

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 05-05
September 1, 2005**

Attorney Jane Doe requests an advisory opinion pursuant to the language of Rule 7.3, N.D.R. Prof. Conduct, addressing the question of whether printed materials she distributes at her general estate planning seminars complies with the language of that rule.

Attorney Jane Doe has a law practice limited particularly to estate planning. From time to time, the attorney would meet with groups of individuals in a seminar setting to discuss general areas of estate planning topics that would be of interest to that group. At these meetings, attorney Doe would hand out a referral form. In the referral form attorney Doe would ask attendees of the seminar to list anyone they thought might be interested in learning about the services of Jane Doe's law firm. The form handed to the attendee inquires as to whether the attendee has a name of an individual which the attendee would be willing to refer to attorney Doe.

The requested opinion is not directed to revealing the existing client but rather whether the method used by attorney Doe to possibly expand her client base is consistent with, and appropriate ethical conduct pursuant to, the new language of Rule 7.3, N.D.R. Prof. Conduct. Although the forms submitted had previously been used in a seminar context, the actual form itself was withdrawn by the attorney pending the

opinion of this committee as to whether recently adopted Rules of Professional Conduct addressing lawyer advertising prohibited use of the form the requesting attorney distributed to persons who attend the seminars. In other words, it is the understanding of the Committee that the form in question was not used after the current version of N.D R. Pro. Con. 7.3 (2005) became effective on March 1, 2004.

APPLICABLE RULES

Rule 7.3 in its entirety addresses the issue of direct contact with prospective clients. Most directly applicable are the provisions of subparts (a) and (b) of that rule.

RULE 7.3 - DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer, or the lawyer's representative, shall not by in-person or telephone contact, or other real-time contact, solicit professional employment from a prospective client when a significant motive for the solicitation is the lawyer's pecuniary gain unless the person contacted:

(1) is a lawyer; or

(2) has a family, personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded, or electronic communication or by in-person, telephone, or real-time contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment; or

(3) the receipt of the solicitation is uninvited and imposes any involuntary economic cost on the prospective client to respond to the solicitation.

(c) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or

subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

DISCUSSION

There appear to be no applicable ethical opinions issued by this Committee in past years relative to this request. This also appears to be the first ethical opinion which touches upon and interprets the language of Rule 7.3, N.D.R. Prof. Conduct.

The “referral form” is actually in two parts. The first part requests the recipient to provide the attorney the names of family members, friends, [or presumably other people] who the recipient believes may be interested in the legal services provided by the lawyer. The second part of the “referral form” requests permission from the attendee for the lawyer to use the attendee’s name as a “referral”, which appears to mean that the lawyer may use the attendee’s name as a reference. This second part of the “referral form” addresses using a client’s name.

With regard to the “referral form” requesting names of individuals who may be interested in attorney Doe’s services, there are two actions undertaken theoretically by attorney Doe which come under analysis. The first is whether the actual dissemination of the form itself to seminar attendees is inappropriate. The second is whether attorney Doe’s use of the names of potential clients obtained by use of the referral form is appropriate.

The language of Rule 7.3(a) comes into play with respect to this action. Rule

7.3(a) provides that it is impermissible for a lawyer to use “in-person or telephone contact, or other real-time contact” to solicit professional employment for the “lawyer’s pecuniary gain”. Rule 7.3(a) provides only limited exceptions when the “in-person”/direct contacts can be made, i.e., if the contact is to a lawyer, a family member or a person with which the contacting lawyer has a personal or prior professional relationship. The Committee assumes that the seminar attendees do not all fall within that exception. Thus, the initial issue is whether dissemination of the “referral form” in, and of itself, violates Rule 7.3.

The Committee does not believe that the actual dissemination of the referral form is itself a violation of Rule 7.3. The form is not soliciting the actual attendee for professional employment. Rather, the referral form simply asks names of individuals the recipient of the form believes might be interested in attorney Doe’s services.

The second aspect of the request is attorney Jane Doe’s use of the names obtained from the forms. Jane Doe, once receiving that name, might proceed to make in person, telephone or real person contact with that individual which brings into play subpart (b) of Rule 7.3, N.D.R. Prof. Conduct. There is no question but that the form itself once completed by the seminar attendee with the name of a family member or acquaintance would constitute a “prospective client.” Rule 7.3(b) which, as quoted above, provides that a lawyer shall not solicit professional employment from a

prospective client by written, recorded, or electronic communication or by in-person, telephone, or real-time contact even when not otherwise prohibited by paragraph 7.3(a) if: (1) the prospective client has made it known to the lawyer that the prospective client does not want to be solicited; (2) the solicitation involves coercions; or (3) the receipt of the solicitation is uninvited and imposes any involuntary economic cost on the prospective client to respond. In other words, if the prospective client on the referral form is contacted by “in-person, telephone, or real-time contact”, Rule 7.3(a) and (b) must be read together and the result is that such contact cannot be used unless the contact is with a lawyer; a family member; a person with whom attorney Doe has a personal relationship; or with whom attorney Doe has a prior professional relationship. Even if those exceptions apply and “direct contact” by phone or otherwise is allowed under Rule 7.3(a), the contact is still impermissible if subparagraphs (1) through (3) of 7.3(b) apply, e.g., if the prospective client advises attorney Doe not to solicit him or her, etc. If, however, attorney Doe contacts the prospective clients on the “referral form” by using letters or other written, recorded or electronic communication, i.e., not direct contact, then the contact is not a violation of Rule 7.3 unless the prohibited conduct and/or request not to be solicited set out in subparagraph (1) through (3) of subpart 7.3(b) apply.

Moreover, to the extent attorney Doe’s written communication with the

prospective clients identified on the referral forms constitutes the mailing of a brochure or other “advertising” materials, attorney Doe is directed to N.D.R. Pro. Con. 7.2 (2005) which addresses advertising of legal services.

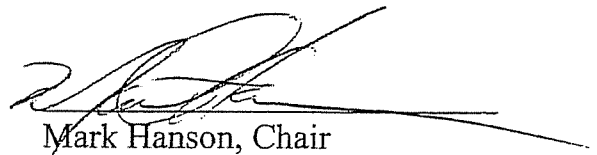
CONCLUSION

It is the opinion of the Ethics Committee that the use of the referral form by attorney Jane Doe in a seminar program to solicit potential clients and make in person, telephone or real person contact with the names provided by attendees of the seminar in the referral form is a violation of the existing language of Rule 7.3 and the conduct would be unethical.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. Lawyer Disc. The Rule states:

A lawyer who acts with 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 James S. Hill and was approved by a unanimous vote of the Committee on September 1, 2005.


Mark Hanson, Chair