

Nebraska Ethics Advisory Opinion for Lawyers
No. 89-7

A LAWYER MAY SEND A "CANNED" NEWSLETTER TO CLIENTS AND NONCLIENTS PROVIDED THE LAWYER FOLLOWS THE GUIDELINES SET FORTH IN DR 2-101, THE NEWSLETTER IS NOT FALSE OR MISLEADING, AND THE LAWYER PROPERLY IDENTIFIES THE AUTHOR OF THE NEWSLETTER IF IT IS NOT WRITTEN BY THE LAWYER. OPINION NO. 78-7 IS HEREBY RESCINDED TO THE EXTENT INCONSISTENT HEREWITH.

FACTS

The American Bar Association publishes a quarterly newsletter entitled "Your Law" which is made available to attorneys for distribution to clients and "potential" clients.

An attorney wishes to mail these newsletters to acquaintances (clients and non-clients) with the attorney's name, address and telephone number imprinted on the top of the front page.

QUESTIONS PRESENTED

Whether it is ethical for an attorney to mail an informational newsletter entitled "Your Law" published by the American Bar Association, or any similar newsletter, to clients and non-clients with the attorney's (or firm's) name, address and telephone number imprinted or stamped thereon.

DISCUSSION

This issue was specifically addressed in NSBA [Advisory Opinion 78-7](#) where the Committee concluded that "a lawyer or law firm may not ethically place the name of such lawyer or law firm with address and telephone number on the pamphlets that are made available by the Nebraska Bar Association for the general information of the public." This opinion was based upon Nebraska's

DR 2-102(A) which has since been revised.

Informal Opinion No. 1464 of the American Bar Association Committee on Ethics and Professional Responsibility ("ABA Committee") dealt with whether it would be ethically permissible to publish an advertisement in the ABA Journal to aid the marketing of a "canned column" subscription service. The service provided a series of short law related publications intended for personalization by subscribing lawyers for publication in the newspaper.

The article provided would contain a basic and accurate explanation of a legal subject of general interest to a non-lawyer reader. As a result the articles contain no reference to the lawyer and when published would be followed by a tagline stating they were presented as a "public service" or "community service" and would include the name of the attorney or law firm, its address, telephone number and perhaps a small photograph. The ABA Committee stated:

The Model Code as amended permits a lawyer, in order to facilitate informed selection of lawyers by potential consumers of legal services, to publish in local newspapers dignified advertisements that include all or some of the kinds listed in DR 2-101, so long as the advertisement contains no false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim.

DR 2-101 as adopted by the ABA Committee contains a lengthy and specific list of information that a lawyer may include when publishing advertisements. Although the proposed advertisement in this case was not clearly envisaged by DR 2-101, the ABA Committee found that the advertisement was permissible so long as it did not contain any misleading, deceptive, fraudulent, false, self-laudatory or unfair statement or claims.

However, the ABA Committee indicated that on the facts presented the advertisement would contain a byline

implying that the lawyer was the author of the advertisement and because the lawyer was not the author, this would violate DR 2-101 as being misleading.

In Nebraska, DR 2-101 provides:

(A) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about the results a lawyer can achieve, or states or implies that a lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(3) Compares the lawyer's services, with other lawyers' services, unless the comparison can be factually substantiated.

(B) Subject to the requirement of DR 2-101(A) and 2-104(B), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact. A copy or recording of an advertisement or written communication shall be kept for one year after its dissemination along with a record of when and where it was used.

EC 2-9 provides:

The lack of sophistication on the part of

many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of a claim are the principle factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful and relevant information to the public.

Newsletters like the one at hand serve the purpose of providing the recipients with information on the current changes in the law, hence providing education to the general public to recognize legal problems as suggested by EC 2-1.

The United States Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), indicates that state bar associations should not discourage the free flow of information from attorneys to members of the public. However, this interest is balanced by the need to avoid dissemination of misleading information. The Committee believes it is therefore ethically permissible for a lawyer to send a newsletter that is not authored by the lawyer to existing clients, provided that

it does not contain false or misleading information. Furthermore, if the newsletter sent by the lawyer is not authored by that lawyer, the lawyer should clearly identify on the newsletter who the actual author is or at least that the attorney did not author the newsletter.

The mailing of a newsletter to a non-client provides a more difficult situation because the danger of improper solicitation is more prevalent. DR 2-104(B) provides:

B. A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) The communication involves coercion, duress or harassment.

DR 2-101(F) provides:

F. On the front of each envelope in which an advertisement of a lawyer is mailed or delivered or on the front of each post card, if the advertisement is printed on a post card, shall be placed the words: 'This is an advertisement'. These words shall be printed 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 card.

The Nebraska Code clearly does not prohibit such solicitations and DR 2-101 provides guidelines for such solicitations. Further, the distribution of a newsletter to non-clients is less invasive than that of personal contact

and any person receiving the unwanted newsletter may simply dispose of it.

Therefore, if the guidelines of DR 2-101 are observed and the proper authorship of the newsletter is established, the Committee concludes that a lawyer may send the newsletters to clients and nonclients alike. Furthermore, the lawyer should be careful to review the content of the columns to ensure that the information contained therein is consistent with the Nebraska law so as not to be misleading. To the extent the Committee's [Advisory Opinion 78-7](#) conflicts with this opinion, it is hereby rescinded.

CONCLUSION

A lawyer may send a "canned" newsletter to clients and nonclients provided the lawyer follows the guidelines set forth in DR 2-101, the newsletter is not false or misleading, and the lawyer properly identifies the author of the newsletter if it is not written by the lawyer.

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