ORANGE COUNTY BAR ASSOCIATION
PROFESSIONALISM AND ETHICS COMMITTEE

FORMAL OPINION NO. 93-001

STATEMENT OF FACTS

After reading a short newspaper story about a traffic accident in which a child was seriously injured, attorney penned a letter to the child's parents labelled "Advertising Solicitation."[1]/ Attorney had never met parents, had no connection with their family and no knowledge of their particular circumstances outside sketchy details provided in the article which indicated parents were from a poor, predominately Hispanic neighborhood. In the letter, attorney (1) expressed "sympathy for the tragic accident" in which the child was involved; indicated that, (2) based upon attorney's review of the newspaper article, "it seemed apparent [the parents] have a very good law suit against the City for neglect in providing a crosswalk or traffic signal"; (3) attorneys take such cases "on a percentage"; (4) parents would "have to pay [no] attorney's fees if there is no recovery"; (5) attorney's office "specializes in these types of matters"; and (6) "[c]onsultations [with attorney] are always free." Each of these statements is considered in turn.

QUESTIONS PRESENTED

(A) WHETHER AN ADVERTISING LETTER, PURPORTEDLY SENT TO EXPRESS SYMPATHY FOR PARENTS WHOSE CHILD HAD RECENTLY BEEN INVOLVED IN A SERIOUS TRAFFIC ACCIDENT, CONSTITUTES A FORBIDDEN COMMUNICATION TO PERSONS THE SOLICITOR SHOULD REASONABLY KNOW ARE SUBJECT TO MENTAL OR EMOTIONAL PRESSURES WHICH MIGHT PREVENT THEM FROM EXERCISING REASONABLE JUDGMENT IN ENGAGING LEGAL COUNSEL.

(B) WHETHER ATTORNEY'S STATEMENT THAT, BASED UPON ATTORNEY'S REVIEW OF A SHORT NEWSPAPER ARTICLE, PARENTS HAVE "A VERY GOOD LAW SUIT AGAINST THE CITY" CONSTITUTES A "PREDICTION CONCERNING THE RESULT OF THE REPRESENTATION" IN VIOLATION OF RULE 1-400 OF THE RULES OF PROFESSIONAL RESPONSIBILITY.

(C) WHETHER ATTORNEY'S REPRESENTATION THAT PARENTS' CASE WOULD BE TAKEN ON A PERCENTAGE BASIS AND THAT PARENTS WOULD "HAVE TO PAY [NO] ATTORNEY'S FEES IF THERE IS NO RECOVERY" IS MISLEADING IN THE CONTEXT OF A LETTER SOLICITING EMPLOYMENT.

(D) WHETHER ATTORNEY'S REPRESENTATION THAT ATTORNEY'S OFFICE "SPECIALIZES" IN PERSONAL INJURY CASES IS MISLEADING OR INAPPROPRIATE.

(E) WHETHER ATTORNEY'S REPRESENTATION THAT "CONSULTATIONS WITH [ATTORNEY] ARE ALWAYS FREE" IS MISLEADING IN THE CONTEXT OF A LETTER SOLICITING EMPLOYMENT.

APPLICABLE RULE

California Rules of Professional Conduct, rule 1-400, provides in pertinent part:

> (A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
>
> (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
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> (2) Any stationery, letterhead . . . or comparable written material describing such member, law firm, or lawyers; or
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> * * *
>
> (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.
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> (B) For purposes of this rule, a "solicitation" means any communication:
>
> (1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
>
> (2) Which is:
>
> (a) delivered in person . . . .
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> * * *

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[1]/The text of the letter follows: "Dear Mr. and Mrs. ----,
This letter is to express my sympathy for the tragic accident that occurred to your child, ----. In reviewing the [newspaper] article concerning the accident, it seemed apparent that you have a very good law suit against the City . . . for neglect in providing a crosswalk or traffic signal. This is the kind of case attorneys take on a percentage, and that [sic] you do not have to pay attorneys fees if there is no recovery. Our office specializes in these types of matters, and I have enclosed a brochure from my office describing my experience and qualifications. [¶] Consultations are always free. Should you wish to pursue a law suit against the City, I hope you will contact my office and make an appointment at your earliest convenience."

