked whether a lawyer may advertise the lawyer's services through the placement of the lawyer's business card or brochure in the reception area of an office of a chiropractor or physician. Lawyer advertising is constitutionally protected commercial speech. Shapero v. Kentucky Bar Association, 486 U.S. 469, 472 (1988). So long as it is not false or deceptive, and does not concern unlawful activities, commercial speech may be restricted only if the restriction directly advances a substantial governmental interest. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985). In Shapero, the United States Supreme Court made clear that a state, consistent with the first and fourteenth amendments, may not prohibit lawyers from soliciting

business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. 486 U.S. at 472-73. Similarly, the placement of a lawyer's business cards and brochures in the office of a chiropractor or physician on its own, does nothing more than direct a written advertisement to a group of persons who may need the legal services offered by the card and brochure. Shapero makes clear that written advertising directed at a specific audience is permissible regardless of the mode of dissemination. Shapero, 486 U.S. at 473.

Second, the Ethics Committee is asked whether it will pre-approve a lawyer's brochure for its appropriateness as to content and form. Written communications regarding the services of a lawyer must conform with the requirements contained at North Dakota Rule of Professional Conduct Rule 7.1(a). Rule 7.1(a) provides:

(A) 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 comments to the rule indicate that certain communications may be problematic. For example, the comment cautions that communications which describe the amount of a damage award or the lawyer's record in obtaining favorable verdicts, unless suitably qualified, could mislead a prospective client by creating an unjustified expectation that similar results will be obtained for others. The

comment further cautions that communications comparing the lawyer's services with those of other lawyers could be false and misleading if the claims cannot be appropriately substantiated.

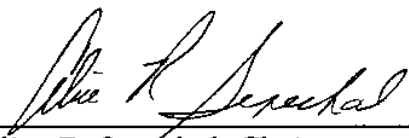
The Ethics Committee, in the past, has provided limited guidance to lawyers concerned about the content of their advertising. In one instance, the Committee suggested that a lawyer delete the word "ONLY" from the heading of a yellow pages advertisement which stated "DIVORCE ONLY." The Committee was concerned that the inclusion of the word "ONLY" could be possibly misleading. Ethics Committee Opinion No. 93-05. In a second instance, the Committee requested that a lawyer delete from a proposed, direct mail letter references which created the possibility of a prospective client having an unjustified expectation of a positive result. Ethics Committee Opinion No. 92-19.

However, it must be realized that in most instances the Ethics Committee is not in a position to determine whether a particular communication is truthful and not misleading. The Committee is not investigatory and cannot verify the veracity of the various statements that could be made in the context of lawyer advertising. It remains the obligation of the lawyer to ensure that a communication is truthful and not misleading. Thus, the Committee will not pre-approve a brochure or other similar documents. If the lawyer has a specific question regarding a specific portion of the brochure, the Committee will respond to such question to the extent that it has the necessary facts.

This opinion is provided pursuant to Rule 1.2 (b) North Dakota Rules of
Lawyer Discipline which states:

A lawyer who acts in good faith and reasonable reliance
on a written opinion or advisory letter of the ethics
committee of the association is not subject to sanction for
violation of the North Dakota Rules of Professional
Conduct as to the conduct that is the subject of the
opinion or advisory letter.

This opinion was drafted by George A. Koeck and was unanimously approved
by the Ethics Committee on November 11, 1997.



Alice R. Senechal, Chair

[REDACTED]

February 27, 1997

Sandi Tabor, Executive Director
State Bar Association of ND
P.O. Box 2136
Bismarck, ND 58502

RE: ETHICS COMMITTEE REQUEST
LAWYER ADVERTISING

Dear Sandi:

I wish to request an opinion of the SBAND Ethics Committee. I understand that the SBAND office will then forward my request to the Ethics Committee chair. Specifically, I ask for the Ethics Committee's interpretation of Rule 7.1, N.D.R.Pro.Con., as it relates to my question below.

My question to the Ethics Committee is whether it is appropriate and ethical for a lawyer to advertise in a chiropractor or physician's reception area through the placement of the lawyer's business cards and/or brochure which details the lawyer's practice and expertise in the area of personal injury. Second, if the Ethics Committee deems that both the lawyer's business card and lawyer's personal injury brochure are appropriate for display as above mentioned, would the Ethics Committee pre-approve the lawyer's brochure for its appropriateness as to content and form?

Thank you in advance for the committee's attention to this matter. Should the committee find that it is appropriate to have a lawyer's brochure displayed as earlier described, I would then forward a copy of our personal injury brochure to the committee for its review and comment. Please call if you or committee members have questions.

Thank you.

Yours truly,

[REDACTED]