

**Nebraska Ethics Advisory Opinion for Lawyers
No. 09-05**

AN ADVERTISEMENT COUPON PLACED IN A MASS MAILER, WHICH DOES NOT STATE “THIS IS AN ADVERTISEMENT” ON THE OUTSIDE OF THE ENVELOPE VIOLATES RULE 7.2.

A LAWYER MAY RENT A TABLE OR SPONSOR A BOOTH AT A BUSINESS EXPOSITION AND NOT VIOLATE RULE 7.3, AS LONG AS THE LAWYER DOES NOT APPROACH, ACCOST, OR IMPORTUNE MEMBERS OF THE PUBLIC IN THE AREA OF THE TABLE OR THE BOOTH. A LAWYER MUST NOT USE ANY DECEPTIVE TACTICS TO INFLUENCE THE PUBLIC’S DECISION TO VISIT OR NOT VISIT THE TABLE OR THE BOOTH. THE DECISION TO MAKE CONTACT MUST ALWAYS BE MADE BY THE PUBLIC, NOT BY THE LAWYER.

QUESTIONS PRESENTED

I. May a Nebraska lawyer include in a mass mailer an advertisement coupon which specifies a percentage off or a reduced fee for professional fees charged, but does not state “This is an advertisement” on the outside of the envelope? If so, under the Rules of Professional Conduct, what restrictions apply to the language used in the advertisement?

II. May a Nebraska lawyer rent a table at Chamber of Commerce events to promote his professional services? If so, may a Nebraska lawyer offer a free giveaway to an individual by drawing from business cards which are voluntarily placed into a container at the table?

FACTS

A Nebraska lawyer is interested in including an advertisement coupon in a mass mailer service which will mail an envelope containing forty-five to seventy-five coupons for various local businesses to individuals residing within zip codes in a defined area. The coupons would only be redeemable at the attorney’s law office and would not have a cash value. The mailing would be addressed to specified residents residing at that address, or more generally, to “Occupant.” The envelopes would not bear the language “This is an advertisement.”

The same lawyer is also interested in renting a table at Chamber of Commerce events in order to promote his professional services. In providing this information, the lawyer would like to offer a free giveaway from business cards that are dropped into a container on the rented table.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 7.1 COMMUNICATION CONCERNING A LAWYER’S SERVICES

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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3 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.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT:

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[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 7.2 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 7.1. 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.

[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 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(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 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[7] The requirement in Rule 7.3(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.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

....

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

DISCUSSION

I. May a Nebraska lawyer include in a mailer service an advertisement coupon, which specifies a percentage off or a reduced fee for professional fees charged? If so, under the Rules of Professional Conduct, what restrictions apply to the language used in the advertisement?

Rule 7.2(a) generally provides that attorneys are free to advertise their services so long as those advertisements are not false or misleading; however, Rule 7.3(c) requires that the envelope and first page of communications mailed or delivered to potential clients contain the message “This is an advertisement.” This Committee is of the opinion that because the envelope containing the proposed coupon will not contain the required language, the attorney’s coupon would be in violation of the Rules of Professional Conduct. If, however, the lawyer wished to mail his coupons out to the general public either himself or through an advertising service that would print the required language on the envelope, this practice would be proper so long as the mailing met the requirements under the Rules of Professional Conduct.

Formal Opinion 89-56 addressed the issue of a law firm offering a coupon for a “free simple will” or a discount on more complex wills under the former Nebraska Code of Professional Responsibility. This Committee held that the language of the proposed coupon was misleading because it was not clear to the general public what would constitute a “simple” or a “complex” will. This language had the potential to confuse the customer and create unrealistic expectations of the services to be rendered and the fees to be charged. Therefore, the language of the attorney’s coupon must be clear in identifying what “professional fees” will be discounted (i.e. will the discount apply to paralegal or legal assistant fees, filing fees, mileage costs, and copy and print charges?). Furthermore, in identifying the service to be offered at a discount it is necessary to specify any limits on the discounted service, and explain terms which may be misinterpreted by the potential client.

According to Rule 7.2(c), every advertisement must contain the name and office address of at least one lawyer or law firm responsible for the content of the advertisement. The lawyer is not prohibited under Rule 7.3 from sending truthful and non-misleading letters to persons who are known to need specific legal services so long as the lawyer does not have actual knowledge that the prospective client does not wish to receive communication from the lawyer. The Committee would also call attention to Rule

7.4(d), which restricts the lawyer's ability to advertise as a "specialist." Any such statements are subject to the "false and misleading" standard under Rule 7.1.

II. May a Nebraska lawyer rent a table at Chamber of Commerce events to promote his services? If so, may a Nebraska lawyer offer a free giveaway to an individual by drawing from business cards which are voluntarily placed into a container at the table?