(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter . . . which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

* * *

(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court.

ANALYSIS

Statement (1): Rule 1-400 of the California Rules of Professional Responsibility addresses the propriety of "communications" made to prospective clients concerning the availability of an attorney or firm for professional employment. Pursuant to rule 1-400(E), the Board of Governors of the State Bar of California has formulated and adopted standards to determine the types of "communications" presumptively violative of rule 1-400.

Standard (3) presumptively condemns communications made to persons the solicitor knows, or reasonably should know, are in particularly malleable mental states. It provides a presumption against the following genre of communications:

> A "communication" which is delivered to a potential client whom the member knows or should reasonably have known is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

As regards the communication at hand, it appears attorney's expression of "sympathy for the tragic accident" was simply a veiled attempt to develop a rapport with people attorney did not personally know--parents who had recently experienced significant trauma involving their child--as a means to personal financial gain. While there is nothing inherently unethical about written solicitations for clients, facilitating financial gain or demonstrations of compassion, the Professionalism and Ethics Committee is concerned that, in the present context, attorney's "expression of sympathy" places attorney's communication under the rubric of Standard (3), set forth above.

As the majority of the United States Supreme Court recognized in Shapero v. Kentucky Bar Assn. (1988) 486 U.S. 466, 475, while mail and newspaper solicitations generally do not suffer from the same infirmities as in-person solicitations, "The relevant inquiry is . . . whether the mode of communication poses a serious danger . . . lawyers will exploit any [potential client's] susceptibility" to undue influence. (Id., 486 U.S. at p. 474.) Thus, while attorney's mere use of the mail to solicit legal business cannot be condemned (see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 376-378), questions remain as to whether parents were especially susceptible to attorney's sway and whether attorney's gratuitous expression of "sympathy" constituted an attempt to influence parents unfairly by developing an affinity with them which, in reality, was simply a fast track to winning a business contract.

The Committee first notes that, whether or not the statement was intended to have the effect of playing to the emotions of the recipients, it at least gives the appearance of having that design. As a result, it is reasonable to expect the statement might confuse or impair parents' judgment by expressing attorney's pecuniary motivation in a misleading context. Moreover, the special relationship existing between parents and their children, and the nature of this particular child's condition at the time of the communication, lead us to find attorney reasonably should have known parents were subject to an extraordinary level of stress which would likely impact their ability to exercise reasonable judgment in a presumably unfamiliar area of concern--the choice of counsel.

Whether parents received solicitations from other attorneys at the time of their child's accident or whether parents were particularly savvy about their available remedies, the Committee cannot say. However, under the circumstances presented here, a reasonable attorney would have exercised particular care in dealing with parents who, based upon objective data available to the attorney, may have been especially susceptible to attorney's influence as a result of limited financial resources and inexperience with the American legal system. Assuming attorney's letter was the only offer of legal services parents received, parents may well have believed retention of attorney their only viable option.

Not only do we find the statement inappropriate on the facts presented, the Committee notes that, to the cynical reader, the mere expression of sympathy in the context of a solicitation for employment by someone the recipient does not even know appears contrived, creating an impression of base motivations which could only contribute to the general disrepute into which our profession has, in some quarters, fallen. The Committee acknowledges that the questions presented here are close. Further, the Committee in no way desires to discourage sincere expressions of sympathy. However, the Committee believes the prudent attorney must choose the appropriate vehicle and timing for such expressions. In the context of the communication at hand, attorney's choice was seriously flawed. The Committee finds the statement at issue had a significant potential to exert undue influence upon parents' decision concerning the retention of legal counsel because of the emotional trauma inherent in the circumstances parents were experiencing. Accordingly, we sustain the presumption of Standard (3) in this case and deem the expression of sympathy, coupled with the solicitation for employment, in violation of rule 1-400 (D)(2).

