

Advertising: Targeted Mailings for Personal Injury and Criminal Clients

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Five days ago, two trains collided just outside of Binghamton. Your six lawyer firm, with some experience in complex personal injury litigation, wants to offer its services by sending a "tasteful", targeted mailing to victims of the accident and their families. The proposed mailing expresses sympathy to the victims and offers free consultation. Is the mailing permissible? One of your partners reminds you that in another situation involving several criminal defendants, your partners decided unanimously not to send a mailing. Are the two situations different?

In 1977, the Supreme Court decided that lawyer advertising for the price of routine legal services was protected commercial speech, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Since then, the law has evolved to permit direct mail solicitations targeted to potential clients, subject to certain caveats: Advertisements must not contain false, deceptive or misleading information, Advertisements cannot contain puffery, self-laudatory comments or claims that cannot be verified, Brochures and advertisements that are mailed must be filed with the appropriate Disciplinary Committee.

Florida 30-Day Rule Upheld

But is it constitutional for a Bar to require a lawyer to wait thirty days after an accident or injury before he can send letters targeted to potential clients? The Florida Bar passed such a rule and the Supreme Court upheld it in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), a 5-4 decision. The majority opinion justified the Florida rule because of the "erosion of confidence in the profession" that advertising of this kind engenders. The sharp dissent pointed out that there was scant and unscientific evidence to establish a connection between advertising and diminishing professionalism.

While the thirty-day rule is a much-criticized one and has not been implemented in most states, it has been codified into federal law for aviation disasters. The July 1996 TWA Flight 800 crash, and the crash of ValueJet Flight 592 a few weeks earlier, prompted Congress to pass a law restricting lawyers from contacting family members within 30 days after an air carrier accident. That law provides:

In the event of an accident involving an air carrier providing interstate or foreign air transportation, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 30th day following the date of the accident.

Aviation Disaster Family Assistance Act of 1996, Pub. Law 104-264, Title VII, §701-05 (the "Act," codified at 49 U.S.C. 1136 and 41114).

Bar Association Warnings

That law and the response of the bar to the TWA 800 crash in July 1996 are indicative of the likely reaction of Bar Associations toward lawyers who desire to solicit personal injury clients for similar future accidents. At the time of the TWA crash, the Association of the Bar of the City of New- York sent out strong warnings to lawyers that even the appearance of soliciting clients would lead to disciplinary action. Then, the Association created a Committee on Mass Disaster Planning to provide guidance for future disaster cases.

The Committee's recommendations include the creation of Disaster Response Teams that would meet with families within a few days after an accident and provide them with guidance and information, including the selection and retention of lawyers, and the rules governing lawyer solicitation, legal fees, and retainer agreements. Obviously, any lawyers who offered their services for the Team would not accept representation of claims that arose from the disaster. (Association of the Bar of the City of New' York, October 1997 Report and Recommendation of TWA Flight 800 Crash, pp.1-2). Thus, even though there is no 30-day rule governing lawyers in non-aviation cases, there is likely to be careful scrutiny of any solicitation shortly after any future mass disaster, or, for that matter, any accident that arouses the attention of the media.

Bar Association Proposal

In the present climate, the concerns of the bar about eroding professionalism and invasion of privacy of potential clients may be extended to other personal injury cases. These concerns are reflected in the proposed changes to the Disciplinary Rules that the New York Stare Bar Association submitted to the Appellate Division on March 4, 1999. These Rules are likely to be adopted.

The proposed changes to DR 2-103, Solicitation and Recommendation of Professional Employment, does not contain a thirty-day rule. It provides that:

- A. A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact, if:
 - B. 1. The communication or contact violates DR 2-101(A); (false, deceptive or misleading claims).
 - 2. The prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
 - 3. The solicitation involves coercion, duress or harassment; or
 - 4. The lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney;
 - 5. The lawyer intends or expects, but [does] not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

Paragraph 4, above, reflecting the bar's concerns for accident victims, should engender a healthy degree of caution, particularly since a lawyer sending a targeted mailing to many persons would have difficulty gauging its likely effect upon each recipient.

Criminal Cases Distinguished

No reported cases in New York, and few around the country, have considered targeted mailings in the context of soliciting criminal clients. *Ficker v. Curran*, 119 F. 3d 1150 (4th Cir. 1997) struck, on first amendment grounds, a 1996 Maryland law prohibiting direct mail solicitation of defendants in criminal or traffic cases for thirty days after arrest.

The Court was not persuaded that the ban achieved the goals of guarding against undue influence and confusion, guarding recipients' privacy, and protecting the reputation of the profession.

The court distinguished criminal from personal injury cases because: (1) the arrest is a matter of public record, so privacy is less of a factor; (2) a thirty-day ban will not keep a defendant from being annoyed on the 31st day; and (3) Maryland already allows such solicitation for DWI cases in its administrative license procedure.

California Bar Associations have considered the issue of "jail mail" and reached a result that is similar to the proposed N.Y. DR 2-103(A). The State Bar of California Standing Committee on Professional Responsibility and Conduct, Opinion 1995-142, recognized that prospective clients in jail are vulnerable targets. The opinion urged the attorney to consider a variety of factors that would lead a reasonable lawyer to know that a client could not be expected to exercise reasonable judgment in the retention of counsel. The San Diego County Bar Association reached a similar result. (San Diego Cty. Bar Ass'n. Formal Opn. No. 10992-3)

The swirling commentary about lawyer advertising in personal injury and criminal matters is likely to continue unabated with a presumed, but unproven, connection between advertising and the erosion of professionalism. Ironically, while many lawyers presume that advertising is undignified and therefore unprofessional, it does not seem that the public shares this view.

In the meantime, prudent New York lawyers should carefully consider how their proposed targeted mail is likely to be received by the reasonable victim and by their colleagues at the bar.