

Advisory Opinion 1984-3

An attorney has requested an opinion from the Advisory Opinions Committee regarding the propriety of a letter under the standards set for attorney advertising in New Mexico. The attorney intends to mail the letter to banks, credit unions and similar potential clients. The letter reads as follows:

Recently the United States District Court for the District of New Mexico ruled that direct mail solicitation is a permissible form of attorney advertising when not misleading. Although the new ruling offers some potential for abuse, it also offers an opportunity for attorneys to directly contact prospective clients and give them information regarding the attorney and his services that the prospective client might otherwise be unaware of. I am sending this letter to acquaint you with my qualifications and fees.

I am certified by the New Mexico Supreme Court as primarily limiting my practice to commercial law. About 75% of my practice involves commercial and retail collections, including replevins and foreclosures. I have several excellent commercial clients including one hospital and one acceptance company that specializes in mobile home financing. I have been an attorney for approximately eight years, having practiced in New York for three years and in New Mexico for the last five.

I have also done the best that I can to keep my office overhead expenses modest so that I can charge reasonable legal fees. I charge \$300.00 for replevins and \$400.00 for foreclosures, if there are no counterclaims, and on a contingent fee basis plus costs for straight collections.

I hope that you will at least consider me in the event that you need legal services. I will certainly supply you with additional information and references upon request.

In the recent case of *L.M. v. The Disciplinary Board of the Supreme Court of the State of New Mexico, et al.*, 83-0077HB, the federal district court considered the propriety of a letter mailed directly to restaurant owners in Albuquerque in which an attorney offered his services in assisting the restaurant owners in acquiring beer and wine licenses. The Disciplinary Board had ruled it was inappropriate and violated Rule 2-103(A) of the N.M. Code of Professional Responsibility. The court held that Rule 2-103(A) was unconstitutional as applied to Plaintiff's letter and declared that an attorney may send by direct mail truthful, non-misleading advertising for legal services and fees to persons who in general might find such services useful, but who are not known to need legal services of the type offered.

The nature of the letter presented to this Committee is similar to the letter in *L.M. v. The Disciplinary Board, supra*, and is substantially in accordance with the guidelines established by the court therein. The Committee concludes that it is appropriate for the attorney to send his proposed letter with two modifications. First, the Committee believes it is misleading and incomplete to state that he is "certified by the New Mexico Supreme Court. A prospective client may infer that the New Mexico Supreme Court has personally evaluated the attorney and certified as to his expertise when in fact it is the Specialization Board appointed by the Supreme Court which establishes the prerequisites for the registration of attorneys. Counsel is therefore advised to limit his statement to the effect that "my practice is primarily limited to commercial law."

Second, counsel should disclose his hourly rate. Counterclaims may arise in replevin actions and particularly in foreclosure actions when more than one lien is asserted. One of the purposes of advertising is to provide prospective clients with information regarding an attorney's services and fees. Information regarding the attorney's hourly rate would be an important fact to prospective clients. Although the Committee does not believe it is essential to describe in great detail his fee and cost structure in the letter, we assume that counsel will fully explain to prospective clients about such matters as: (a) whether the quoted fee includes or excludes court costs and gross receipts tax; (b) the extent of costs, particularly in foreclosure actions; and (c) contingent fee rates and whether the percentage contingency is computed before or after deduction of costs.

Finally, there is some concern regarding two subjective statements in the proposed letter that counsel should reconsider. The first statement occurs in paragraph 2 where counsel refers to excellent commercial clients and the second statement occurs in paragraph 3 where counsel discusses his modest office overhead expenses. We recognize that in *L.M. v. The Disciplinary Board, supra*, the court found the use of the term "expert" in the letter to be essentially factual in nature, susceptible of measurement, and not actually or inherently misleading. Counsel should consider whether his subjective statements are factual, *reasonably* susceptible of measurement and not misleading.

Counsel is further asked to review Rule 2-101(A) of the Code of Professional Responsibility which prohibits self-laudatory statements in any form of public communication and the advertising rules contained in Model Rule 7.1 *et seq.* of the Model Rules of Professional Conduct which have been recommended for adoption in New Mexico by the Subcommittee of the Task Force Committee on the Regulation of the Legal Profession that was formed by the New Mexico Supreme Court on January 25, 1984. A copy of those rules accompany this opinion to counsel. The Committee feels that both subjective statements in the proposed letter are a testimonial about or an endorsement of the attorney and that the statement about overhead would be too difficult for a prospective client to factually substantiate. The Committee recommends that those particular statements be reworded. In any event, counsel is strongly encouraged to stamp the outside envelopes of the proposed letter with the word "advertisement" in the manner required by Model Rule 7.3.