

Advisory Opinion 1987-3

Question Presented: Whether the attorney would be violating the Code of Professional Ethics in mailing out a monthly newsletter to current and former clients, other professionals (including non-lawyers, such as CPAS) and prospective clients.

Facts: The attorney attached a sample newsletter to the request and noted that each newsletter would include two advisory footnotes, one describing the origin of the newsletter, and the other warning that the general comments and solutions contained in the newsletter are not necessarily applicable to each particular situation that arises. The sample newsletter was about revocable inter vivos trusts. After defining such a trust and noting that many out-of-state publications recommend their use to avoid probate, the newsletter posed and answered the question of whether such trusts were good for Texas and New Mexico residents. The answer listed seven items of advantage or disadvantage in using such a trust, e.g., expense, confidentiality, tax savings, and the like. The note describing the origin of the newsletter stated, "In an effort to help those who are interested in estate planning and tax planning, we are writing a periodic letter of comments from our experience on these subjects ... [This letter] is written personally by us ... ; so, it is based on ... our concrete experiences in the local situation."

Conclusion: The attorney may send out a newsletter/solicitation provided that less emphasis is placed on the experience of the law firms.

Discussion: (Note. When the District 2 Committee met to discuss this issue, the New Mexico Supreme Court had not yet adopted the new Code of Professional Responsibility, effective January 1, 1987, which specifically addresses newsletter solicitations.) In our initial discussion, we noted various ways in which the newsletter in question might violate the present New Mexico Code of Professional Responsibility, particularly Rule 2-103 and Rule 2-104(A)(2). Nevertheless, the committee members unanimously considered this newsletter to be a permissible solicitation for new business. Our basis for this conclusion came from constitutional considerations, as expressed in the United States Supreme Court in *In re R.M.J.*, 455 U.S. 191 (1982), along with an expansive reading of Rule 2-104(A)(4) of the present New Mexico Code of Professional Responsibility.

Anticipating whether this newsletter is permissible both constitutionally and under the new rules regarding lawyer advertising in New Mexico, the committee refers the attorney to Rule 7.2 of the newly-adopted rules, effective January 1, 1987. Rule 7.2(a) specifically allows advertising "through written communication not involving personal solicitation." Although "personal solicitation" is not defined in these New Mexico rules, it has been noted that the direct-mail context is *not* analogous to in-person solicitation, since the likelihood of overreaching and high-pressure sales tactics are not present in a mailing. *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984).

Although the court in *Spencer* found a blanket prohibition of direct-mail solicitation to be unconstitutional, it went on to hold that the state's proscription of "false or misleading" advertising prohibited the attorney advertising to or advising potential clients that he is an "experienced" pilot or an "experienced" computer programmer, since these characterizations are inherently misleading. Similarly, when Ohio changed its disciplinary rules to allow self-laudatory statements, it still proscribed "subjectively self-laudatory" statements (Ohio DR2-101), pursuant to its interpretation of the ABA Model Rule 7.1 prohibition of "false or misleading communication about the lawyer or the lawyer's services." New Mexico has adopted this rule.

The committee generally approved the format of the newsletter in question, but felt that some of the statements contained in the sample newsletter emphasized the attorney's experience, without objectively stating the basis for such statements. These statements may be misleading.

Finally, note Rule 7.2(b) of the newly-adopted New Mexico Code of Professional Responsibility that requires a copy of any written communication be kept by an attorney responsible for its content for two years after its last dissemination along with a record of when and where it was used.