

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 672**

March 2018

QUESTION PRESENTED

Does a written communication from a lawyer to employees in a particular position constitute direct mail solicitation if the communication does not directly offer to represent the recipients of the communication, but suggests to the recipients that they have claims because they are similarly situated to the plaintiffs in the lawsuit?

STATEMENT OF FACTS

A plaintiffs' lawyer represents employees suing a corporation to challenge the corporation's employment practices. The plaintiff's lawyer sends a written communication to nonclients employed by the defendant-corporation. The communication describes the allegations in the lawsuit. It states that other employees who have had the same experience as the lawyer's clients are pursuing certain employment claims. The communication states that it is the lawyer's opinion that employees who are similarly situated should be entitled to compensation. The communication states that the lawyer is gathering information to determine the scope of employment practices. The communication ends with the lawyer describing the nature of the legal services the lawyer provides. The communication is not labeled as advertising material.

DISCUSSION

Lawyers use different methods to communicate with clients, prospective clients, and nonclients. This includes using targeted communications to reach prospective clients, as well as nonclients who may provide information in connection with the lawyer's fact investigation. In Texas, certain written solicitations intended for prospective clients are governed by the Texas Disciplinary Rules of Professional Conduct, as well as civil and criminal barratry laws. This opinion is limited to a discussion of the Texas Disciplinary Rules of Professional Conduct.

Rule 7.05 of the Texas Disciplinary Rules of Professional Conduct applies to written, electronic, or digital communications to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm. The pertinent part of Rule 7.05(b) that deals with written solicitations, states as follows:

“Except as provided in paragraph (f) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of non-electronically transmitted written communication, be plainly marked “ADVERTISEMENT” on its first page, and on the face of the envelope or other packaging used to transmit the communication . . . , [and]

(2) shall, in the case of an electronic mail message, be plainly marked “ADVERTISEMENT” in the subject portion of the electronic mail and at the beginning of the message’s text.”

In addition, Rule 7.05(b)(5) requires that a non-exempt written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment disclose “how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication, or a family member of such person(s).”

To determine whether the written communication described in the facts must comply with these requirements under 7.05(b), the threshold question is whether the communication constitutes a written, electronic, or digital solicitation to a prospective client “for the purpose of obtaining professional employment.” Under the statement of the facts, the lawyer’s communication with the nonclients stated that the lawyer is gathering information. If the purpose of the communication with the nonclients was limited to such a request for information, the communication should not be treated as a written solicitation under the terms of Rule 7.05 because the communication was not for the purpose of obtaining professional employment. In addition to stating that the lawyer is gathering information, the communication stated the lawyer’s opinion that employees who are similarly situated to the plaintiffs should be entitled to compensation. The communication also described the nature of legal services the lawyer provides. Although the lawyer’s communication does not expressly ask the nonclients to retain counsel, the communication’s references to the lawsuit and related claims may suggest to the nonclients that they might consider retaining the lawyer. This portion of the communication may convert a request for information to a written solicitation governed by Rule 7.05.

Applying the provisions of Rule 7.05, the determinative issue is whether the law firm’s communication constitutes a non-exempt written communication for the purpose of obtaining professional employment. Rule 7.05(f) sets forth exceptions for such communication:

“(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client’s specific existing legal problems of which the lawyer is aware;

(3) if the lawyer’s use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain, or

(4) that is requested by the prospective client.”

Based on these facts, the only exception that may apply to the communications with the employees is Rule 7.03(f)(3), which exempts communications “to secure professional employment that was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain.”

Assuming that the lawyer is handling the employment matter on a fee basis, the context of the communication suggests that it may have been sent, at least in part, for the purpose of obtaining professional employment for pecuniary gain. Therefore, the question as to whether the communication constitutes direct mail solicitation largely turns on the lawyer’s intent to seek professional employment, significantly motivated by pecuniary gain. The evaluation of a lawyer’s intent may in part turn on a determination of the recipient’s understanding of the meaning or purpose of the communication. Evaluating a lawyers’ intent must be done on a case-by-case basis.

Similar issues arose in the case of *Neely v. Commission for Lawyer Discipline*, 196 S.W. 3d 174 (Tex. App.—Houston [1st Dist.] 2006, review denied). In that case, attorney Neely agreed to represent homeowners in a case against a builder. Neely published notices, inviting interested homeowners to meetings to exchange information with other homeowners. The Texas Commission on Lawyer Discipline filed a disciplinary action against Neely for violating the Texas Disciplinary Rules of Professional Conduct. Neely defended, asserting that the notices were not advertising and commercial speech under the ambit of Part VII of the Texas Rules. *Id.* at 182. In making this argument, Neely relied on *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Texas 1995), which was a broad-based constitutional challenge to then recently enacted State Bar lawyer advertising rules. Among those challenges was a claim by one of the plaintiffs that the new lawyer advertising rules would have prohibited a newspaper advertisement he placed that concerned only the system of conducting judicial elections, which was ostensibly non-commercial speech. The plaintiff conceded that the advertisement was also intended to publicize his law firm name in hopes of obtaining clients, although the advertisement did not overtly solicit clients for his firm. The federal court concluded that the new lawyer advertising rules would not affect this plaintiff’s advertisement concerning judicial elections, even though the lawyer had an ulterior motive to promote his commercial interest in gaining clients. *Id.* at 1344.

In *Neely*, the court rejected the attorney’s arguments. In doing so, the court evaluated the attorney’s communications “using their commonsense meaning to assess whether a notice proposes a commercial transaction and is thus commercial speech.” *Id.* at 183. The court explained that Neely’s second notice “suggests a commercial transaction on its face by indicating that a class action has been filed, seeking recovery of damages against a specific defendant” *Id.* According to the court, this advertisement is unlike the advertisement in *Texans Against Censorship* that contained only political commentary with no indication that the purpose of the notice was to obtain professional employment. Based on the record and the standard of review, the *Neely* court concluded that there was sufficient evidence for the trial court to find that the notice was disseminated for the purpose of obtaining professional employment and violated the applicable disciplinary rules. *Id.* at 183-84. The court further held that the trial court was entitled to disbelieve Neely to make the determination that he published the notices for the purpose of solicitation rather than investigation. *Id.* at 185.

Whether the lawyer’s communication in question constitutes direct mail solicitation turns on the lawyer’s intent to seek professional employment, significantly motivated by a desire for pecuniary gain. In this case, the content of the communications with employee-recipients and the

related circumstances could support a conclusion that the communications were made for the purpose of obtaining professional employment. The communication provided information on the employment claims. In addition, it states that the lawyer believes that employees similarly situated to the lawyer's clients should be entitled to compensation. These statements, coupled with information on the law firm, could lead a finder of fact to conclude that the communications effectively invited the employee-recipients to consider retaining the lawyer with respect to a particular matter, but the question of intent must be determined on a case-by-case basis.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer's written, electronic or digital communication with a nonclient that purports to seek information may be treated as a written solicitation subject to the provisions of Rule 7.05(b) if statements in the letter are made with the intent to seek professional employment. When none of the exceptions under Rule 7.05(f) apply, communications for the purpose of obtaining professional employment must comply with the provisions of Rule 7.05(d).