

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1994-95/3
Radio Call-In Program
April 20, 1995

RULE REFERENCES:

- *Scope
- *Rule 1.6
- *Rule 1.7
- *Rule 1.9
- *Rule 1.10
- *Rule 7.1
- *Rule 7.3

SUBJECTS:

ANNOTATIONS:

An attorney may conduct a radio call-in program, but is cautioned to take precautions against improper solicitation, disclosing confidential information or engaging in a conflict of interest. See Rules 1.6, 1.7, 1.9, 7.3.

QUESTION:

Whether an attorney may conduct a radio call-in program where the callers will be undisclosed other than their first names, and each caller will provide a brief statement of the facts pertaining to their inquiry.

FACTS:

The inquiring attorney proposes to conduct a radio call-in programs in which callers will not be allowed to state their full name or address, but will provide their first name and a statement of relevant facts. The attorney will respond to the inquiry to the best of his or her ability, but will defer responding if they are unable to do so in the allotted time or do not feel competent to respond. In such instances, the attorney will suggest the caller consult with an attorney.

The program will run a disclaimer at the beginning and end of each broadcast, stating as follows:

Every problem is unique and the producers of this program and the New Hampshire Bar Association want everyone listening to understand that it is very important to consult with your own attorney prior to applying the advice heard on this or any other program to their own situation as small changes in the facts can completely change the legal result. Further, the attorneys on this program want to be sure that all listeners understand that only their own lawyer can take the time to fully understand their individual problems and properly advise them of the correct legal action.

On occasion, attorneys experienced in a specific area of practice will participate in the program, and it will be advertised that they are available to address inquiries concerning that area of practice

An additional element of the program's format will be to address developments in the law. Apparently, this section of the program will not address caller inquiries.

RESPONSE:

The ethical issues arising from the proposed radio call-in program are similar to those found in educational seminars. See Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Opinion #94-13. In Opinion 1992-93/11, this Committee considered the application of Rule 7.1², prohibiting lawyers from making false or misleading statements, to educational seminars. In that Opinion, the Committee reviewed Ethical Consideration 2-5 under the former Code of Professional Conduct:

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in factual situations may require a material variance in the applicable advice;

Otherwise the public may be misled and misadvised. Talks and writing by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Thus, in addition to broadcasting the proposed disclaimer, the program attorneys are cautioned to avoid providing specific answers to any caller, and each answer should explain that additional facts may change the legal advice applicable to a particular situation. The Committee also recommends that the disclaimer³ be broadcast more frequently than proposed to increase the likelihood it is heard by callers and listeners who may not hear the entire program. As an additional precaution to avoid misleading callers or listeners, the Committee recommends that the participating attorneys defer responding to inquiries beyond the scope of their knowledge.

Because the telephone calls on the proposed program will be a live, one-on-one communication, and may result in employment of the program attorneys, the Committee cautions them to review and consider the rules regarding solicitation. An improper solicitation is defined at Rule 7.3 (c):

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has not 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 terms "solicit" and "solicitation" include contact in person, by telephone . . . or by other communication directed to a specific recipient

The foregoing definition of the terms solicit and solicitation is construed in accordance with the parameters defined by the United States Supreme Court.⁴ While the proposed format of the radio call-in program does not appear to constitute an improper solicitation in violation of Rule 7.3, there may be instances where a caller wishes to establish an attorney-client relationship with a program attorney.

As long as it is the inquirer who seeks to employ the program attorneys, an offer of employment probably may be accepted. The program attorneys are cautioned not to initiate personal contact with a caller for the purpose of creating an attorney-client relationship, as such contact may violate Rule 7.3 (c) see e.g. , Committee on Professional Ethics of the Connecticut Bar Association Opinion #89-4; Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Opinion #94-3.

As a final precaution, the program attorneys should consider the possibility that a relationship may be established with the callers that will implicate the rules concerning the confidentiality of information and conflicts of interest.⁵ Rule 1.6 (a) prohibits attorneys from revealing "information relating to representation of a client unless the client consents after consultation." Since the duty of confidentiality may arise prior to the formal creation of an attorney-client relationship, the participating attorneys may want to explain the right to confidentiality prior to speaking with each caller, thereby avoiding a disclosure of confidential information without the caller's consent.⁶

In addition, the Rules of Professional Conduct consider loyalty to clients an "essential element" of the attorney-client relationship and require an attorney to decline representation where an impermissible conflict of interest exists. See ABA Model Code Comments to Rule 1.7. In circumstances where representation of a caller would be directly adverse to the interests of an existing client⁷ or former client⁸, the Committee recommends that the program attorneys refrain from responding to that particular individual's question. This requires the program attorneys to inquire as to the actual identity of each caller, the parties involved and a brief description of their matter prior to going on-the-air.⁹

CONCLUSION

While the Committee does not believe the proposed radio call-in program violates any of the Rules of Professional Conduct, the program attorneys are cautioned to:

- (1) provide only general answers to caller inquiries;
- (2) to broadcast the disclaimer frequently enough so that all callers and listeners hear it;
- (3) to refrain from soliciting employment by a caller;
- (4) to advise callers of the right to confidentiality and
- (5) to conduct a conflict or interest check prior to going on-the-air with a caller.

¹The Committee is assuming, based upon the facts presented by the inquiring attorney, that the inquiring attorney will not be paying for the radio air time. In the event the inquiring attorney will be paying the radio station for the program air time, certain additional ethical considerations may be implicated beyond those discussed in this opinion.

²Rule 7.1 states that a communication is false or misleading if it

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all the circumstances, not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

³Because the New Hampshire Bar Association will not be sponsoring, supporting or otherwise involved with the program, the Committee requests that any reference to the Association be omitted from the disclaimer.

⁴See e.g., Peel v. Attorney Registry and Disciplinary Commissioner of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); Shapers v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), on remand 763 S.W.2d 126 (1989), cert. den., 490 U.S. 1107, 109 S.Ct. 3160, 104 L.Ed. 2d 1022 (1989).

⁵Generally, state law determines whether an attorney-client relationship is created, and the duties arising from the creation of an attorney-client relationship arise "only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." Scope, Rules of Professional Conduct. Some of those duties, however, such as the duty of confidentiality set forth at Rule 1.6, attach when an attorney "agrees to consider whether a client-lawyer relationship shall be established." Id.

⁶The Committee does not believe confidentiality is ensured by using first names only and a brief description of the facts, as even that limited information may identify a caller.

⁷Rule 1.7(a) generally prohibits an attorney from representing a client "if the representation of that client will be directly adverse to another client."

⁸Rule 1.9 generally prohibits attorneys who formerly represented a client in a matter from subsequently representing "another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of both" or from using information relating to the former representation to the former client's disadvantage.

⁹This precaution does not, however, address the imputed disqualification rule set forth at Rule 1.10.