

ETHICS OPINION

RO-2003-01

OFFICE OF GENERAL COUNSEL

The Office of General Counsel regularly receives various requests for informal opinions concerning the requirements and limitations imposed upon attorney advertising by Rules 7.1, 7.2 and 7.3 of the Rules of Professional Conduct. The Disciplinary Commission has determined that it would be beneficial to consolidate into one formal opinion those informal advertising opinions which appear to be of profession-wide interest. Accordingly, RO-2003-01 will address those questions set forth below.

QUESTION ONE:

Are an attorney's business cards considered advertising? May an attorney leave his business cards in the offices of other professionals such as doctors and accountants?

ANSWER QUESTION ONE:

The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients. Direct solicitation of prospective clients is governed by Rule 7.3 of the Rules Professional Conduct. Paragraph (a) of that Rule provides as follows:

"Rule 7.3 Direct Contact With Prospective Clients

- (a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. *A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf.* A lawyer shall not enter

into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

In formal opinion RO-91-17, the Disciplinary Commission concluded that it was impermissible for an attorney to participate in a Welcome Wagon sponsorship whereby the attorney's brochure and other advertising material would be distributed by a Chamber of Commerce employee to new residents in the community. The Commission determined that such participation would constitute solicitation by an agent acting on the lawyer's behalf in violation of Rule 7.3 of the Rules of Professional Conduct. Additionally, the Office of General Counsel has held in various informal opinions that attorneys may not leave their business cards or other advertising materials in bars and nightclubs, doctors' offices or the offices of bail bondsmen because to do so would constitute face-to-face solicitation by an agent. It is, therefore, the opinion of the Disciplinary Commission that it would be ethically impermissible for an attorney to provide business cards to other professionals for distribution to their clients, customers or patients.

QUESTION TWO:

May an attorney print an advertisement for legal services on the exterior of prescription bags which a pharmacy will dispense to customers?

ANSWER QUESTION TWO:

The Disciplinary Commission is of the opinion that the ethical concerns discussed in RO-91-17, cited in the previous question, are equally applicable to this inquiry. The Commission determined that attorney participation in Welcome Wagon sponsorships is prohibited because such participation constitutes solicitation by an agent. In this instance, the pharmacist would be soliciting on behalf of the attorney in much the same manner, and to the same extent, as the Chamber of Commerce employee in RO-91-17. Furthermore, the attorney is obviously paying the pharmacist for the right to place his advertisement on the prescription bags. The fact that the attorney's advertisement is on the pharmacist's prescription bags constitutes, or could readily be construed to constitute, an endorsement or recommendation of the attorney by the pharmacist. Rule 7.2 (c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyers services . . .". Accordingly, it is the opinion of the Disciplinary Commission that it would be ethically improper for an attorney to place an advertisement for legal services on the exterior of a prescription bag or on any other item which is to be distributed to the public by a third party.

QUESTION THREE:

Is an offer to provide legal services on a pro bono basis subject to the Rules governing advertising and solicitation?

ANSWER QUESTION THREE:

Rule 7.3 of the Rules of Professional Conduct governs attorney solicitation of prospective clients. Paragraph (a) of that Rule provides, in pertinent part, as follows:

"Rule 7.3 Direct Contact With Prospective Clients

- (a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, *when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.*

* * *

The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of "pecuniary gain" within

the meaning of the above-quoted Rule. Accordingly, offers to provide such services need not comply with the requirements of subdivision (b)(2) of Rule 7.3 and need not contain the disclaimer required by Rule 7.2(e). The Commission's opinion is consistent with, and supported by, the decisions of the United States Supreme Court in *NAACP v. Button*, 371 U.S. 415 (1963), upholding the right of NAACP attorneys to solicit potential clients in civil rights litigation and in *In re Primus*, 436 U.S. 412 (1978), upholding the right of an ACLU attorney to send a solicitation letter to a woman who had been sterilized as a condition of Medicaid eligibility.

QUESTION FOUR:

Must written communications sent to former or existing clients for the purpose of soliciting representation of those clients in matters wholly unrelated to the existing or previous representation comply with the direct-mail solicitations requirements of Rule 7.3?

ANSWER QUESTION FOUR:

Direct mail solicitation of prospective clients is governed by Rule 7.3 of the Rules of Professional Conduct. Paragraph (a) of that Rule provides, in pertinent part, as follows:

"A lawyer shall not solicit professional employment
from a prospective client *with whom the lawyer has*

no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."
(Emphasis supplied)

It is the opinion of the Disciplinary Commission that the above-quoted language exempts written communication directed to former or existing clients from the requirements of Rule 7.3 regardless of whether the communication relates to the existing or prior representation or is for the purpose of soliciting the recipient as a client in a new and unrelated matter. To the extent language in RO-93-02 may be interpreted to indicate otherwise, it is the intent of the Commission to reject such an interpretation and to modify the language of RO-93-02 consistent with this opinion.

