

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 09-04**

IT IS NOT NECESSARY TO INCLUDE THE WORDS "THIS IS AN ADVERTISEMENT" FOR LAW FIRM NEWSLETTERS SENT TO PRESENT CLIENTS, FORMER CLIENTS, AND PERSONS WHO REQUEST THAT A COPY OF THE NEWSLETTER BE SENT TO THEM.

WITH RESPECT TO NEWSLETTERS EMAILED AS ATTACHMENTS, WHERE THE WORDS "THIS IS AN ADVERTISEMENT" ARE REQUIRED, IT IS SUFFICIENT IF THOSE WORDS ARE INCLUDED IN THE SUBJECT LINE OF THE EMAIL MESSAGE AND AT THE END OF THE EMAIL MESSAGE. IT IS NOT NECESSARY TO ALSO INCLUDE THOSE WORDS IN THE ATTACHED NEWSLETTER.

**QUESTIONS PRESENTED**

1. May a law firm mail or email a newsletter to present clients, former clients, and persons who request a copy of the newsletter without including the disclaimer "This is an Advertisement" on either the front of the mailing envelope or within the email?
2. Is the general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment inapplicable to persons who have engaged the law firm for estate planning in the past?
3. With respect to email communications which require the inclusion of the words "This is an advertisement," where must these words appear when the newsletter is included as an attachment to an email message?

**FACTS**

A law firm publishes one or more newsletters several times per year. The purposes of the newsletters are: (1) to update its readers on changes in a certain area of the law; and (2) to inform readers about legal issues or topics which deal with a certain area of the law. The newsletter is sent without charge to current and former clients, professional advisors in related disciplines who have a personal or professional relationship with the law firm, persons who request copies, or persons who the law firm believes would be interested in the newsletter.

The first issue of the newsletter has been printed and mailed. The front of the envelopes for all newsletters included the disclaimer "This is an Advertisement" in a type size at least as large as the print of the address. Included with the first issue of the newsletter was a response card whereby recipients could indicate if they wanted to receive future issues in print or electronically by email, or not at all. Recipients who did not complete and return the response card continue to receive paper copies of the newsletter. Each copy of the newsletter includes a

statement that recipients can stop receiving copies of the newsletter by sending an email to the law firm.

## **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

### **RULE § 3-507.2 ADVERTISING**

(a) Subject to the requirements of Rules 3-507.1 and 3-507.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

### **RULE § 3-507.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client shall include the words "This is an advertisement" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, and in the subject line of an email, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). "This is an advertisement" shall appear in type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or postcard.

### **COMMENTS:**

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 3-507.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of

Rule 3-507.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 3-507.3(a) and the requirements of Rule 3-507.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 3-507.1, which involves coercion, duress or harassment within the meaning of Rule 3-507.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 3-507.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 3-507.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 3-507.3(b).

[7] The requirement in Rule 3-507.3(c) that certain communications be marked "This is an advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

## **DISCUSSION**

In Formal Opinion 95-2, this Committee determined that a law firm's newsletter constituted an "advertisement" subject to former Disciplinary Rule 2-101(F) of the Code of Professional Responsibility. Specifically, the Committee's opinion was that this rule applied to "targeted mailings where canned or internally generated newsletters are mailed to former and existing clients and other persons who are calculated to need legal advice concerning the subjects that are discussed in the newsletter." Consistent with Formal Opinion 95-2, we determine that a law firm's newsletter is considered an advertisement subject to Rule 3-507.3 of the current Rules of Professional Conduct.

