Enduring Ethics Opinions: Opinion # 16, Letter Soliciting Personal Injury Case
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In Ethics Opinion #16, entitled Letter Soliciting Personal Injury Case, sending a letter to a relative of a personal injury victim to invite the relative or the victim to contact the lawyer about representation in the matter leading to the injury was found not to be a per se violation of the Maine Bar Rules. The Opinion noted, however, that the applicable Maine Bar Rule 3.9(f) would be violated if the letter were received by the relative or victim “while under treatment in a hospital or under other circumstances set forth in subsection (1) (iii)” of the Rule, which create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited.

This opinion was issued in 1980. At the time Maine Bar Rule 3.9 regulated solicitation of potential clients by Maine lawyers, and the Commission found Rule 3.9(f) to be controlling. In pertinent part, Rule 3.9 (f) provided:

(f) Recommendation or Solicitation of Employment.

(1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:

(i) By using any statement, claim or device that would violate this rule if part of a public communication;

(ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious or harassing conduct; or

(iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist as to the person solicited if he is in the custody of a law enforcement agency or under treatment in a hospital, convalescent facility, or nursing home, or if his mental faculties are impaired in any way for any reason. Notwithstanding the foregoing, such circumstances shall be deemed not to exist when a lawyer is discussing employment with any person who has, without solicitation by the lawyer or anyone acting for him, sought the lawyer’s advice regarding employment of a lawyer. (Bold supplied for emphasis)

Even though the letter was to be sent to a relative of the prospective client, the commission found such communication to be a “form of personal contact” sufficient to implicate the Rule under circumstances which would “create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited”. Such circumstances were found to exist if the soliciting letter were to be received by the potential client while “under treatment in a hospital” or under the other specifically identified circumstances set forth in subsection (1)(iii). These identified circumstances
included receipt by the recipient of the letter while in the legal custody of a law enforcement agency, while being treated in a hospital, convalescent facility or nursing home, or any other situation where the recipient’s mental faculties are impaired in any way for any reason.

Maine Bar Rule 3.4 (f) was abrogated, effective August 1, 2009, and was replaced by Rule 7.3 of the Maine Rules of Professional Conduct. Unlike the abrogated rule which, on its face, reached solicitation of employment of any potential client “through any form of personal contact”, Rule 7.3’s prohibition against solicitation is more limited and is concerned only with direct contact with prospective non-commercial clients “in person, by live telephone, or by real-time electronic contact…if such solicitation involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits.” The specific enumerated circumstances of former Rule 3.9(f)(1)(iii) which were expressly deemed to present appreciable risk of undue influence or ill-considered action by the recipient (namely receipt of the communication by a person in law enforcement custody, under treatment in a hospital, convalescent facility or nursing home, or when his mental faculties are impaired for any reason) do not appear in this new Rule.

Rule 7.3 is entitled “Direct Contact with Prospective Clients” and, in pertinent part, provides that:

(a) A lawyer, in person, by live telephone, or by real-time electronic contact, shall not solicit professional employment from a non-commercial client if such solicitation involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits. The prospective client’s sophistication regarding legal matters; the physical, emotional state of the prospective non-commercial client; and the circumstances in which the solicitation is made are factors to be considered when evaluating the solicitation.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer.

The Comment accompanying the rule observes that there is substantial risk for abuse inherent in direct in-person, live telephone, and real-time electronic contact with an unsophisticated, non-commercial client. The Reporter’s Notes specifies that “[n]on-commercial prospective clients are those individual clients in need of legal services in non-commercial or personal matters or circumstances. “ See Reporter’s Notes, Maine Rule of Professional Conduct 7.3. Such a potential client may “already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and
appropriate self-interest in the face of [a] lawyer’s presence and insistence on being retained immediately.” See Comment 1, Maine Rule of Professional Conduct 7.3 Other forms of contact, such as a letter presumably presented and received in circumstances not accompanied by “in-person, live telephone, or real-time electronic” presence of the sending lawyer, are not prohibited.

Rule 7.3 is more restricted in the reach and scope of its prohibition of solicitation than the former Bar Rule. The former Rule’s prohibition of solicitation through “any form of personal contact” with all potential clients no longer applies. The prohibition of Rule 7.3 reaches only solicitation of prospective clients who are non-commercial under circumstances where the solicitation by the lawyer is specifically (1) “in person, by live telephone, or by real time electronic contact” and (2) the solicitation simultaneously “involves or has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation or unwarranted promises of benefits”.

The letter which was the subject of Ethics Opinion #16 in 1980 was presumably to be delivered by regular mail to a relative of a personal injury victim, unaccompanied by in-person, telephone, or real-time electronic contact with the sending lawyer. This letter would not be prohibited today under Rule 7.3, even if the letter were directed to and received by a non-commercial prospective client, because the circumstances of receipt do not include “in-person, live telephone, [or] real time electronic contact” with the sender. The personal circumstances of the letter’s recipient at the moment of receipt, such as being in legal custody, in hospital or in convalescence, which were expressly significant in the former Rule, are no longer relevant under Rule 7.3 unless the letter is accompanied by such “in person, live telephone, or real-time electronic contact” by the sending lawyer and (2) the circumstance of receipt, together with other relevant factors, simultaneously “involves or has the potential of involving harassing conduct, coercion, duress, compulsion, intimidation, or unwarranted promises of benefits”.

The essential result in Ethics Opinion #16 therefore remains the same, albeit for reasons differing from those of 1980 and now mandated by Rule 7.3 of the Maine Rules of Professional Conduct. Sending such a letter or any other form of solicitation, however, should be approached with extreme caution, as even permitted forms of solicitation can be abused. Maine Rule of Professional Conduct 7.1, which governs all communications about a lawyer’s services, including advertising, prohibits making a false or misleading communication about the lawyer or the lawyer’s services. Care must be exercised to be sure that a letter or any other communication is truthful and contains no misrepresentations or material omissions. If a lawyer intends to solicit a prospective non-commercial client “in person, by live telephone, or by real-time electronic contact”, the lawyer must be certain that the solicitation “neither involves nor has substantial potential of harassing conduct, coercion, duress, compulsion, intimidation, or unwarranted promise of benefit.” Maine Rule of Professional Conduct 7.3 (a). A careful practitioner will heed the circumstances identified in former Rule 3.9(f) as automatically giving rise to appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited, as well as the criteria of Rule 7.3(a) by which any solicitation will be measured (prospective client’s sophistication in legal matters,
prospective client’s physical and emotional state, and circumstances in which solicitation is made). Care must also be exercised to conform any such communication with companion Rules 7.2 governing lawyer advertising and 7.4 governing communication about field of practice and specialization. See Maine Rule of Professional Conduct 7.2, 7.4. Further, one must also be mindful of Rule 7.3(b) which prohibits solicitation of professional employment from any prospective client “by written, recorded, or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer.” Indeed, Comment 5 to Rule 7.3 suggests that if, after sending a letter or other communication to a prospective client, a lawyer receives no response, any further effort to communicate with the prospective client may be prohibited. See Comment 5, Maine Rules of Professional Conduct 7.3.