

# 74

## LAWYER NEWSLETTERS

Adopted July 26, 1986.

Addendum issued 1995.

### *Introduction and Scope*

The Colorado Bar Association Ethics Committee (“Committee”) is aware that a number of lawyers in Colorado are sending newsletters to their existing clients and to other persons. The Committee also has received a number of inquiries from lawyers seeking the Committee’s informal views as to the propriety of the sending of particular newsletters. In addition, recent decisions of the U.S. Supreme Court under the First Amendment and amendments to the Colorado Code of Professional Responsibility (“Code”) have raised questions as to what a lawyer may and may not do in this area.

The purpose of this opinion is to provide guidance in the area of lawyer newsletters. This opinion does not address any special limitations or constraints applicable to communications broadcast by electronic forms of communication (television and radio). We also do not address what specific disclaimers may be appropriate in a lawyer newsletter.

### *Definitions*

For the purpose of this opinion, the following terms have the following meaning:

1. *Newsletter or lawyer newsletter.* A lawyer newsletter means a written communication distributed by a lawyer that contains information on current developments in the law or items of general interest concerning legal matters. A lawyer newsletter may be periodic (*i.e.*, published monthly or quarterly) or it may be published at irregular intervals. It may be limited to particular areas of the law, or it may cover more than one area of the law.
2. *Sending lawyer.* A sending lawyer means the lawyer or law firm that sends the lawyer newsletter to the recipient, irrespective of who actually prepares or publishes the newsletter.

### *Syllabus*

A lawyer may send a newsletter to existing clients and persons other than existing clients (including other lawyers and prospective clients) provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim, and provided that it conforms in all respects to the applicable provisions of DR 2-101(A), (B) and (C).

It is unethical for a lawyer (or law firm) to send a newsletter to clients or others which has been prepared by someone other than the sending lawyer without disclosing on the face of the newsletter the fact that the sending lawyer did not author the newsletter.

### *Opinion*

I. The first issue to be addressed is whether lawyer newsletters are ever permissible under the Code. Lawyer newsletters serve the salutary function of providing the recipient with current information on changes and developments in the law. EC 2-1 recognizes that one of the important functions of the legal profession is to educate laymen to recognize their legal problems and to assist in making legal services fully available.

Lawyer newsletters, by their nature, also may have advertising and solicitation components that cannot be ignored. It is, of course, possible that some lawyer newsletters have no solicitation or advertising component. For instance, a newsletter prepared by a lawyer-employee (or volunteer) of a public interest group may not have any advertising or solicitation components. Such newsletters are not subject to the advertising or solicitation rules set forth in the Code and would be subject to full First Amendment protection. *See Zauderer v. Office of Disciplinary Counsel, Supreme Court of Ohio*, 85 L.Ed.2d 652, 664, n. 7

(1985). However, the Committee believes that it will be the rare lawyer newsletter, sent by a lawyer in private practice, that is devoid of any advertising or solicitation component.

The Code defines “solicitation”:

... “Solicitation” means any unrequested communications to a nonlawyer, directly or indirectly, initiated by a lawyer which indicates or implies that it is transmitted for the purpose of securing or obtaining professional legal employment for the lawyer, the lawyer’s partner or the lawyer’s firm. “Solicitation” does not include advertising in or through any public communication.

Definition 11 of the Code (adopted Nov. 15, 1984, effective April 1, 1985)

Following the U.S. Supreme Court’s decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Colorado Supreme Court made major changes to DR 2-101 to bring it into compliance with the U.S. Supreme Court’s interpretation of the First Amendment. DR 2-101(E) provides:

... Unless expressly authorized in these rules, solicitation is prohibited. Where pecuniary gain is a significant motive for the solicitation, a lawyer may engage in solicitation if the solicitation is in writing, is general in nature and is not directed to a specific claim or matter involving the recipient of the solicitation. Solicitation is permitted, and need not be limited to general or written solicitation, if pecuniary gain is not a significant motive for the solicitation.

There are three possible categories into which a newsletter may fall. First, it may not constitute a solicitation at all, such as where a lawyer-employee of a non-profit public interest group publishes a newsletter. Such newsletters are not subject to the solicitation limitations of the Code. Second, the motivation behind the sending of the newsletter may be primarily for pecuniary purposes. If so, the solicitation may be engaged in if it is in writing, is general in nature, and is not directed to a specific claim or matter involving the recipient of the solicitation. Third, if pecuniary gain is not a significant motive for the solicitation, the solicitation does not have to be limited to one of a general nature or a written solicitation.

Since, by definition, the newsletter is a general treatment of current developments in the law, the sending of a newsletter to a client would not normally be “directed to a specific claim or matter involving the recipient of the solicitation.” See DR 2-101(E). However, in certain circumstances, the sending of a newsletter could be deemed to be “directed to a specific claim or matter.” For a discussion of this subject, see *Matter of Von Wiegen*, 101 App. Div. 2d 627, 474 N.Y.3d 147, *modified*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. denied*, 105 S.Ct. 2701(1985) (holding that New York State’s blanket prohibition against lawyer’s direct mail solicitation of accident victims violated the First Amendment).

