

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 92-5**

Solicitation of Clients

The Board of Governors has requested the committee's guidance regarding the Bar's duty to the public following mass disasters. This opinion will set forth ethical considerations involved in the solicitation of clients. These ethical rules are binding upon lawyers in Alaska. The ethical rules apply to any lawyer soliciting any client for pecuniary gain and are not limited to mass disaster situations.¹

DR 2-103 and DR 2-104 of the Code of Professional Responsibility deal with solicitation of clients. DR 2-101 deals with media advertisement. The Model Code predates recent United States Supreme Court decisions involving legal solicitation.² The American Bar Association Model Rules of Professional Conduct recognize the evolution of the law of lawyer advertisement. Model Rule 7.3(a) correctly states the constitutional limitations on solicitation of clients. The

¹ The committee recognizes the work of Bruce B. Weyhrauch, Esq. and the bench and bar of Juneau who have studied and prepared a mass disaster plan for the First Judicial District.

² The Bar Association has proposed the adoption of the Model Rules of Professional Conduct but the Alaska Supreme Court has yet to act upon that recommendation. More than two-thirds of the States have adopted the Model Rules. Given the evolution of the law of Lawyer advertising in the United States Supreme Court, the existing canons are both incomplete and confusing.

ethical limits on solicitation must be determined by reference to the present canons together with applicable case law.

Summary of the Opinion

1. A lawyer may not, either personally or through third persons, engage in person to person or telephonic solicitation of persons who have been involved or who have had family members involved in mass disaster.

2. A lawyer may advertise in the public press or through the electronic media. The advertisement may not misrepresent or mislead the public. It must state at the beginning and end of the message that it is an advertisement.

3. A lawyer may make direct mailings either to the general public or to individuals known to be in need of legal services subject to the same rules on misrepresentation. The mailing must contain the words "Advertising material" on the outer envelope.

4. A lawyer may not continue to directly solicit business after the prospective client makes known a desire not to receive such solicitation. The solicitation may not involve coercion, duress or harassment.

Discussion

DR 2-103(A) provides "A Lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, or himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-103 (B) prohibits the payment of compensation to individuals or organizations not listed within DR 2-103(D) for referral of work or recommendation resulting in employment. If a lawyer gives unsolicited advice to a layperson recommending that the layperson obtain counsel, that lawyer may not thereafter accept employment from that person except in the limited circumstances set out in the rule. Thus, the present canons prohibit a lawyer from recommending herself or her law firm to an unrepresented layperson who

has not sought such advice. The rules would allow the lawyer to advise the individual that he needs to seek counsel. When such unsolicited advice is given, the lawyer cannot thereafter accept employment.

Present DR 2-101 prohibits "public communications" containing false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims. DR 2-101(B) limits or purports to limit the information which may be disseminated. DR 2-101(B) also requires advertisement to be made in a "dignified manner."

The disciplinary rules are amplified by decisions of the United States Supreme Court. There are three cases which are germane to the situation before the committee. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978), the Court upheld a blanket prohibition against any form of in-person solicitation of legal business for pecuniary gain. The State's interest in preventing "those aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides the lawyer's interest in communication. See Annotated Model Rules of Professional Conduct, American Bar Association (Second Edition) 1992, p. 522. The Supreme Court noted that since in-person solicitation for pecuniary gain is basically impossible to regulate, a prophylactic ban is constitutional.³ Thus, the committee believes that the ban on in-person solicitation arising out of DR 2-103 and DR 2-104 is proper and may be enforced. The considerations which influenced the Court in Ohralik are no less important in Alaska. "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to

3 The Constitutional ability to ban solicitation is limited to situations where the lawyer is motivated by pecuniary gain. The Supreme Court has specifically ruled that in cases where there is no motivation for pecuniary gain (public interest litigation), the Bar may not regulate solicitation of prospective clients because of the lawyers right to free association. In re Primus, 436 U.S. 423 (1978).

provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making..." 436 US at 457.

This prophylactic ban is limited to in person and telephonic solicitations. It does not apply to printed advertisements. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). There, the Supreme Court also evaluated constitutional limitations on the content of printed solicitations. The State may always regulate false or misleading statements. Other restrictions may be made only "in the service of a substantial governmental interest and only through means that directly advance that interest." Id. For instance, the State's desire that attorneys maintain their dignity in communications with the public is not an interest substantial enough to justify abridgement of the First Amendment right. Id.

The Supreme Court upheld the state finding of misleading solicitation in one important instance. Zauderer had advertised the availability of a contingent fee arrangement, without informing the public that an unsuccessful litigant would be liable for costs and fees. The Court noted that the advertisement informed the public, "if there is no recovery, no legal fees are owed by our clients." Id. The Court upheld the state's discipline because the reasonable implication made by unsophisticated laypersons would be that if the cause was unsuccessful, they would owe nothing. Id.

Shapiro v. Kentucky Bar Ass'n, 486 US 466 (1988) held that a State Bar Association may not preclude a lawyer from sending mail advertisements to individuals who are known to require specific legal services. The Court rejected the claim that Shapiro was Ohralik "in writing." "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." 486 US at 475. The letter sent by Shapiro posed much less risk of overreaching or undue influence than in-person solicitation because of the absence of "the coercive force of the personal presence of a trained advocate" or

the "pressure on the potential client for an immediate yes-or-no answer." Id. The recipient of a letter is free to ignore the mailing, discard the mailing or if he chooses read it. The personalized mailing is, of course, subject to the same limitation on misrepresentation as any other public communication.

Proposed Model Rule of Professional Conduct 7.3(a) correctly limits a lawyer from in-person and telephone solicitation for pecuniary gain.

The United States Supreme Court Cases do not regulate the extent to which a lawyer may continue to solicit clients after being informed that the client does not wish to be the recipient of further solicitation or the solicitation involves coercion, duress or harassment. Model Rule 7.3(b) would prohibit those practices. The committee believes that such limitations would be implicit under the current canons as applied by the United States Supreme Court because an attorney's First Amendment right to free speech does not include a right of coercion, duress or harassment.

Model Rule 7.3(c) requires that "Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication." Shapiro neither condemns nor condones this limitation. In the view of the committee, there is much less opportunity for misrepresentation or misleading solicitations if such communications are clearly labeled as advertisement. Therefore, in the view of the committee, this restriction is reasonably related to the express goal of preventing misleading solicitation.

Approved by the Alaska Bar Association Ethics Committee on April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

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