

FORMAL OPINION NO 2021-196

Rule 7.3 Solicitation of Clients

Facts:

Lawyer represents several condominium owners in a lawsuit alleging construction defects against the builder of the condo building. Lawyer obtained the phone numbers and email addresses for every owner of a unit in the building from one of Lawyer's clients. Lawyer mailed a flyer to every owner with information about the lawsuit and offering Lawyer's services if the owner wanted to bring claims against the builder. The flyer included Lawyer's office address, phone number, and email address.

One week after mailing the flyers, Lawyer called each owner whom Lawyer did not yet represent to ask if they wanted to participate in the lawsuit. Owner A told Lawyer on the phone that they did not want to participate in the lawsuit and told Lawyer "don't bother me again!" Despite Owner A's instruction to Lawyer not to bother Owner A again, Lawyer emailed Owner A that day and asked Owner A to reconsider, telling Owner A that they could make a lot of money by hiring Lawyer.

Questions:

1. May Lawyer mail flyers to all owners of the building?
2. May Lawyer call Owner A?
3. May Lawyer email Owner A under these facts?

Answers:

1. Yes.
2. Yes.
3. No.

Discussion:

Oregon RPC 7.3 prescribes limits on lawyer advertising and solicitation to protect the public from overreaching, coercion, duress, or

harassment, while protecting the lawyer’s freedom of speech under the First Amendment to the United States Constitution and Article 1, section 8 of the Oregon Constitution.

Oregon RPC 7.3 provides:

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(b) the person who is the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

1. May Lawyer mail flyers to all owners of the building?

Yes, it is permissible for Lawyer to mail flyers to all owners in the building—as long as all factual statements in the flyer about the lawsuit were truthful and not misleading. *See* Oregon RPC 7.1.¹ Care should be given to avoid statements that could be understood to promise a particular result or foster unreasonable expectations about potential outcomes, as such statements could implicate Oregon RPC 7.1, which prohibits a lawyer from making false or misleading communications about that lawyer’s services. Additionally, advertising communications must comply with Oregon RPC 7.2(c) and include “the name and contact information of at least one lawyer or law firm responsible for its content.”

¹ Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Here, because the facts indicate that this is Lawyer’s first contact with the nonclient residents of the building, the flyer contained Lawyer’s contact information in compliance with Oregon RPC 7.2(c), and nothing suggests that the flyer contained false or misleading language that would implicate Oregon RPC 7.3(c), mailing the flyer is permissible.

2. May Lawyer call Owner A?

Yes, it is permissible for Lawyer to call Owner A. A lawyer may call a potential client to solicit the lawyer’s services, if the call does not involve “coercion, duress or harassment” under Oregon RPC 7.3(c), if there is no indication that Owner A lacks the ability to exercise reasonable judgment in employing a lawyer under Oregon RPC 7.3(a), and if the solicitation is not “for the purpose of obtaining business on account of personal injuries to any person, or for the purpose of bringing damage suits on account of personal injuries.” *See* ORS 9.510.

Here, there is no indication that the phone call involved coercion or duress and, because it was the first time Lawyer called Owner A, nothing suggests that the call could constitute harassment. Further, there is no indication in the fact pattern that Owner A’s physical, emotional, or mental state is such that Owner A could not “exercise reasonable judgment in employing a lawyer.” Oregon RPC 7.3(a).² It is therefore permissible for Lawyer to call and solicit Lawyer’s services to Owner A.

3. May Lawyer email Owner A under these facts?

No, it is not permissible for Lawyer to email Owner A. Owner A explicitly told Lawyer on the phone “don’t bother me again!” Oregon RPC 7.3(b) prohibits a lawyer from soliciting to a person that has made known to the lawyer that the person desires not to be solicited by the lawyer. Here, by telling Lawyer not to bother Owner A again, Owner A made *known* the

² Under Oregon RPC 1.0(m), “[r]easonably should know’ . . . denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.”

desire that Lawyer not solicit to Owner A again.³ By following up the call with an email that day, Lawyer was in clear violation of Oregon RPC 7.3.

Approved by Board of Governors, February 2021.

³ Oregon RPC 1.0(h) provides:

“‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person’s knowledge may be inferred from circumstances.”

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 2 (solicitation) (OSB Legal Pubs 2015).