QUESTION FIVE:

The Comment to Rule 7.3 contains the following provision which has generated some confusion regarding the correct interpretation and application thereof:

"General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee."

Does this provision mean that such mailings need not comply with the requirements of Rule 7.3?

ANSWER QUESTION FIVE:

The Disciplinary Commission is of the opinion that this portion of the Comment does not mean that such mailings need not comply with the requirements of Rule 7.3. The Comment says that such mailings are "permitted" by the Rule. It does not say that such mailings are "exempt" from the Rule. The correct interpretation, in the opinion of the Disciplinary Commission, is that such mailings are permitted provided those mailings comply with the requirements of Rule 7.3 and also provided they comply with the requirements of Rule 7.2. Any mailing which is a "written form of communication directed to a specific recipient with whom the lawyer has no familial or current or prior professional relationship" must comply with Rule 7.3 and with Rule 7.2. The only exception to this requirement is that discussed in the previous question, i.e., written communication sent to former or existing clients or family members.

QUESTION SIX:

Another provision in the Comment to Rule 7.3 about which questions have been raised regarding the meaning thereof is the following:

"Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule."

ANSWER QUESTION SIX:

This comment refers to communications which have been solicited by the recipient. For example, if someone who needs legal assistance and, in the process of attempting to determine which attorney to employ, contacts one or more attorneys asking for information on their background and experience, the response to such a request need not comply with the Rule governing direct mail solicitation. Conversely, communications which are sent to prospective clients on an unsolicited basis must comply with the Rule.

QUESTION SEVEN:

A lawyer proposes to publish an advertisement which contains the following language: "Experienced, Driven & Knows the System - The Lawyer You Choose Makes A Difference". Is this language permissible?

ANSWER QUESTION SEVEN:

It is the opinion of the Disciplinary Commission that such "comparative" language is directly contrary to the intent and purpose of the disclaimer required by paragraph (e) of Rule 7.2, i.e., "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers." The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney

does, in fact, provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.

QUESTION EIGHT:

An attorney proposes to send a brochure to prospective clients with a cover letter worded as follows:

"Enclosed is a courtesy copy of my firm's July/August 2003 newsletter. I hope that you find it informative. If you would like to receive additional copies of the newsletter in the future, please take a moment to complete and return the enclosed postcard to me, and I will see to it that additional copies are sent to you."

Must the cover letter and brochure comply with the requirements of Rule 7.3 of the Rules of Professional Conduct which govern direct mail solicitation of prospective clients by attorneys?

ANSWER QUESTION EIGHT:

Paragraph (a) of Rule 7.3 provides as follows:

"(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this

rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule."

It conclusively appears that the proposed cover letter and brochure are "written form[s] of communication directed to a specific recipient". It further appears that the intended recipient is someone "with whom the lawyer has no familial or current or prior professional relationship". Accordingly, it is the opinion of the Office of General Counsel that the letter and brochure must comply with Rules 7.2 and 7.3. As discussed in response to Question Four, written communication sent to former or existing clients or family members are exempt from all advertising and solicitation requirements.

QUESTION NINE:

An attorney proposes to send a calendar to prospective clients which would have printed on it the attorney's name, address, telephone number, fax number and a sketch of the attorney's office building. Must this proposed calendar comply with Rule 7.3?

ANSWER QUESTION NINE:

It is the opinion of the Disciplinary Commission that the proposed calendar is not a "written form of communication" within the meaning of Rule 7.3 and, therefore,

need not comply with the requirements thereof. However, if the calendar includes any reference to the attorney's areas of practice, it must contain the disclaimer as required by Rule 7.2(e).

QUESTION TEN:

May advertisements contain "success stories" about cases the attorney has successfully litigated and amounts recovered on behalf of clients? May advertisements contain "client testimonials" relating favorable comments from satisfied clients?

ANSWER QUESTION TEN:

Rule 7.1 of the Rules of Professional Conduct provides, in pertinent part, as follows:

"A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

*** * ***

(b) is likely to create an unjustified expectation about results the lawyer can achieve . . .".

The Comment to the above-quoted provision expands upon this prohibition:

"The prohibition in paragraph (b) of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

In a recent informal opinion, the Office of General Counsel approved an advertisement which included those elements expressly prohibited in the Comment, i.e.,

references to successful litigation, information concerning amounts recovered and favorable comments from satisfied clients. However, the General Counsel's opinion was predicated on the fact that the advertisement contained the following disclaimer:

"These recoveries and testimonials are not an indication of future results. Every case is different, and regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

The Disciplinary Commission concurs in the opinion of the General Counsel that such "success story" and "testimonial" advertisements are permissible, provided such permission is expressly conditioned upon the inclusion of an explicit, comprehensive and appropriately worded disclaimer and provided, of course, that the statements made in the advertisements are true and accurate.

