

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
OPINION 1989-2**

A member of the Delaware Bar has requested the "feedback and approval" of the Committee of a form of letter the attorney proposes to "mail to potential clients" (the "proposed mailing"). The text of the proposed mailing is as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to loss [sic] your home. Federal law may allow you to keep your home by ORDERING your creditors to stop and give you more time to pay them.

You may call my office anytime from 9:00 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

CALL NOW, don't wait. It may surprise you on what I may be able to do for you. Just call and tell me you got this letter. Remember it is free, there is no charge for calling.

The attorney advises the Committee that the text of the proposed mailing is "essentially identical" to that contained in direct mail attorney advertising approved by the United States Supreme Court in Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988). From her letter, it appears the attorney recognizes that the proposed mailing violates the provisions of the Delaware Lawyers' Rules of Professional Conduct as they currently exist. The attorney, however, contends in her letter the Shapero decision "essentially made Rule 7.1(a)(1) of the Delaware Lawyers' Rules of Professional Conduct, constitutionally defective." She apparently seeks approval of the proposed mailing on this ground.

CONCLUSION:

The Committee concludes the proposed mailing is prohibited by Rule 7.1(h)(1)(b) of the Delaware Lawyers' Rules of Professional Conduct (the "Rules") because it is clear on the face of the proposed mailing that it is intended to be "distributed at a time calculated

to relate to events in the personal life of the recipient." While the Committee recognizes the constitutionality of Rule 7.1(h)(1)(b)'s blanket prohibition on targeted direct mail advertising may be questionable in light of the Supreme Court's decision in Shapero, the Committee is not chartered to pass upon the constitutionality of the Rules and must apply the Rules as they currently exist in reviewing the proposed mailing. The proposed mailing is clearly impermissible under those Rules.

DISCUSSION:

The rules regarding lawyer direct mail advertising are set forth in Rule 7.1 of the Rules. Rule 7.1(e)(1) prohibits lawyers from advertising "by personal, telephone or direct mail contact." However, Rule 7.1(h) provides:

(h) **Direct Mail Advertising.**

(1) Notwithstanding paragraph (e)(1) of this Rule, direct written communication, as for example direct mail, may be used for the distribution of such information as is permitted by this Rule, provided, however, that such communications (a) shall include on the face of the envelope or sheet containing the address and on each page of the advertisement and type at least as large as the largest in the advertisement the words: "Advertising Material" and (b) shall not be distributed at a time calculated to relate to events in the personal life of any recipient.

(2) One copy of each written communication and the names and addresses of those to whom it was sent shall be sent simultaneously to the chairman of the board on professional responsibility of the Delaware Supreme Court.

The comment to Rule 7.1(h) indicates Rule 7.1(h) was adopted to satisfy the holding of the Eastern District of Pennsylvania in Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880 (E.D. Pa. 1984), aff'd sub nom., 760 F.2d 261 (3d Cir. 1985). In Spencer, the Eastern District held a total ban on lawyer advertising by mail, such as that contained in Rule 7.1(e)(1), is unconstitutional.¹

¹ When Rule 7.1(h) is considered, it is difficult to understand what, if any, purpose is served by the purported ban on direct mail advertising contained in Rule 7.1(e).

Under Rule 7.1(h), attorney direct mail advertising is permissible if certain "procedural requirements" are met. The envelope in which the proposed mailing is mailed and each page of the proposed mailing must contain the words "Advertising Material" in a type size as large as the largest type size found in the proposed mailing. Rule 7.1(h)(1)(a). The lawyer must also send to the Chairman of the Board on Professional Responsibility of the Delaware Supreme Court a copy of the proposed mailing and the names and addresses of those to whom it is sent. Rule 7.1(h)(2). Lastly, in addition to meeting, to the extent applicable, the requirements of Rule 7.1(a) through (d), the proposed mailing may not be distributed at a time intended to relate to events in the personal life of the recipient. Rule 7.1(h)(1)(b).