Every ethics committee in the United States that has considered the issue after the Supreme Court’s decision in *Bates* has determined that it is proper for a lawyer to send a newsletter regarding current developments in the law to existing clients, provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim and provided that the newsletter does not contain self-laudatory statements or testimonials regarding the sending lawyer.<sup>1</sup> See DR 2-101.

At least two courts have addressed the issue in the context of reviewing disciplinary action imposed against a lawyer for sending a newsletter. *In re Ratner*, 194 Kan. 362, 399 P.2d 865 (1965) (decided prior to *Bates* on ground that newsletter sent to clients was not a “solicitation”); *In re Madsen*, 68 Ill.2d 472, 370 N.E.2d 199 (1977) (decided after *Bates*, noting that after *Bates* a question existed whether a lawyer may be disciplined for mailing a “tip sheet” to his clients).

The American Bar Association’s Committee on Professional Ethics decided in Formal Opinion No. 213 (1941) that it was not improper for a patent firm to circulate to its regular clients a *Law News Bulletin* which included significant features of current legislation, administrative rules and important decisions in the patent field.

Based upon these authorities, we conclude that if all rules relating to solicitations are met, a lawyer may send a newsletter to existing clients provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim.

II. The question as to whether a lawyer may send a newsletter to persons other than existing clients is more difficult. This is so because the solicitation component when dealing with a lawyer's existing clients is minimized, while it is substantially increased when non-clients or prospective clients are involved. In addition, any communication by a lawyer to a non-client carries with it an increased risk that the communication may be deemed to be intimidating or an invasion of privacy. DR 2-101(A).

The ethics committees and bar associations that have considered the issue are split. Some have concluded that it is unethical to distribute a newsletter to prospective clients; others have held that it is permissible. *See* ABA/BNA *Lawyers Manual of Professional Conduct* 801:1319-801:9105. Our analysis must again begin with the Colorado Code.

Even though there is a much greater likelihood that the lawyer's motivation for sending the newsletter to non-clients is for pecuniary gain, DR 2-101 does not prohibit solicitations merely because the solicitation component is strong. Indeed, DR 2-101 provides special rules for solicitations in which pecuniary gain is a significant motive. Therefore, in the Committee's view, the sending of lawyer newsletters to non-clients cannot be prohibited on the ground that such solicitations are more likely to be motivated by considerations of pecuniary gain.

However, the sending of a newsletter to non-clients does carry with it risks and problems that exceed those relating to the sending of a newsletter to an existing client. For example, a newsletter sent to a nonclient may be deemed by the recipient to be intimidating and an invasion of the recipient's privacy. DR 2-101(A). It is established that certain types of in-person solicitation by lawyers may constitutionally be prohibited. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). *See* ED 2-3; ABA Model Code of Professional Conduct § 7.3 (1983).

While the sending of a newsletter to a non-client's home or office arguably may be considered more invasive than the advertisement which the Supreme Court held was protected conduct in *Zauderer*, the Committee believes that the invasive potential of a newsletter is minimal at least in comparison to the invasive characteristics of in-person solicitations. The recipient of the unwanted lawyer's newsletter may immediately dispose of it. It simply does not carry with it the same pressures and dangers as an in-person solicitation.

Therefore, we conclude that under the Code, a lawyer may send a newsletter to non-clients, even if pecuniary gain is a significant motive for the sending of the newsletter, provided that the solicitation limitations of DR 2-101 are observed.

III. The final issue to be addressed by this opinion is whether it is ethical for a lawyer to send to his or her clients (and others) a newsletter which has not been written by the lawyer, but rather has been obtained from a third party by the sending lawyer.

The question presented is whether it is misleading or deceptive to pass off another author's work as the work of the sending lawyer. To the extent that a client or prospective client reads a newsletter sent to him and concludes that any aspect of the newsletter reflects favorably upon the sending lawyer, it obviously is misleading if, in fact, the sending lawyer had nothing to do with the preparation of the newsletter. Accordingly, we conclude that it is a violation of DR 2-101 of the Code for a lawyer to send a newsletter to any person without clearly identifying on the newsletter the actual author.

### **1995 Addendum**

*Note: The previous addendum to Formal Opinion 74 issued on July 24, 1993 is withdrawn.*

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (regarding communications concerning a lawyer's services), Rule 7.2 (regarding advertising) and Rule 7.4 (regarding communication of field of practice).

## NOTE

1. In 1968, the Ethics Committee of the Colorado Bar Association issued Formal Opinion 42 which concluded by stating that: "If the communication goes to persons other than regular clients of the lawyer, or if it contains information not strictly applicable to the interests of the recipient, though he be a regular client of the lawyer, it would constitute an advertisement in violation of Canon 27. A periodic bulletin containing general information about statutes, decisions, etc. disseminated to a number of clients having different interests, even though through regular clients, would violate Canon 27." As a result of the later decisions of the U.S. Supreme Court in *Bates* and *Zauderer, supra*, and the amendment to the Code which became effective in 1978 and 1985, the Committee believes that portions of Formal Opinion 42 are no longer viable. Accordingly, Formal Opinion 42 is withdrawn.