

Advisory Opinion 1985-9

An attorney has requested an opinion from the Advisory Opinions Committee regarding the propriety of a letter he proposes to send to student loan guarantee agencies and lenders who may need student loan collection services in New Mexico. He proposes to stamp the envelope with the word "advertisement." The letter in substance reads as follows:

Ladies and Gentlemen:

I am an attorney licensed to practice in the State of New Mexico. The purpose of this letter is to inform you of the availability of my services. My practice is primarily limited to commercial and student loan collections. My clients include:

1. The New Mexico Educational Assistance Foundation (the state-designated lender for guaranteed educational loans in New Mexico);
2. The New Mexico Student Loan Guarantee Corporation (the New Mexico guarantee agency for federally guaranteed educational loans); and
3. The University of New Mexico.

I have personally handled all the student loan collection litigation, including FISL, GISL, and NDSL, for these clients since 1977.

I will accept referrals for student loan collections involving borrowers who reside or work anywhere in the State of New Mexico. I will accept referrals of any account at my hourly rate of \$85.00 per hour plus costs, including a \$100.00 cost advance. If you prefer, I will also accept certain student loan collection referrals on a contingent fee basis, as follows:

<u>Amount of Claim</u>	<u>Terms</u>
\$ 0 - \$ 500	Hourly only
\$500 - \$2,000	30% contingent fee plus costs including a \$100.00 cost advance.
\$2,000 - up	25% contingent fee plus costs including a \$100.00 cost advance.

I will also accept referrals for creditor defense of bankruptcy discharge of student loans at my hourly rate of \$85.00 per hour plus costs, including a \$100.00 cost advance.

Please note that this type of direct mail solicitation is acceptable under the code of professional responsibility applicable to attorneys in New Mexico. If you have any questions regarding my services or fees, please feel free to call me. Thank you very much for your time and consideration.

On May 28, 1985, the United States Supreme Court issued its opinion in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587 (May 28, 1985), holding that a State may not, consistent with the First Amendment, discipline an attorney for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding potential clients, legal rights or for using accurate and non-deceptive illustrations in such advertisements. It further held that commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. However, the Supreme Court did uphold that portion of the Ohio Supreme Court's decision that disciplined the attorney for failing to disclose in his advertisement that claimed that "no legal fees are owed by our clients" if no recovery occurs, that the clients would have to pay "costs" even if the lawsuit was unsuccessful. See also, *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

In the recent case of *L.M. v. the Disciplinary Board of the Supreme Court of the State of New Mexico*, 83-0077HB, the New Mexico Federal District Court considered the propriety of a letter mailed directly to restaurant owners in Albuquerque in which the attorney offered his services to assist 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 New Mexico Code of Professional Responsibility. The United States District Court held that Rule 2-103(A) was unconstitutional as applied to the Plaintiff's letter and declared that an attorney may send by direct mail truthful, non-misleading advertising for legal services to persons who, in general, might find such services useful, but who are not known to need legal services of the type offered. See also, *State Bar of New Mexico Advisory Opinions Committee-Advisory Opinions* 1984-3 & 1984-9.

It is the opinion of the Advisory Opinions Committee that if the statements contained in the proposed "advertising letter" are true and correct, it is appropriate for the attorney to provide the same to prospective or potential clients.