One factor to be considered is whether email communication constitutes "real-time electronic contact." If so, there would be limitations on the use of email for advertising purposes. The Maryland State Bar Association Commission on Ethics determined that an email message is not prohibited "real time" communication (Opinion 2009-02, 8/28/08). That opinion cited Utah

Ethics Opinion 97-10 (1977) which analogized email to regular mail. Note that Model Rule 7.3(c) does not include the phrase “and in the subject line of an email.” As indicated in Comment 3, one of the issues is whether the communication can be permanently recorded so it cannot be disputed and may be shared with others. Since the Nebraska version of Model Rule 7.3(c) added specific reference to email communication, the use of email is, by implication, a permitted form of advertising. For these reasons, we do not consider email communications as real-time electronic communication.

With respect to the specific questions presented:

1. Comment 4 to Neb. Ct. R. Prof. Cond. § 3-507.3 indicates that the requirements of Rule 3-507.3(c) are not applicable to communications with former clients, individuals with whom the lawyer has a close personal or family relationship, or with other lawyers. Rule 3-507.3(a)(2) includes those persons having a prior professional relationship with the lawyer. This language is broad enough to cover current clients. Comment 7 provides that the requirement to mark communications with “This is an advertisement” does not apply to communications sent in response to requests by potential clients. Requests include the return of response cards indicating how or whether they desire to receive future newsletters. Thus, a firm may mail or email newsletters to present clients, former clients, and persons who request the newsletter without including the disclaimer: “This is an advertisement.” There is a caveat, however.

Included with the first issue of the newsletter was a response card whereby recipients could indicate if they wanted to receive future issues in print or electronically by email, or not at all. Recipients who did not complete and return the response card continue to receive paper copies of the newsletter. Comment 5 to Rule 3-507.3 provides: “Moreover, if after sending a letter or other communication to a client as permitted by Rule 3-507.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 3-507.3(b).” While the Committee has not been asked to proffer an opinion on this particular issue, the law firm should be fully cognizant of those persons not returning the response cards as well as applicable ethics rules.

2. Comment 4 to Neb. Ct. R. Prof. Cond. § 3-507.3 indicates that the requirements of both Rule 3-507.3(a) and Rule 3-507.3(c) are not applicable to communications with former clients. Those who have engaged the law firm for estate planning in the past are obviously former clients, and (i) may be contacted by in-person, live telephone or real-time electronic contact, or (ii) solicited without including the words “This is an advertisement.”

3. As per Neb. Ct. R. Prof. Cond. § 3-507.3, where necessary, “This is an advertisement” must appear on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, *and in the subject line of an email* (emphasis added). The addition of the italicized phrase appears to be unique to Nebraska as it is not included in the corresponding Model Rule. As a result, there may be unintended duplication within the Nebraska rule since an email is also an electronic communication. Nevertheless, the use of the word “and” in Rule 3-507.3(c) indicates that email communication must comply not only with the specific requirement for emails, but also with the requirements for electronic communication. We believe that the inclusion of the words “This is an advertisement” in the subject line is sufficient to cover the

requirement that the words appear at the beginning of an electronic communication. It will then be necessary to include those words at the end of the email message. However, where the newsletter is included as an attachment to an email, the actual email message is similar to the envelope of a mailed newsletter. Thus, it is not necessary to include the words "This is an advertisement" in the attached newsletter.

Notwithstanding the above comments, no solicitation by mail or email may be made with respect to prospective clients where prohibited by Rule 3-507.3(b). No solicitation shall be made where it is made known to a lawyer that a prospective client does not desire to be solicited, or the solicitation involves coercion, duress or harassment. While this committee does not provide legal opinions, any lawyer sending newsletters by email should be aware of laws regulating unsolicited commercial email such as the CAN-SPAM Act, 15 U.S.C. §§7701-13.

### **CONCLUSION**

It is not necessary to include the words "This is an advertisement" for law firm newsletters sent to present clients, former clients, and persons who request a copy of the newsletter. The general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment is inapplicable to persons who have engaged the law firm for estate planning in the past. With respect to newsletters emailed as attachments, where the words "This is an advertisement" are required, it is sufficient if those words are included in the subject line of the email message and at the end of the email message. It is not necessary to include those words in the attached newsletter.