Enduring Ethics Opinion #85: Distribution of Newsletter to Non-clients

Issued by the Professional Ethics Commission

In 1988, the Professional Ethics Commission addressed the ethics of distributing a newsletter to non-clients by an out of state law firm. The enduring applicability of this Opinion is important to revisit due to changes in solicitation through the expanding use of social media. This is true not only of the method and delivery of newsletters and other advertising materials but also due to the ability of law firms to work on a more nationwide basis.

The factual scenario addressed in Opinion #85 involved a law firm from another state which prepared and distributed a newsletter to clients and non-clients in Maine prepared by members of the law firm. The newsletter provided reports and updates on legislative enactments, regulatory agency rulings and court decisions, and also gave “general descriptions of courses of action and alternatives its readers can consider when involved with a problem such as an unfriendly takeover bid of a corporation.” The newsletter suggested to its readers that they contact named members of the firm with questions on any given news article. Finally, the newsletter described seminars and educational activities that firm members conducted or participated in. At the end of the publication, the newsletter contained a general disclaimer that it does not constitute legal advice and suggests that readers consult with counsel to determine the applicability of any new development to their specific situation. It concludes with a final invitation to contact the firm for more information on any item discussed in the newsletter. The question presented was whether the distribution of the newsletter to non-clients of the firm violates any provision of the Maine Bar Rules.

The Commission answered these questions by consulting then applicable Maine Bar Rule 3.9(a) (e)(f). At the time, Rule 3.9(a) prohibited “any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.” Rule 3.9(e) stated that a “multi-jurisdictional partnership shall disclose, in all public communications containing the names of lawyers affiliated with it, jurisdictional limitations of those lawyers not licensed to practice in the jurisdiction in which the communication is published.” Rule 3.9(f) stated that, among other things, a lawyer shall not solicit employment on behalf of the lawyer or any affiliated lawyer through any form of personal contact “i) by using any statement, claim, or device that would violate this rule if part of a public communication; (ii) by using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious, or harassing conduct; or (iii) when the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited....”

In Opinion #85, the Commission concluded that with one exception, nothing in the presented scenario suggested that the newsletter contained any statement or claim that would violate Rule 3.9. It specified that: a) all articles in the newsletter were prepared by the law firm; b) explicit statements or claims are made about the firm’s competence to handle any particular legal problem of a reader; and c) the descriptions of participation in educational seminars is factual and “does nothing more than to suggest that the firm attempts to keep up with new developments in the law”. Although there was nothing unique to the particular law firm or “particularly newsworthy” about the reports, it was determined not to be likely to unduly influence the reader
in their assessment of the firm’s legal abilities relative to its competition. The opinion did note that the presented scenario did not indicate whether the lawyers in the firm are licensed to practice in Maine. It therefore did not address whether the distribution of the newsletter to Maine citizens by a lawyer or law firm which is not licensed to practice law in the State of Maine constituted the unauthorized practice of law 4 M.R.S.A. §807 (Unauthorized Practice of Law), a question which the Commission noted it had no authority to answer.

The Commission then addressed the question of whether the newsletter is subject to the restrictions of Rule 3.9(f) relative to solicitation activities. It distinguished the newsletter from merely a publication intended to convey general information of a legal nature and noted that it was clear it was designed to solicit employment for the firm. It noted that the “admonition in the newsletter that the reader may need to take some action to comply with a change in a regulation, the identification of the individual authors of the articles, and the suggestion that these authors be contacted to discuss the matter more thoroughly, while perhaps subtle is nonetheless a form of solicitation that must stay within the bounds proscribed by Rule 3.9(f).” It then concluded that neither the newsletter’s content nor method of distribution suggested duress, intimidation, or vexatious or harassing conduct. It noted it was simply sent through the mail with no follow-up contact with the reader. The reader is free to throw it away “without any fear of embarrassing consequences.” The Commission further found that although the newsletter suggested that the firm can and will provide legal services for the reader relating to the matters discussed in the newsletter, that in and of itself does not constitute “unwarranted suggestions or promises of benefits” prohibited by the Rule. Finally, the Commission said it could not find in these circumstances an appreciable risk of undue influence by the firm or ill-considered action by the readers of the newsletter.

However, the Commission noted that in one respect the newsletter as prepared would violate Rule 3.9(e). It stated that although the firm had offices in only one state, it appeared to serve clients in several states and did not confine its newsletter to matters of federal or its “home state” law. The newsletter discussed and analyzed case law in several state jurisdictions. The Commission concluded that under the circumstances the newsletter should describe the jurisdictional limitations of the lawyers whose names appear in the publication.

The results under today's Maine Rules of Professional Conduct would be the same as the results under the abrogated Maine Bar Rule 3.9.

Potentially all of the Rules contained within Section 7, Information About Legal Services, would apply to this situation. More particularly, Rules 7.1, 7.2, 7.2-A and 7.3 address the specific facts presented in the 1988 opinion of the Commission:

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." M. R. Prof. Conduct 7.1.

- "A lawyer, in person, by live telephone, or by real-time electronic contact, shall not solicit professional employment from a non-commercial client if such solicitation
involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits. The prospective client’s sophistication regarding legal matters; the physical, emotional state of the prospective non-commercial client; and the circumstances in which the solicitation is made are factors to be considered when evaluating the solicitation.” M. R. Prof. Conduct 7.3(a).

- “A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.” M. R. Prof. Conduct 7.5(a).

The substance of the current Maine Rules of Professional Conduct applicable to these facts is consistent with that under the former Maine Bar Rule underlying Opinion #85, although more generally stated. There are, however, potential issues that exist now with regard to dissemination that did not exist in 1988 when the opinion was issued. For instance, does the fact that the newsletter is sent to non-clients through email, Facebook notification, or other social media solicitation compel a different result? It was significant to the Commission in 1988 that nothing about receiving the newsletter in the mail compelled a response or was designed to or would constitute duress, intimidation, or vexatious or harassing conduct, that there was no follow-up contact with the reader, and the reader was free to throw it away without any fear of embarrassing consequences. The Commission concludes that under the same fact scenario the result would likely not be different now as long as the use of social media to disseminate it does not require or encourage any higher level of involvement by the reader. The Commission recognizes the possibility that under certain circumstances the response may be different in the event the dissemination through social media is more invasive, requires a response of some sort, or otherwise is more invasive than a mailing. For instance, if the email sending the newsletter automatically registered the recipient for services or captured information about the recipient to use for additional solicitation, such actions may cross the line as to what constitutes conduct that is considered harassing. Finally, current Rule 7.5(a) is consistent with the Opinion’s warning that if the newsletter discussed law in several state jurisdictions, it should describe the jurisdictional limitations of the lawyers whose names appear in the publication.