Statement (2): The solicitation letter indicates attorney learned about the child's injuries from an article published in a newspaper which reported the accident in which the child was involved. Attorney opined, based upon attorney's review of that article, the child's parents have "a very good law suit against the City . . . ." California Rules of Professional Responsibility, rule 1-400, Standard (1), provides a "communication" that "guarantees, warranties, or predict[s] . . . the result of the representation" is presumptively in violation of rule 1-400.

While, obviously, attorney's statement renders an opinion about the strength of the parents' prospective lawsuit, that opinion is clearly labelled as being based upon the information attorney gleaned from a review of the newspaper's brief report of the facts. Viewed objectively, it does not seem reasonable to conclude attorney's opinion, so limited, would be construed as a prediction concerning "the result of the representation." Accordingly, while the statement could surely have been written more artfully, indicating what facts made the case attractive to attorney rather than giving an evaluation of the merits of a case about which attorney had only rudimentary and apparently unverified information, the statement does not appear to be in violation of Standard (1) or rule 1-400.

Statements (3) and (4): In explaining the cost of his representation, attorney makes two assertions. First, he represents the parents' potential suit is the kind of case attorneys take on a "percentage" basis. That is certainly accurate. Second, however, the letter indicates, if the parents choose to hire attorney, they would "pay [no] attorney's fees if there is no recovery." The Committee views this statement as misleading because persons unfamiliar with standard legal business arrangements would reasonably construe the statement as a representation they would be guaranteed no out-of-pocket expenses in connection with attorney's representation. Such an implied representation is, of course, false.

No mention is made in attorney's letter that, should the parents decide to retain attorney's services, they would be liable for their costs, not to mention their potential liability for the defendants' costs should their lawsuit be unsuccessful. While an attorney advertising by way of a short television commercial spot may be limited as to the amount of information he or she can effectively convey to the listener, an attorney preparing written correspondence is not similarly limited. No reason exists to prevent attorney from making clear that costs incurred will be parents' responsibility. Such a clarification should have been made here. In the Committee's view, the failure to include it constituted an omission "to state [a] fact necessary to make the statements made . . . not misleading to the public" in violation of rule 1-400 (D)(3).

Statement (5): Attorney also asserts in the course of the solicitation that attorney's office "specializes" in handling "these types of matters." California Rules of Professional Responsibility, rule 1-400(D)(6), prohibits members of the bar from "[s]tat[ing] that a member is a 'certified specialist' unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court." In addition, rule 1-400 (D)(2) prohibits the communication of "any matter . . . which is . . . deceptive, or which tends to confuse . . . or mislead."

It may be that attorney's firm has limited its practice to handling plaintiff's personal injury suits; however, the California Board of Legal Specialization does not certify specialists in the field of personal injury litigation. In the Committee's view, the term "specialist" is a term of art with which all attorneys are presumed to be familiar. To use it outside the context of a specialization certified by the Board of Legal Specialization is, in this Committee's view, improper and misleading. Even without the term "certified," the use of which appears to be required before a violation of Rule 1-400 (D)(6) can be found, it conjures up a false faith in the mind of the lay person which is confusing and professionally unjustified. We therefore conclude its use violated Rule 1-400(D)(2).

Statement (6): Finally, attorney declares, "[c]onsultations [with attorney] are always free." While the financial arrangements attorney makes with clients are not discussed in the advertising letter, there certainly are times when consulting with a lawyer is not free. If attorney's intent was to indicate that initial consultations are free, then that limitation should have been expressed. If, on the other hand, once retained, attorney welcomes consultations on any related or unrelated subject with those who have retained attorney's services, and no charges are made for any of those consultations (which we doubt), then the statement would, of course, have been accurate. In view of Rule 1-400 (D)(3), however, it is the opinion of the Committee, since the communication is in writing, more information concerning the exact financial arrangement anticipated should have been set out for the parents' consideration.

CAUTIONARY NOTE

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