Under Rule 7.3, the general rule is that a lawyer must not solicit fee-paying work by initiating personal or live telephone contact, or real-time electronic contact, with a non-lawyer prospect with whom the lawyer has no family, close personal, or prior professional relationship. Though the personal contact here will be aimed at a small segment of the community and may provide general information regarding legal services, the contact will be accompanied by proposals of professional employment by the attorney. Solicitation under Rule 7.3 rather than advertising under Rule 7.2 is therefore the issue.

The State of Arizona was confronted with a similar issue in 2002. This Committee finds the Arizona analysis and conclusions persuasive. In Arizona Supreme Court Judicial Ethics Advisory Committee Opinion No. 02-08, the Arizona Committee discussed this issue as follows:

Formal opinions from the few jurisdictions that have considered this issue generally have allowed lawyers to sponsor trade show booths so long as there is no in-person solicitation and other safeguards are followed. *See* Mo. Op. 990116 (5/99-6/99) (Yes); Pa. Op. 91-13B (1/25/91) (Yes); and Utah Op. 99-04 (6/30/99) (Yes). *But see* Kan. Op. 98-04 (4/2/98) (No).

Ultimately, the Arizona Supreme Court is the judge of what constitutes ethical behavior under the Arizona Rules of Professional Conduct, subject to the First Amendment. Although to date the Arizona Supreme Court has not addressed the issue raised by this particular inquiry, the court historically has followed U.S. Supreme Court directions on the First Amendment while taking strong steps to protect the public. *See, e.g.*, Official Comment to the 1989 amendments to BR 7. 3(b).

The U.S. Supreme Court first held that commercial speech was entitled to First Amendment protection in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

One year later, the Court held that lawyer advertising was a form of protected free speech. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Holding that the First Amendment barred states from enacting absolute bans against lawyer advertising, the Court indicated that free and clean advertising is generally desirable

because it educates the public and promotes the proper administration of justice. Although considerations of professional dignity alone must yield to the First Amendment (*Id.*, 433 U.S. at pp. 369-372), the Court emphasized that states still had the right to place reasonable restrictions on the time, place, and manner of advertising in order to protect the public. *Id.* at pp. 384-385.

Except when the information is false, misleading, or proposes an unlawful transaction, absolute bans on commercial speech have not fared well in the U.S. Supreme Court. *See, e.g., Bates v. State Bar of Arizona, supra*, 433 U.S. 350 (prohibiting absolute bans on lawyer advertising); *Shapiro v. Kentucky Bar Association*, 466, 108 S. Ct. 1916, 100 L.Ed.2d 475 (1988) (no absolute bans on solicitation in the context of direct mailings to potential clients).

However, in *Ohralik*, the Court held that states have the right to enact outright bans against “in-person” solicitation by lawyers because of its potentially coercive effects on vulnerable people and because the difficulty of preserving oral solicitations might encourage fraud. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 465-466. Writing for the Court, Justice Powell did not define what constitutes an “in-person” solicitation. However, he held that a prophylactic rule was constitutionally justified in order to minimize the potential for intrusion, distress and invasion of privacy whenever an attorney initiates an in-person contact, “even when no other harm materializes.” *Id.* Indeed, the contact in *Ohralik* was initiated by the attorney and was particularly egregious. One young accident victim was approached while she was lying in traction and the other was approached shortly after being discharged from the hospital. Under the circumstances, the persons solicited in *Ohralik* “were especially incapable of making informed judgments or of assessing and protecting their own interests.” *Id.*, 436 U.S. at p. 467.

The question presented by this inquiry is whether sponsoring a booth at a “business exposition” in and of itself constitutes a prohibited in-person solicitation within the meaning of ER 7. 3(a) and whether the Ethics Committee correctly recommended a blanket ban on such activities in Ariz. Op. 91-04.

While it is true that a booth constitutes an invitation to meet the attorney, so does the sign in front of a lawyer’s office and an attorney’s ad in the telephone book. All of these forms of communication are solicitations targeted to members of the public who may need legal services now or in the future. But even though each of these methods frequently leads to a face-to-face encounter between lawyers and members of the public, the subsequent meeting does not thereby transform the original solicitation into a proscribed “in-person” solicitation within the

meaning of ER 7. 3(a). *See* Ariz. Op. 87-23, *supra* (“in-person” contacts are unlawful under ER 7. 3(a) only when they are initiated “by the attorney”).

The *sine qua non* of an “in-person” solicitation within the meaning of ER 7. 3(a) is the initiation of contact by a lawyer with a member of the public in such immediate circumstances of time and place that the person would reasonably feel pressured, intimidated, or importuned.

