

Nebraska Ethics Advisory Opinion for Lawyers  
No. 88-4

AN ATTORNEY MAY SOLICIT LEGAL BUSINESS FOR PECUNIARY GAIN BY SENDING TRUTHFUL AND NONDECEPTIVE LETTERS TO PROSPECTIVE OR POTENTIAL CLIENTS KNOWN TO FACE PARTICULAR LEGAL PROBLEMS, SUBJECT TO THE REQUIREMENTS OF THE CODE OF PROFESSIONAL RESPONSIBILITY CONCERNING WRITTEN COMMUNICATIONS.

FACTS

An attorney asks whether he may ethically send letters directly to prospective or potential clients if the letters seek to solicit business from those prospective or potential clients based on legal problems the prospective or potential clients are known to face.

DISCUSSION

DR 2-101(B) of the Code of Professional Responsibility generally allows such written communications.

DR 2-101 provides:

"(A) 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:

(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;

(2) Is likely to create an unjustified expectation about results the 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

(3) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

(B) Subject to the requirements of DR 2-101(A) and DR 2-104(B), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact. A copy or recording of an advertisement or written communication shall be kept for one year after its dissemination along with a record of when and where it was used.

(C) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(D) Unless otherwise specified in the advertisement, if a lawyer publishes fee information in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes fee information in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes fee information in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(E) Unless otherwise specified, if a lawyer

broadcasts fee information, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(F) On the front of each envelope in which an advertisement of a lawyer is mailed or delivered or on the front of each post card, if the advertisement is printed on a post card, shall be placed the words: 'This is an advertisement.' These words shall be printed in type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or card."

DR 2-104(B) precludes a lawyer from sending a written communication to a prospective client for the purpose of obtaining professional employment if:

"(1) The lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person has made known to the lawyer a desire not to receive the communications from the lawyer; or

(3) The communication involves coercion, duress or harassment."

Subject to the two limitations quoted above, lawyers are not prohibited from sending written communications to prospective clients in an attempt to advertise services, as long as the communication does not involve "personal contact." The Committee is of the opinion that sending letters directly through the mail and addressing them to particular identified potential clients is a "written communication," and does not constitute "personal contact" within the meaning of DR 2-101(B).

This finding is in accord with the United States Supreme Court opinion, *Shapiro v. Kentucky Bar Ass'n*, 108 S.

Ct. 1916 (1988), which discusses direct solicitation of legal business from prospective clients by letters. In *Shapero*, the Supreme Court struck down the decision by the Kentucky Supreme Court which held that "a lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." See *id.* at 1920.

The *Shapero* opinion focuses on the first amendment rights of the attorney versus the concern that the particular potential client will feel "undue influence" whether to seek legal assistance on a matter, and if so, what attorney he should seek. *Id.* at 1922. The State of Kentucky had argued that this case was "*Ohralik* in writing." The reference is to the opinion *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Court found states could constitutionally ban "in-person solicitation by lawyers for profit." *Id.* at 1921. The Court distinguished *Ohralik*, however, because *Shapero* involved letters mailed directly to potential clients, not in person solicitation.

In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* . . . turned on two factors. First, was our characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.' . . . Second, 'unique . . . difficulties' . . . would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.'

*Id.* at 1922. (citations omitted). According to the Court, these factors were not present in direct mail solicitation, and thus the *Ohralik* ban was inapplicable.

Although the Advisory Committee does find that attorneys may send letters directly to prospective or potential clients with known legal difficulties in the hopes of procuring for-profit employment, this ability is not without limits. In accordance with DR 2-101(A), these statements cannot be "false or misleading" as defined.

Caution should also be exercised by attorneys to ensure that DR 2-104(B) is not violated. If the attorney knows or reasonably should know that the potential client suffers from a physical, emotional, or a mental state which hampers his or her ability to exercise reasonable judgment, or the person has indicated to the attorney that he or she does not wish to receive any type of communication from the attorney, or the communication involves coercion, duress, or harassment, such a written communication is not allowed under the Code of Professional Responsibility.

Additionally, attorneys should heed DR 2-101(F). If an attorney advertisement is sent through the mail, or delivered, the front of each envelope or postcard carrying the advertisement shall bear the following words: "This is an Advertisement." The words shall be printed in a type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or card.

Finally, attorneys are reminded that pursuant to DR 2-101(B), a copy of whatever advertisement or communication is sent out must be kept by the attorney mailing the material out, for one year from date of mailing. In addition to keeping a copy of the letter, the attorney is responsible for maintaining records of when and where the materials were used.

## CONCLUSION

An attorney may solicit legal business for pecuniary gain by sending truthful and nondeceptive letters to prospective or potential clients known to face particular legal problems, subject to the requirements of the Code

of Professional Responsibility concerning written communications.

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