

**ETHICS OPINION NUMBER 216  
OF THE MISSISSIPPI BAR  
RENDERED MARCH 4, 1994**

**IN-PERSON CONTACT WITH PROSPECTIVE CLIENTS THROUGH LEGAL SERVICE PROVIDER** - An attorney or law firm may not solicit professional employment from a prospective client through in-person contacts by agents or marketing representatives of a legal services provider for whom the attorney or law firm is the sole and exclusive provider of legal services in this state.

The Ethics Committee of the Mississippi Bar has been requested to issue an opinion as to the ethical considerations concerning the following situation:

A law firm ("the firm") has contracted to be the Mississippi provider for a for-profit, pre-paid legal services plan ("LSP" is not the name of the company but simply an abbreviation for the generic "legal services plan." ). LSP's customers will be families and individuals who will pay periodic membership fees and receive in return certain legal consultation and legal assistance services to be provided by the firm. The firm will act as the sole and exclusive provider of legal services for LSP's customers in this state. To market its plan, LSP has contracted with persons to act as sales agents or "marketing associates," within the state. As part of its marketing, LSP has designed and paid for a firm brochure for the firm. That brochure will be provided by LSP to its "marketing associates" for them to use in marketing the plan.

Specifically, the Committee has been asked for an opinion on the following questions related to this situation: 1. Does the sale of the firm brochure by LSP to its marketing associates, for use in sales presentations by them, violate Rule 7.2, MRPC; 2. Does LSP's marketing strategy comply with Rule 7.3, MRPC; 3. Does the firm brochure comply with Rules 7.1 through 7.4, MRPC?

Rule 7.2(c) of the Mississippi Rules of Professional Conduct provides:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the

usual charges of a not-for-profit lawyer referral service or other legal services organization.

The official comment to Rule 7.2(c) recognizes that the rule does not prevent an organization or person other than the lawyer from advertising or recommending that lawyer's services and that a prepaid legal services plan may pay to advertise legal services provided under its auspices. Accordingly, Rule 7.2(c), read in conjunction with the official comment, does not in and of itself prohibit advertisement of the firm's legal services by LSP.

That does not end the inquiry. Rule 7.3 of the Mississippi Rules of Professional Conduct provides:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family, close personal 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 term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988), the United States Supreme Court ruled that portions of Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (virtually identical to Mississippi Rule 7.3) dealing with written communications to prospective clients run afoul of the First and Fourteenth Amendments of the United States Constitution by prohibiting constitutionally protected commercial speech. That decision has partially invalidated Mississippi's Rule 7.3. See Mississippi Ethics Opinion No. 158.

A decade before *Shapero*, the United States Supreme Court had held in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978) that a state may categorically ban information or advice from in-person solicitation by lawyers for profit. In *Shapero*, the Court distinguished *Ohralik* on the basis that unique features of in-person solicitation by lawyers, justifying a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, are not present in the context of

written advertisements. 486 U.S. at 472. The Court recognized two reasons for this distinction:

1. Face-to-face or in-person solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," and
2. The practice's "unique . . . difficulties . . . would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.'" Id. at 475.

Accordingly, that portion of Rule 7.3 prohibiting in-person solicitation for profit remains viable and controls the present question. LSP's marketing plan contemplates that its agents or marketing associates will engage in in-person contacts with the individuals and families to whom it wants to make its memberships (and the firm's services) available. Such in-person solicitation is ethically prohibited.

The provisions of Rules 7.2 and 7.3, MRPC, addressed here are based upon like provisions in the American Bar Association's Model Rules of Professional Conduct (1983, amended 1987). ABA Formal Opinion 87-355 (1987) addresses lawyers' participation in for-profit prepaid legal service plans. Speaking to advertising and solicitation related to such plans, that opinion states:

Another concern relates to the manner in which potential subscribers are solicited. For example it would constitute improper solicitation for a lawyer to participate in a plan in which the plan's sponsor engages a sales force which solicit members by telephone or in Person. Model Rule 7.3 . . . [Emphasis supplied](ABA Formal Opinion 87-355 was issued before the Supreme Court's decision in *Shapiro*; however, *Shapiro* leaves undisturbed the logic of that portion of the opinion quoted here.)

The Committee concludes, therefore, that LSP's marketing strategy violates Rule 7.3, MRPC.(The comment to Rule 7.3 notes that that rule does not prohibit a lawyer from contacting representatives of organizations or groups interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing those entities of availability of and details concerning the plan or arrangement which the lawyer or his firm is willing to offer. Such communication is not directed to a specific prospective client known to need legal services related to a particular matter, but to an individual acting in a fiduciary or representative capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. The situation addressed in the

comment differs significantly from that presented here and does not alter the Committee's conclusion, *infra*, that the advertising/solicitation proposed here is prohibited.) The Committee expresses no opinion related to the content of the proposed firm brochure. (The Committee does not act as a screening committee for firm brochures. The firm requesting this opinion furnished the Committee with a copy of the brochure and requested the Committee's approval or disapproval. The Committee does not have authority to approve or disapprove past conduct. The Committee expresses opinions only and does not endorse any specific brochure. See Formal Interpretive Opinion No. 162.) Likewise, the Committee here expresses no opinion concerning any other ethical issues arising from the relationship between the firm, LSP, its agents or marketing associates, and its prospective "customers." Moreover, we note that the arrangement proposed here may subject the firm and/or LSP to the operation of certain legal obligations or regulations. (For instance, Section 83-49-13(3) of the Mississippi Code expressly prohibits the sponsor of a plan such as that proposed by LSP from "recommending to the subscriber any attorney.") Such obligations, if any, are beyond the scope of matters upon which this Committee can opine.