There is nothing inherently coercive about maintaining a booth at a business exposition so long as the decision to make “in-person” contact is made by the public, not the lawyer. While the potential for abuse or overreaching always exists once contact is made, it is not necessarily any greater in this situation than it would be for a member of the public attending his or her first meeting in the prospective lawyer’s office. Indeed, the casual visitor to a business exposition might feel less obligation to the lawyer than someone who reserves a block of time in the lawyer’s own office. It would be a relatively simple matter for a visitor to a business exposition to break off contact with the lawyer and rejoin the milling crowd.

In addition, business people as a whole are not generally characterized by their vulnerability or susceptibility to pressure tactics, particularly in a public forum. While some visitors to the exposition might need legal services, it is just as likely that others will have no immediate need for such services at all. They might simply wish to engage the lawyer in conversation to familiarize themselves with the delivery of legal services for future reference. Balancing public protection concerns with the public’s interest in enjoying the free flow of accurate information, there seems to be little justification for adopting a blanket ban on lawyer’s information booths at business expositions, so long as proper safeguards are observed. In Edenfield v. Fane, 507 U.S. 761, 774-776, 113 S.Ct. 1792, 1802-03 (1993), the Court used the First Amendment to strike down a state ban on in-person solicitation by CPAs. Although the Court distinguished Ohralik based in part upon its belief that CPAs are more objective than lawyers, at least by training, the Court also noted the significant differences between the accident victims in Ohralik and sophisticated business persons whom CPAs “typically” try to market.

Based upon the foregoing, it seems clear that the Ethics Committee erred by recommending an absolute ban on the sponsorship of booths by lawyers at business expositions in Ariz. Op. 91-04. The absolute ban recommended by Ariz. Op. 91-04 is not warranted, because it covers situations where in-person contacts are initiated by the public, not by the attorney. Recall Ariz. Op. 87-23, *supra*, which drew the dividing line between prohibited “in-person” solicitations and all other forms of

solicitation at the point where contact is “initiated *by the attorney*” (emphasis added). In Ariz. Op. 91-04, by contrast, the inquiring attorney emphasized that she had no intention whatsoever of approaching anyone to solicit business, and there was no indication in the facts that she had any reason to believe that she would be interacting with vulnerable people at the upcoming trade show.

Although a lawyer may ethically sponsor a booth at a business exposition, certain public protection limitations still apply. But in order to remain within the First Amendment guidelines set forth by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980), the focus of regulation in this area should be on the prevention of coercion and the protection of vulnerable persons rather than the dignity of the legal profession.

Addressing the issue of coercion, lawyers sponsoring a booth at a business exposition must not approach, accost, or importune members of the public in the area of the booth or otherwise. Moreover, lawyers must not use any deceptive tactics to influence the public’s decision to visit or not to visit the booth. The decision to make contact must always be made by the public, not by the lawyer. But once members of the public take the initiative to contact the lawyer, the lawyer has the right to respond and to distribute written materials which otherwise comply with the Rules of Professional Conduct, just as the lawyer would be free to do in his or her own office.

On the issue of vulnerability, the lawyer must consider the nature of the exposition beforehand and avoid gatherings where vulnerable people reasonably can be expected to be found. The risk of vulnerability would ordinarily be less in a business exposition than it would be in the context of a victims’ support group meeting, for example.

Of course, lawyers must be sensitive to the likelihood that visitors to their booth will often attempt to shift the conversation from general topics to matters bearing on their own situation. At that point, lawyers should caution visitors that they have the right to keep such matters confidential (ER 1.6) and encourage them to refrain from discussing particular situations except with their own attorney.

AZ Jud. Adv. Op. 02-08, 2002 WL 32062454 (Ariz.Sup.Ct.Jud.Eth.Adv.Comnt).

Thus, an attorney may rent a booth at a Chamber of Commerce event to promote his professional services. This includes offering a drawing for a prize so long as the use of the attorney’s services is not required to enter or win the drawing. Listening to a “pitch” should not be a requirement for entering or winning the drawing.

CONCLUSION

The Committee is of the opinion that an advertisement coupon placed in a mass mailer, which does not state "This is an advertisement" on the outside of the envelope violates Rule 7.2. The Committee is further of the opinion that a lawyer may rent a table or sponsor a booth at a business exposition and not violate Rule 7.3, as long as the lawyer does not approach, accost, or importune members of the public in the area of the table or the booth. A lawyer must not use any deceptive tactics to influence the public's decision to visit or not visit the table or the booth. The decision to make contact must always be made by the public, not by the lawyer. Once members of the public take the initiative to contact the lawyer, the lawyer has the right to respond and to distribute written materials which otherwise comply with the Rules of Professional Conduct, just as the lawyer would be free to do in his or her own office.