

ETHICS OPINION

RO-2006-01

OFFICE OF GENERAL COUNSEL

Direct Solicitation of Former and Present Clients

QUESTION #1:

Under what circumstances may an attorney conduct direct solicitation – via in-person contact or by telephone – for professional employment under Rule 7.3(a), Alabama Rules of Professional Conduct?

ANSWER:

Rule 7.3(a), Ala. R. Prof. C., expressly authorizes an attorney to directly solicit any family member (related by blood or marriage), former client, or current client.

DISCUSSION:

Rule 7.3(a) continues the traditional prohibition against direct solicitation of legal employment. That Rule provides in pertinent part the following:

Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule.

Direct solicitation is disfavored, in part, because the contact between attorney and prospective client is in private and therefore, not subject to public scrutiny. As such, the attorney can overreach and “can more readily mix misleading speech with factual statements.”¹ The reason for prohibiting direct solicitation is also discussed in the Comment to Rule 7.3:

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer’s own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Rule 7.3(a), Ala. R. Prof. C., however, expressly exempts from the ban against solicitation those persons with whom the attorney has a familial relationship and/or a current or prior professional relationship.

¹ Hazard & Hodes, *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005).

It is presumed less likely that an attorney would engage in abusive or misleading practices against a person with whom he enjoys a familial relationship. While there is a recent trend to also exclude close personal friends from the prohibition against direct solicitation, the Bar has yet to adopt such a provision.² Rather, the term “familial” literally denotes a family relationship, by either blood or marriage. It would be exceedingly difficult to enforce a rule that allowed direct solicitation of “close, personal friends.” What constitutes a “close, personal” relationship would be subject to debate and individual interpretation. As such, the Commission believes that a “familial” relationship refers strictly to a family member by blood or marriage.

Current and former clients are also excluded from the prohibition against direct solicitation. Due to their previous or ongoing interaction with the attorney, current or former clients will have a sufficient basis upon which to judge whether to continue or reactivate a professional relationship with a particular attorney.

It should also be noted that in *In Re Primus*, 436 U.S. 412 (1978), the United States Supreme Court held that the solicitation of prospective clients by nonprofit organizations that engage in litigation as a form of political expression are entitled to First Amendment protection and not subject to disciplinary action under the

² ABA, *Annotated Model Rules of Professional Conduct*, 547, Fifth Edition (2003).

First Amendment for improper solicitation. In *Primus*, the prospective client was contacted after she had been sterilized as a condition to receiving Medicaid benefits. *Id.* The attorney offered to represent her, free of charge, under the auspices of the American Civil Liberties Union. *Id.* The ban against direct solicitation also may not apply when the attorney is not seeking and will not receive any type of financial benefit from the representation.

To the extent that RO-93-02 opined otherwise or conflicts with this opinion, it is hereby withdrawn.

JWM/s

6/21/06