

**ETHICS OPINION NUMBER 146
OF THE MISSISSIPPI BAR
ADOPTED MARCH 11 , 1988**

ADVERTISING-DIRECT MAIL SOLICITATION-FIRM BROCHURE - A law firm may ethically prepare a brochure describing the firm and its services provided the brochure is not false, deceptive, or misleading and complies with the applicable requirements of Rules 7.1, 7.2, 7.4 and 7.5.

Where a significant motive for so doing is the firm's pecuniary gain, the firm may mail such a brochure generally to recipients who are not known by the firm to need legal services of the kind provided by the firm in a particular matter, but who are so situated that they might in general find such services useful.

The Ethics Committee of the Mississippi State Bar has been asked to render its opinion on the following situation:

[W]ould it be proper for a law firm to use a well prepared brochure which introduces the firm, its members, and associates, and type of business that it predominately handles, as a means of mail solicitation to targeted clients?

For example, could a law firm properly send a brochure to banks, insurance companies, or other institutional type clients with a cover letter to the effect that the purpose of the brochure is to introduce the firm, the type services it provides, and an implied, if not direct, suggestion that if the recipient desires, the law firm would furnish further information on request, or would be pleased to meet with the prospective client personally to discuss the firm's services further.

Assuming that the information contained in the brochure was not "false, misleading, or deceptive," would such means of marketing be considered ethical and proper in Mississippi? This request raises two basic questions. First, may a law firm ethically prepare a brochure which describes the firm and its services? Secondly, to whom may the firm ethically mail the brochure?

Rule 7.1 of the Mississippi Rules of Professional Conduct prohibits a lawyer from making a "false, deceptive or misleading communication" about the lawyer or the lawyer's services. Subparts (a), (b), and (c) and the comment to Rule 7.1 identify some

specific examples of false, deceptive or misleading communications. The comment to Rule 7.1 states in pertinent part:

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 or fees, statements about them should be truthful.

Rule 7.2 permits a lawyer to advertise services through a public communication subject to the requirements of Rule 7.1. Rule 7.2(a) defines "public communication" to include, but not be limited to, "communication by means of television, radio, motion picture, newspaper, periodical, book, sign, display, directory, professional card, letterhead, listing or through written communication not involving solicitation as defined in Rule 7.3." (emphasis added). Rules 7.2, 7.4 and 7.5 contain several specific limitations on the form and content of permissible advertising.

Based upon these provisions, the Committee concludes that a law firm may ethically prepare a brochure describing the firm and its services provided the information contained in the brochure is not "false deceptive or misleading" within the meaning of Rule 7.1 of the Mississippi Rules of Professional Conduct and provided that its content complies with the applicable provisions of Rules 7.2, 7.4 and 7.5.

The second basic inquiry--to whom such a brochure may be mailed--is governed by Rule 7.3(Except for the insertion of the words "close personal" in its first sentence, Mississippi Rule 7.3 is identical to ABA Rule 7.3. The Committee is aware of the considerable division of opinion among courts and other state bars concerning the constitutionality and scope of permissible regulation of direct mail advertising and solicitation. See generally, ABA/BNA Lawyers' Manual on Professional Conduct 81:601 (1984). Likewise, the Committee is aware that the federal constitutionality of Kentucky's Rule 7.3 (which is identical to ABA Rule 7.3) is before the U.S. Supreme Court this term. See *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 301 (Ky.), cert. granted, U.S. , 108 S. Ct. 64, 98 L. Ed. 2d 28 (1987) (No. 87-16) ("May state bar association employ blanket prohibition against targeted direct mail advertising by attorneys, even when advertising is not misleading, false, or deceptive? 56 U.S.L.W. 3526.) and its comment. Titled "Direct Contact with Prospective Client", Rule 7.3 states in full:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family, close personal or prior professional relationship, by mail, in person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed

to a specific recipient, but does not include 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.

For the purpose of this request, the Committee assumes that a significant motive for the law firm's sending the brochure to recipients is to solicit professional employment for the firm's pecuniary gain. Therefore, this opinion does not address the different situation which would be presented if pecuniary gain for the law firm were not a significant motive. *See generally, In re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978); ABA/BNA Lawyers' Manual on Professional Conduct 81:2501 (1984). In addition, the Committee assumes that the law firm has no "family, close personal or prior professional relationship" with the proposed potential recipients. (Clearly, if the law firm had any "family, close personal or prior professional relationship" with the recipient, then the firm could ethically mail the brochure directly to such recipient because Rule 7.3 does not forbid such solicitation.)

The comment to Rule 7.3 explains its rationale. It notes there is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. The possible abuses identified are undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition. The comment notes that advertising through public communication made available by 7.2 makes it possible for a prospective client to be informed about the need for legal services and the qualifications and availability of lawyers without subjecting the client to direct personal persuasion that may overwhelm the client's judgment. The comment notes that these dangers attend direct solicitation whether in-person or by mail. However, the comment goes on to note:

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or

arrangement which he or his firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Based on Rule 7.3 and its comment, the Committee concludes that the law firm may ethically mail its brochure (the content and form of which comply with Rules 7.1, 7.2, 7.4 and 7.5) and accompanying transmittal letter generally to these institutional type entities if these entities are not known by the law firm to need legal services of the kind provided by the law firm in a particular matter, but are so situated that they might in general find such services useful. See ABA Informal Opinion No. 84-1504 (Jan. 10, 1984) (holding that it is ethically permissible under ABA Rule 7.3 for a lawyer to mail letters to a company's house counsel offering his services and providing information about the lawyer's prior positions and activities in a specific area of law).