

FORMAL OPINION #134

The Committee has been asked to interpret recent amendments to IRPC 7.3(c), governing direct contact with prospective clients. That rule states:

Rule 7.3 Direct Contact with Prospective Clients

\* \* \*

- (c) Every written communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside of the envelope and in the body of any written communication.

Specifically, we have been asked to interpret the provision that requires the use of the words "advertising material."

It would be useful to set forth the background which led to the amendment to IRPC 7.3. Under the Code of Professional Responsibility, in effect in Idaho until late 1986, a lawyer was not permitted to initiate any means of contact with a prospective client. DR 2-103 stated:

DR 2-103 Recommendation or Solicitation of  
Professional Employment

- A. A lawyer shall not seek by direct mail or other form of personal contact and shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer \* \* \*.

The Model Rules of Professional Conduct were adopted in 1986, permitting a lawyer to send target mailings to groups of persons generally thought to be in need of legal services, but not to persons specifically known to be in need of legal services in a particular matter. The rule also continued the prohibition against telephone or in-person solicitation.

Thus, after the adoption of the IRPC, a lawyer could permissibly send mass mailings or other targeted solicitations, but could not write to persons specifically known to have been in an automobile accident, for example.

The United States Supreme Court then decided Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988). Shapero had challenged Kentucky's Model

Rule 7.3 (identical to Idaho's), claiming that he could not constitutionally be prohibited from send a truthful mailing directly to a client known to be in need of legal services. The Court agreed, holding that such communication was protected by the 1st Amendment. At the same time, the Court reiterated the prohibition against in-person or telephonic solicitation.

In reaction to Shapero, IRPC 7.3(c) was amended to its present form in 1990. The rule requires that written solicitations sent to persons known to need legal services in a particular matter must contain the words "Advertising Material" on the outside of the envelope and in the body of the written communication.

A number of Idaho lawyers have adopted the practice of writing to persons known to have incurred personal injuries, those known to be in need of bankruptcy services, or those arrested for DUI. Those letters typically announce the lawyer's availability and invite further inquiry from the client. Inevitably, questions have arisen about the means of compliance with IRPC 7.3(c).

Specifically, the Committee has been asked about the practice of including the words "advertising material" below the signature line of the letter, or in type smaller than that used for the rest of the communication.

The Committee interprets the purpose of IRPC 7.3(c) to be to alert the reader to the fact that the communication is an advertisement, and to reduce the possibility that a less-sophisticated reader might interpret the letter as some form of official communication that requires a response. With those objects in mind, the Committee believes that the following guidelines are inherent in IRPC 7.3(c):

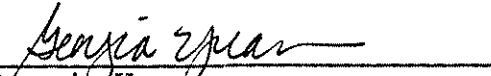
- \* The words "advertising material" should be on the addressed side of the envelope, in typeface at least as large and as bold as that used for the recipient's name and address.
- \* The words "advertising material" should be included in the body of the communication, i.e. between the salutation and the closing.
- \* The words "advertising material" should be in type at least as large and at least as bold as other words used in the body of the letter.
- \* The words "advertising material" may properly be used in the course of a complete sentence, so long as the context does not defeat the purpose of this rule. For example, a lawyer may satisfy this rule by including a sentence that begins: "We are sending you this advertising material so that you may be informed . . . ." A lawyer would not satisfy the rule by writing: "Other lawyers may send you advertising material designed to persuade you to hire their firm . . . ."

All lawyer communications are governed by the general prohibition against false or misleading statements. IRPC 7.1. This interpretation is consistent with that general rule.

Dated this 16<sup>th</sup> day of January, 1992.

  
Robert A. Anderson, Chairman

  
Hon. Lowell D. Castleton

  
Georgia Yuan