

OPINION 507

October 1994

Questions Presented

Is it a violation of the Texas Disciplinary Rules of Professional Conduct if an attorney causes to be published in a newspaper of general circulation an advertisement targeted for potential clients who have a specific legal problem.

Is it a violation of the Texas Disciplinary Rules of Professional Conduct if an attorney sends an unsolicited letter to a lay person not a prospective client but who is in a unique position to refer targeted clients to the attorney in exchange for business referrals from the attorney.

Facts

- A. A certain corporation administers a home warranty program which has as members certain homebuilders in a specified area. These homebuilders provide warranties to home buyers in the specified area. An attorney publishes an advertisement in a newspaper of general circulation within the area in which the homebuilders mentioned above have constructed a significant number of homes. The advertisement is in bold-faced type 4 ½ by 2 block with an illustration of a house that appears to have a bowed foundation. The corporation's name is linked to the word "claims" in the advertisement. Further, the advertisement declares cash settlements can be obtained from the name corporation.

Additionally, the advertisement refers to several potential damaged conditions involving bricks, plaster board and foundation. The advertisement identifies the attorney by name and gives the telephone No. for the attorney with the invitation to call for information.

- B. An attorney sends an unsolicited letter to a foundation-repair contractor who is not a prospective client and informs the recipient of the letter that the attorney's law firm has successfully represented a specified number of clients who experienced foundation failure. Further, the letter:
1. informed the recipient of the law firm's history in obtaining cash settlements from a specified corporation;
 2. characterized the amount of the settlements as sufficient to fund repairs;
 3. disclosed the firm's interest in discussing with the recipient claims against a named corporation;
 4. described the firm's goal to negotiate sizeable cash settlements to pay for repairs;
 5. mentioned a percentage fee would be retained only if there is a recovery; and
 6. invited the home repair contractor to call if the contractor has any questions.

Discussion

This committee lacks jurisdiction to decide questions of law, specifically whether the communications under discussion constitute the criminal offense of barratry as that term is defined in Texas Penal Code §38.12 and prohibited by [Rule 8.04\(a\)\(8\)](#).

An evaluation of the communications to the extent they may constitute commercial speech entitled to First Amendment protection must begin with an analysis under [Rule 7.01](#). This opinion does not discuss the impact, if any of proposed Amendments, of Part VII of the Texas Disciplinary Rules of Professional

Conduct.

Rule 7.01 reads in pertinent part:

- a. A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or law firm. A statement 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 results the lawyer can achieve.

It is a cardinal principle that lawyer advertising must not be false, misleading or deceptive. (Comment I, Rule 7.01). The judgment of this committee is the advertisement may be false or misleading to the extent it may create "an unjustified expectation" that a cash settlement would automatically be forthcoming once the attorney was hired. This committee does not decide, however, that the newspaper advertisement is per se false, misleading or deceptive in its overall impression. Such determination involves a question of fact that this Committee is unable to answer. As long as the communication is truthful an attorney may use public media to inform the public of the attorney's services. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). In the instant case the bare declaratory statement regarding cash settlements, without benefit of qualification, may violate Rule 7.01(a)(2).

Concerning the communication addressed to the home repair contractor who does not qualify as a prospective client, it is the opinion of this committee that this communication although benign on its face does inspire careful consideration of several implications of prohibited conduct. Obviously an attorney is prohibited to ask another person to take some action that the attorney is ethically bound to avoid. (See Comment [Rule 7.03](#)). Secondly, the communication to the contractor may involve matters of prohibited unethical conduct not expressly stated within the four corners of the letter but implied by the transmittal of the letter. Further, Rule 7.01(i) is applicable to this fact situation. There, it is provided, in pertinent part, that "a lawyer shall not give or promise to give anything of value to a lay person for referring clients or potential clients to any lawyer or law firm...." The application of Rule 7.01(i) leads to the reasonable conclusion that the lawyer cannot expressly or impliedly offer to give or provide anything of value to the home repair contractor for referring clients. Notwithstanding the express language of the communication the implication seeded in the transmittal is the enticement to the home repair contractor to refer clients to the attorney in exchange for referral of customers to the contractor. It is the opinion of this committee that conduct by the attorney to initiate this arrangement would violate the spirit of [Rule 7.01\(i\)](#).

Conclusion

It is permissible for an attorney to advertise in print media and to target prospective clients with a specific legal problem if the attorney complies with Rule 7.01. The content of the advertisement must not be false, misleading or deceptive or involve illegal activity.

It is not permissible for an attorney to give or promise to give anything of value, expressly or by implication, to a lay person as an inducement for referring clients or potential clients to the lawyer. When a written communication is so worded to avoid violating the letter of Rule 7.01(i), but gives rise to implications of prohibited conduct, the attorney's conduct must be evaluated in the light of the spirit of Rule 7.01.