We assume, the proposed mailing, if made, would comply with the provisions of Rule 7.1(h) requiring the words "Advertising Material" to appear on the envelope and on each page of the proposed mailing, and the appropriate filings and notifications required under the Rule with respect to direct mail advertisements would be made. In light of our conclusion, set forth below, that the proposed mailing violates Rule 7.1(h)(1)(b), we do not consider whether the proposed mailing complies with Rule 7.1(a)-(d).²

² We note, however, virtually identical mailings were found permissible in both Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988) and in Adams v. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, 801 F.2d 968 (7th Cir. 1986). As the Supreme Court recognized in Shapero, however, such letters "present[] an increased risk of deception [They] could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem she does not actually have or, worse yet, could offer erroneous legal advise." 108 S. Ct. at 1923. Such risks, however, can be minimized by, among other things, "requir[ing] the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that lead the lawyer to the fact)" or by "requir[ing] the lawyer to explain briefly how she discovered the fact and verified its accuracy". 108 S. Ct. at 1924. We believe these are prudent observations and suggestions.

The Committee notes substantial discussion took place regarding the substance of the proposed letter. In particular, certain members of the Committee expressed concerns relative to the potentially misleading nature of the last paragraph of the proposed letter.

It is clear from the content of the proposed mailing that it is intended to be "distributed at a time calculated to relate to events in the personal life of any recipient." The attorney apparently intends to review the records of local courts to determine the names of individuals who have had foreclosure suits filed against them and to send the proposed mailing to these individuals. The threat of foreclosure upon an individual's home is obviously a traumatic event in an individual's life. Direct mail advertising to such individuals under such circumstances constitutes solicitation, not advertising, and, for that reason is prohibited by Rule 7.1(h)(1)(b).

In her letter to the Committee, the attorney implicitly acknowledges the proposed mailing is prohibited under Rule 7.1.³ The attorney states, however, that such a prohibition is unconstitutional under the Supreme Court's decision in Shapero.

Shapero concerned a Kentucky lawyer who requested permission from the state's Attorney Advertising Commission to mail an advertising letter directed to potential clients who were facing mortgage foreclosure suits. As the attorney states, the substance of the mailing at issue in Shapero was virtually identical to that of the proposed mailing here. The Kentucky Commission disapproved the advertising letter based on a Kentucky Supreme Court Rule, substantively identical to that contained in Rule 7.1(h)(1)(b), which prohibited the mailing or delivery of written advertisements "precipitated by a specific event . . . involving a specific addressee . . . as distinct from the general public." Petitioner argued this prohibition on targeted

In addition, we note the proposed mailing contains certain errors appearing to be typographical.

³ In her letter, the attorney actually refers to "Rule 7.1(a)" as having been rendered "constitutionally defective" by Shapero. Rule 7.1(a), however, prohibits, inter alia, lawyer direct mail advertising containing intentionally or recklessly false or misleading statements. A prohibition on such statements was not at issue in Shapero. Indeed, Shapero recognizes the validity of a prohibition on false and misleading direct mail advertising. See 108 S. Ct. at 1921. Accordingly, we assume the attorney's reference to Rule 7.1(a) is an error and the attorney intended to refer to Rule 7.1(h)(1)(b).

direct mail advertising was unconstitutional. The Kentucky Supreme Court upheld the ban. The Supreme Court reversed, holding a state cannot, consistent with the first and fourteenth

amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems.

The Committee recognizes the Shapero decision casts doubt upon the constitutionality of Rule 7.1(h)(1)(b)'s blanket prohibition on attorney direct mail advertising "distributed at a time calculated to relate to events in the life of the recipient." Nonetheless, the function of the Committee is to interpret the Rules as they exist; the constitutionality of the Rules is a matter for the Courts. The Rules were promulgated by order of the Delaware Supreme Court dated September 12, 1985, and effective October 1, 1985. The Rules and accompanying guidelines and comments shall govern the conduct of the members of the Bar of this State. Accordingly, keeping in mind our limited role, we must find the proposed mailing is impermissible under Rule 7.1(h)(1)(b).