

Ethics Opinion

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QUESTIONS PRESENTED:

1. Do a law firm's efforts to secure professional employment by sending letters to individuals who may own homes with defective plumbing systems constitute improper solicitation in violation of Rule 7.3?
2. May a law firm assure potential clients that if they make no recovery they will not be responsible for any costs advanced for purposes of investigating, reviewing, settling, or litigating the claim?

ANSWERS:

1. No.
2. Yes.

FACT SITUATION: A law firm is using targeted mailings to seek professional employment from homeowners whose homes are suspected by members of the firm to contain defective plumbing. The firm's form letter not only describes and names the problematic plumbing system but also chronicles the firm's experience in successfully representing property owners in similar litigation. The firm's letter and incorporated fee agreement additionally state that, unless they recover, potential clients assume no responsibility for attorneys fees or costs advanced on their behalf. The fee agreement specifically provides that the firm may deduct any costs incurred in investigating, reviewing, settling, or litigating the claim from the client's net recovery.

ANALYSIS:

1. Solicitation. The law firm's form letter conforms with the proscriptions against direct contact with prospective clients contained in Montana's version of Rule 7.3 and does not constitute improper solicitation. The Montana Supreme Court chose not to adopt Rule 7.3 as proposed by the State Bar, reasoning in part that such an over-broad rule would effectively prohibit any solicitation of professional relationships with prospective clients with whom the lawyer had no family or prior professional relationship. In the Matter of the Adoption of the American Bar Association Model Rules of Professional Conduct, 84-303. Instead, the Court recognized the importance of using written materials to adequately inform the public about available legal services. *Id.*

The Court ultimately adopted a permissive version of Rule 7.3 similar to that approved in both Virginia and the District of Columbia. The District of Columbia actually eliminated Rule 7.3, instead incorporating some of its concepts into Rule 7.1 which permits organized informational advertising campaigns. The Comment to the District of

Columbia's Rule 7.3 recognizes, as did the Montana Supreme Court, that the need to provide information about legal services to the public outweighs the importance of a historical prohibition on advertising.

Although it adopted a liberal version of Rule 7.3, the Montana Supreme Court did acknowledge the need for certain restrictions to "deter those who would otherwise seek to represent people whose physical, emotional, or mental states prevent them from exercising reasonable judgment in employing a lawyer." Rule 7.3 therefore prohibits an attorney from contacting or sending a written communication to a prospective client for the purpose of obtaining professional employment if:

- (a) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer;
- (b) the person has made known to the lawyer a desire not to receive a communication from the lawyer; or
- (c) the lawyer reasonably should know that the communication involves coercion, duress or harassment;
- (d) the lawyer reasonably should know that the person is already represented by another lawyer.

The letter in question in the instant case complies with the permissive requirements of Rule 7.3. Targeted mailings are generally accepted as a proper form of advertising. *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988). The controversial letter targets individuals who may own homes with defective plumbing. Such a structural defect in their homes would not render these targeted individuals physically, emotionally, or mentally incapable of exercising reasonable judgment in employing an attorney as contemplated by Montana's Rule 7.3. Nor is it apparent that any of the targeted individuals informed any member of the law firm responsible for sending the letters that they did not wish to receive such a communication. Finally, there is no indication that the attorneys involved reasonably should have known that their letters in any way coerced or harassed the targeted individuals or that the targeted individuals had previously retained counsel. In fact, letter's initial paragraph advises individuals already represented by a lawyer to disregard the letter.

Although the letter in question does not violate the permissive provisions of Rule 7.3, additional consumer protections appear in Rule 7.1 which governs communications concerning a lawyer's services. The Montana Supreme Court imposed few restrictions on direct contact with prospective clients in part because of the protections against misleading communications contained in Rule 7.1. Rule 7.1 provides in relevant part that a communication is false or misleading if it "is likely to create an unjustified expectation about results the lawyer can achieve." This provision generally prevents an attorney from referring to the amount recovered for other clients because such a representation would create the misleading impression that the targeted individual will receive similar results regardless of the specifics of his or her case. Montana Ethics Opinion 870709.

Although the letter in this case chronicles the law firm's successful record in prosecuting cases involving the same plumbing system for other clients, such a discussion does not violate the provisions of Rule 7.1. The law firm carefully refers to several "large" settlements and jury verdicts without mentioning their specific amount. The law firm additionally warns its potential clients that "each case must be evaluated on its own facts," thus minimizing any potentially misleading effect of its representations.

The Legal Ethics Committee of the District of Columbia Bar, whose permissive rule regarding solicitation Montana emulated, has concluded that an advertisement referring to "thousands of successful claims" brought against a specific manufacturer was not misleading because it did not lead the public to believe that claimants had recovered any specific amount. D.C. Eth. Op. 188 (1987). The Committee further noted that a disclaimer, such as the one used in the instant situation, stating that recovery depends on the facts of each case may prevent the public from developing unjustified expectations.

Here, the law firm's description of its experience in successfully representing property owners in similar litigation is not false or misleading. The firm properly avoids reference to the exact size of former settlements and jury verdicts and reminds potential clients that their results will depend on the facts of the case.

2. Fees. Both the Model Rules and their predecessor, the ABA Code, limit the extent to which an attorney may provide financial assistance to a client in litigation. Under ABA Code DR 5-103(B), a lawyer could advance court costs and litigation expenses on the client's behalf provided the client remained ultimately liable for those expenses. Rule 1.8(e) differs in one important respect from the old rule, DR 5-103(B). Rule 1.8(e) similarly provides that a lawyer may advance the court costs and litigation expenses, but adds that repayment of court costs and litigation expenses by the client may be made contingent on the outcome of the case.

The law firm's letter and incorporated fee agreement establish a fee arrangement which complies with the requirements of Rule 1.8(e). Rule 1.8(e) states in part that:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

In the last paragraph of its letter, the law firm in the instant situation assures the potential client "that you will not be responsible for attorney's fees or for any costs we may advance on your behalf if we do not win your case." Rule 1.8(e) clearly allows a law firm to make repayment of advanced costs contingent upon a favorable resolution of the case.

The fee agreement attached at the end of the letter gives the potential client a more detailed explanation of the fee arrangement. The potential client is asked to

sign a statement which reads in part as follows: I further agree and understand that my attorneys will incur costs in investigating, reviewing, settling or litigating my claim, and I agree and understand that my attorneys may deduct such costs from my net recovery. *In the event no recovery is made, I understand that I will not be indebted to my attorneys for any sum whatsoever as attorneys' fees and/or costs.* (emphasis in original).

This portion of the fee agreement simply clarifies the general statement in the body of the letter itself and complies with the provisions of Rule 1.8(e).

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