

Nebraska Ethics Advisory Opinion for Lawyers
No. 95-2

A NEWSLETTER SENT BY A LAWYER OR LAW FIRM TO CLIENTS AND NONCLIENTS CONTAINING ARTICLES REGARDING LEGAL DEVELOPMENTS AND ISSUES IS AN "ADVERTISEMENT" WITHIN THE MEANING OF DR 2-101 (F) OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND MUST STATE "THIS IS AN ADVERTISEMENT" IN A CONSPICUOUS PLACE ON THE ENVELOPE OR ON THE OUTSIDE COVER IF AN ENVELOPE IS NOT USED.

STATEMENT OF FACTS

An attorney has submitted materials to this Committee which are intended for distribution "mostly to our clients ... (and) other persons who have requested them or whom we believe are interested in receiving the newsletters." The newsletters "provide general legal information on current topics" and are entitled Report from Counsel and Technology Legal Report.

The Report from Counsel shows the name of the firm at two places on the front page, together with the address, phone number and fax number. It contains a disclaimer stating, "Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This publication is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues that we feel could be useful to our clients and friends." The Report from Counsel is not copyrighted. It does not indicate whether the five articles it contains were prepared by someone in the law firm or whether the document is purchased from a supplier as a "canned" newsletter.

The Technology Legal Report is published by the "Technology Work Group" of the firm, and lists the names of three partners to whom the articles contained therein are attributed. It lists the address, phone and fax numbers of the firm on each page.

The attorney has also indicated that it is his practice to include a brief note with each mailing couched in the following terms:

EXAMPLE #1: WE APPRECIATE YOUR REFERRALS.

"Thank you for referring your friends and associates to us. It is gratifying to know that you are pleased with our services and are willing to mention us to others."

EXAMPLE #2: THANK YOU FOR YOUR REFERRALS.

"We take this opportunity to thank you for referring your family and friends to us for legal work. It is gratifying to know that you have the trust and confidence to mention us to others."

EXAMPLE #3: THANK YOU.

"We consider it a privilege to work with you and serve as your attorneys. We want you to know that we appreciate the trust and confidence that you have placed with us."

EXAMPLE #4: THANK YOU FOR YOUR TRUST.

"We appreciate your referrals and especially the trust and confidence that you have placed with us in referring your friends, family and associates to us."

QUESTION PRESENTED

Is the dissemination of the newsletters, coupled with the "thank you" note, an "advertisement" which requires compliance with Disciplinary Rule 2-101(F)?

APPLICABLE CODE PROVISIONS

DR 2-101 Publicity.

. . . .

(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.

DISCUSSION

The mailing of newsletters to clients and nonclients is covered comprehensively by [Opinion No. 89-7](#). [Opinion 89-7](#) reviews the provisions of Disciplinary Rule 2-101, but does not specifically discuss whether a newsletter is an advertisement requiring application of Disciplinary Rule 2-101 (F). It does, however, set forth the general principles that a newsletter (1) must follow the guidelines set forth in Disciplinary Rule 2-101, (2) must properly identify the author of the newsletter if it is not written by the lawyer, and (3) must not be false or misleading.

In determining whether a particular act or set of materials constitutes advertising or an advertisement, the Committee notes that in each instance, the newsletter is a calculated, rather than a spontaneous act. The purpose of the newsletter is to generate new or additional business for the firm. Each newsletter prominently displays the name of the firm, its address, phone and fax numbers, and is coupled with a statement that expresses appreciation for prior business, as well as recommendations of the firm to others. Each article in each newsletter refers to matters of general or specific interest about which legal advice is commonly sought. While the mailings are not the subject of a general publication, they are targeted to clients, persons who have requested the mailings, or persons that the firm believes are interested in receiving the newsletter. The Technology Legal Report identifies the authors as persons who are actually associated with

the firm, implying that the authors have a certain level of legal expertise in the subject of each article. While the Report from Counsel does not identify the authors, there is at least some implication that the firm has the ability to provide legal advice concerning the subjects that are discussed.

Each of the newsletters contains specific legal advice which is general in nature and some of which is fact-specific.

In each instance, a slip is included that thanks the recipient for past business, referrals to others, or both.

While advertising is often thought of as involving public notoriety, the Committee is of the opinion that it also applies 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.

In a general sense, "advertise" means to give notice to; to inform; or to make known to. See, *Bissell Carpet Sweeper Co. v. Masters Mail Order Co. of Washington, D.C.*, 140 F.Supp. 165. The Committee believes that the mailing of the newsletters, even without the "thank you notes" constitutes advertising and that the provisions of Disciplinary Rule 2-101 (F) should be followed.

Two exceptions would apply:

1. Dissemination of the newsletters would not constitute advertising if at least one of the subjects in the newsletter involves a matter that is currently being handled by the firm for the recipient of the newsletter.

2. Dissemination of the newsletter would not constitute advertising if the firm is under contract with the recipient to provide the newsletter.

A careful reading of certain Ethical Considerations promulgated in connection with Canon 2 supports our

conclusion.

Ethical Consideration 2-7 states, inter alia: ".Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services."

Ethical Consideration 2-8 states inter alia: "...Advice and recommendation of third parties--relatives, friends, acquaintances, business associates or other lawyers-- and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment." (Emphasis supplied).

Ethical Consideration 2-9 states inter alia: "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 the claim are the principal 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...." (Emphasis supplied).

Ethical Consideration 2-10 provides in part as follows: "A lawyer should ensure that the information contained in any advertising which the lawyer publishes,

broadcasts or causes to be published or broadcasted is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel...."

In short, the two newsletters appear to be written materials not involving pending matters or matters which are the subject of an existing contract for legal services which are calculated to generate additional legal services by notifying the recipient of the existence of the firm, its address, phone and fax numbers, and implying the availability of the firm and its lawyers to perform legal services in the areas that are discussed in the materials.

CONCLUSION

A newsletter sent by a lawyer or law firm to clients and nonclients containing articles regarding legal developments and issues is an "advertisement" within the meaning of DR 2-101 (F) of the Code of Professional Responsibility and must state "This is an advertisement" in a conspicuous place on the envelope or on the outside cover if an envelope is not used.