

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1986-87/14(a)
Advertising: Direct Mail
September 8, 1987

RULE REFERENCES:

- *Rule 7.1
- *Rule 7.2
- *Rule 7.3
- *Rule 7.3(c)
- *Rule 7.4

SUBJECTS:

- *Advertising and Solicitation
- *Real Estate/Realtors

ANNOTATION:

Pamphlets with attorney advertising distributed free to the public generally at public places would not be solicitation under Rule 7.3(c). (Rule 7.3(c))

Pamphlets with attorney advertising mailed to at least a thousand addresses are "distributed generally" within the meaning of Rule 7.3, and are not solicitation. (Rule 7.3)

Pamphlets with attorney advertising sent to businesses, soliciting the businesses as clients, are not solicitation. (Rule 7.3)

All attorney advertising should comply with Rules 7.1 through 7.4. (Rules 7.1; 7.2; 7.3; 7.4)

FACTS:

A New Hampshire lawyer plans to publish four real estate advertisement pamphlets which will be delivered periodically to business and residential addresses in southern New Hampshire. The pamphlets will include listings of real estate offerings and will contain advertisements for real estate-related businesses such as title companies and mortgage companies. The pamphlets will also contain an advertisement listing the kinds of real estate-related services the lawyer provides.

Each of the pamphlets will be mailed to at least 1,000 addresses. The addresses will be generated by professional mailing list brokers. Some of the pamphlets will be mailed to individuals who have real estate-related occupations. Some of the pamphlets will also be mailed to individuals who meet certain income or other economic criteria. Some of the pamphlets will be distributed free to the public at such places as tourist information booths and State liquor stores.

QUESTION:

Does such pamphlet distribution constitute solicitation proscribed by Rule 7.3 of the New Hampshire Rules of Professional Conduct?

RESPONSE:

The Committee assumes that a significant motive for including the lawyer's advertisement in these pamphlets is the lawyer's pecuniary gain. Accordingly, to comply with Rule 7.3, the advertisements must fall within one of two exceptions.

A. Exclusion for general distributions.

Rule 7.3(c) excludes from the definition of "solicitation" the following:

". . . letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful."

This exclusion also appears in the American Bar Association's Model Rules of Professional Conduct. Pamphlets distributed free to the public generally at public places would clearly fall within this exclusion.

The more difficult issues relate to the pamphlets sent to individuals. This Committee has indicated its support for general mailings which "avoid the potential abuse of 'targeting' recipients through special mailing lists." NH Op. 1983-4/15 (June 12, 1984). This Committee has not yet undertaken to delineate between allowable general mailings and prohibited target mailings, recently indicating that such delineation "will probably only be defined in time by the courts." P. Imse. Practical Ethics -- Client Solicitation, 13 N.H.L.W. 85, 86 (1986).

Courts have usually been more concerned with the constitutional implications of State Bar regulation of advertising, rather than the interpretation of The Rules of Professional Conduct. See generally Annot., "Advertising as Ground for Disciplining Attorney," 30 A.L.R.4th 742, 783-797 (1984). For example, the United States Supreme Court recently found that a lawyer's newspaper advertisement targeted at users of a contraceptive device known as the Dalkon Shield Intrauterine Device was protected by the First Amendment. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). See also Re R.M.J., 455 U.S. 191 (1982) (general mailings of professional announcements).

Under the facts presented, we conclude that pamphlets mailed to at least a thousand addresses are "distributed generally" within the meaning of Rule 7.3. In reaching this conclusion, we are mindful of a number of recent cases which have found much more restricted mailings to be protected by the First Amendment. See Matter of Von Wiegen, 470 N.E.2d 838 (N.Y. 1984) cert. denied 472 U.S. 1007 (1985) (accident victims); Adams v. Attorney Registration and Disciplinary Committee, 801 F.2d 969 (7th Cir. 1986) (named defendants in residential mortgage foreclosure, individuals subject to garnishment proceedings, accident victims). Cf. Shapiro v. Kentucky Bar Assoc., 726 S.W.2d 299 (Ky. 1987) (named defendants in foreclosure suits). But cf. State v. Moses, 642 P.2d 1004 (Kan.

1982) (150 letters on professional stationery addressed to individuals named in multiple listing service). We have therefore construed the rule to avoid constitutional conflict. See White v. Lee, 124 N.H. 69 (1983).

B. Exemption for business contacts.

The New Hampshire rule, unlike the American Bar Association's model rule, contains a specific exception. In New Hampshire, Rule 7.3 does not apply to the following:

" . . . a written solicitation of professional employment to a prospective client in connection with business or commerce carried on or anticipated to be carried on by such prospective client . . . "

This exemption would apply to those pamphlets sent to businesses, to the extent that the pamphlets solicited such businesses as prospective clients.

CONCLUSION:

For the reasons stated above, we conclude that the manner of distribution of such pamphlets comports with the requirements of Rule 7.3.

This Committee has not, however, seen examples of these pamphlets, nor have we been provided details of their dissemination beyond what is stated in this opinion. Accordingly, the lawyer should take care to insure compliance with all provisions of Rules 7.1 through 7.4.