

FORMAL ETHICS OPINION NO. 127

The Idaho State Bar Committee on Ethics and Professional Responsibility has been requested to render an opinion concerning the propriety of a lawyer placing telephone calls to residents of the lawyer's area of practice, selected at random, as a follow up to an advertisement distributed to the public at large. The advertisement says in part:

"\$25.00 cash if we call your number and you can answer two questions about this page. We will make random calls".

The specific question is whether placing the random calls would violate the Idaho Rules of Professional Conduct.

Rule 7.3 of the Idaho Rules of Professional Conduct is controlling:

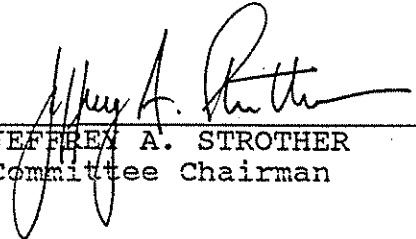
Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no 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 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.

The Supreme Court of the United States held, in Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978), that a State may categorically ban in-person solicitation by lawyers for pecuniary gain. On June 13, 1988, the Supreme Court of the United States decided the case of Shapero vs. Kentucky Bar Association, 1988 W.L. 58273. One holding in that case was that the Kentucky Bar Association could not categorically prohibit lawyers from soliciting business for pecuniary gain by sending truthful and non-deceptive letter to potential clients known to face particular problems. The Court was very careful, however, to distinguish written advertisements from in-person solicitation by lawyers for profit. Thus, the holding in Ohralik was not disturbed by Shapero. In fact, both cases characterize in-person solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud". In both Ohralik and Shapero, the Court remarked upon the difficulties involved in regulating in-person solicitation, short of outright ban.

These decisions authorize categoric bans of personal contact between attorney and prospective clients. By defining "solicit" to include contact by telephone, Rule 7.3 effects such a ban. It is apparent to the Committee that a significant motive for the printed advertisement and later follow-up by telephone is the pecuniary gain of the lawyer. We see no significant difference if the contact is by the attorney himself, a member of his staff, or anyone acting on his behalf. Therefore, it is the

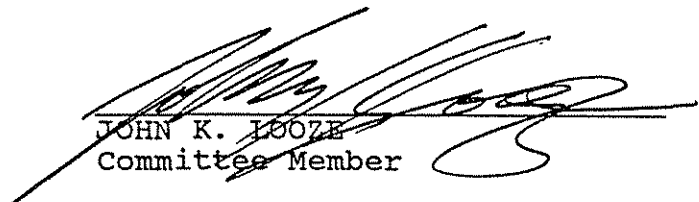
opinion of the committee that, if a lawyer or anyone acting on his behalf, makes telephone contact with persons randomly selected in the community to question them about the content of the lawyer's advertisement, this would constitute in-person solicitation and would be banned by Rule 7.3.



JEFFREY A. STROTHER
Committee Chairman



FRANCIS H. HICKS
Committee Member



JOHN K. LOOZE
Committee Member