

THE CONSTITUTION, DIGNITY, AND DIRECT-MAIL

By

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Heirs of Mary Olson
c/o Johnson Funeral Home
Anderson, MN

Dear Heirs:

This letter is an introduction to myself and my law practice. Enclosed is my resume. The purpose of this introduction is to give you enough information so that you will feel comfortable initiating a telephone conference with me to discuss in detail any matter that has legal or tax implications. *There will be no charge for this telephone conference.*

With the passing away of Mary, you probably already are wondering whether anything legal is necessary

Is this letter from an attorney, apparently mailed to strangers through a funeral home, with identities gleaned from an obituary:

- (a) Constitutionally protected?
- (b) Helpful to some targeted consumer-clients?
- (c) Likely to be seen by some attorneys as bringing the profession into disrepute?
- (d) All of the above?[Ftn1](#)

The letter is in current use. Similar letters to other potential client groups are being used. For instance, a number of attorneys in the Twin Cities interested in DWI defense work have sent solicitation letters to defendants, whose names were obtained from public records.

However the other questions posed above may be answered, there is no doubt that direct, targeted mailing of lawyer solicitations for business is constitutionally protected. The Minnesota Supreme Court said so five years ago. [*Matter of the Discipline of Appert and Pyle*, 315 N.W.2d 204 (Minn. 1981)] The United States Supreme Court implicitly said so in 1985. [*Zauderer v. Office of Disciplinary Counsel of Ohio*, 105 S. Ct. 2265 (1985)] Late last year, the Seventh Circuit overturned an Illinois prohibition against direct-mail advertising. [*Adams v. Attorney Registration and Disciplinary Commission*, 801 F.2d 968 (7th Cir., 1986)] The invalidated Illinois rule was similar to ABA Model Rule 7.3, which states:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

The ABA comment takes the view that the danger of misleading representations and undue

influence attending in-person solicitation is also likely in direct mail. While general advertising is subject to broad public scrutiny, direct mail solicitation is not. Hence, an outright prohibition is said by the ABA to be the only effective (and feasible) regulation of direct mail solicitation. The ABA is considering a proposed amendment that would allow some targeted mailing.

So long as direct-mail solicitation (or other advertising) is not “false, fraudulent or misleading” it is not subject to discipline in Minnesota. Some other states still attempt to impose other restrictions. For example, the New Jersey Supreme Court decided on December 10, 1986, *In the Matter of the Petition of Felmeister and Isaacs* that:

The prohibition on the use of drawings, animation, dramatizations, music or lyrics shall be limited to television advertising. All attorney advertising shall be predominantly informational. The requirement of presentation “in a dignified manner” is eliminated, but advertisements relying in any way on the shock or amusement value of absurd portrayals wholly irrelevant to the selection of counsel is prohibited.

It seems doubtful that these regulations will in fact regulate very much advertising or that all of the regulation would survive constitutional scrutiny. *Felmeister*, indeed, bills itself as “tentative and subject to change.”

Do targeted mailings bring the profession into disrepute? With whom? Or do they provide people with useful information? They may do some of each. The heirs of Ms. Olson may be dismayed that a stranger presumes to refer to the deceased on a first-name basis. They may well be dismayed to receive a business communication from a lawyer, a mortician, or anyone with an interest in the business aspects of what they regard as a personal matter. Their family lawyer may be outraged at perceived poaching. The Federal Trade Commission recently posed the counterargument to the ABA Commission on Advertising:

But advertising that is not false or deceptive, even though viewed by some as lacking in dignity, nonetheless may assist consumers in choosing legal services that best suit their needs .

..

Guidelines on dignity may also have a chilling effect on advertising beyond the intent of the drafters.

The wastebasket is the only readily available target for persons who are themselves the target of unwelcome mailed legal solicitations.

Among professionals, there is a difference between what one may do, without violating a rule, and what is seemly:

Simply because free speech allows us to make fools of ourselves is no reason we should avail ourselves of the opportunity. For then, sadly, it is the whole profession that suffers. [*In re Kotts*, 364 N.W.2d 400, 407 (Minn. 1985)]

Minnesota lawyers by and large have not exercised their option to make fools of themselves, unlike a group of Florida attorneys who advertised, “Get that spouse of yours some ‘in’ he or she’s been wantin’ for a long time . . . A Deeeevorce . . . 150 bucks.” There is no lawyers’ rule against bringing the profession into disrepute – although there are such rules for judges, dentists, and other professionals.

Targeted mail advertising can provide valuable information to groups of people who had no idea of certain legal rights or the availability of certain legal services, or who may want to price-shop for services. On the other hand, some direct mail advertising will be offensive. The marketplace is not famous as an arbiter of good taste. Arguably lawyers in competition with advertisers are not good arbiters either. No satisfactory and constitutional means exists for filtering undignified and offensive communications from those that are helpful.

In the ten years since *Bates v. State Bar of Arizona*, advertising by all kinds of professionals has proliferated. Physicians' yellow pages advertising in the Twin Cities exceeds that of lawyers. The communication of relevant information regarding professional services and fees is no longer to be criticized, let alone prohibited.

The questions of dignified and direct-mail attorney advertising are caught up with larger forces in American society. [Ftn2](#) Commercialization and hype have come to affect, even dominate, more and more of American life, including politics and the professions. Recent constitutional law is not immune from these developments. Moreover, our society has become less confident of what is objectively real or moral, let alone in good taste. The principal remaining counterweights against the hyping of legal services are rules 7.1 and 7.3, forbidding "false or misleading communication" and in-person or telephone solicitation, and lawyers' own personal and communal sense of what it means to be professionals.

The Lawyers Board has approved a policy that results in summary dismissal of complaints alleging that advertisements are undignified, target particular persons, or bring the profession into disrepute. Whether Mary Olson's heirs find their letter helpful or offensive is not a matter for disciplinary consideration.

NOTES

¹ *(d) may be the right answer. Paul Newman, in "The Verdict," went two crucial steps further, passing out his professional cards to bereaved strangers at wakes and posing as a friend of the deceased. In-person and telephone solicitation by attorneys or hustlers hired by attorneys remains without constitutional protection, and therefore subject to discipline. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).*

² *"Dignified" advertising and targeted mailing are partly separate matters, brought together here because they have recently been much discussed and litigated.*