

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 127

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Issues: May a lawyer make in-person solicitations of persons to join the lawyer in forming a citizens' group that will be the nominal plaintiff in litigation, if the members of the citizens' group will be requested to contribute funds for the payment of legal fees and the lawyer intends to serve as legal counsel for the citizens' group in the litigation?

Does the lawyer, who has a personal interest in the outcome of the litigation, have an actual or potential conflict of interest in representing the citizens' group.

Opinion: If a significant motive for the lawyer's solicitation of members to the citizens' group is the lawyer's own pecuniary gain, the lawyer's conduct would violate Rule 7.3(a) of the Utah Rules of Professional Conduct. However, if the citizens' group is a bona fide association of persons commonly interested in the assertion of legal rights and is not a sham association formed by the lawyer to avoid the solicitation rules or an association so controlled or dominated by the lawyer that it was the alter ego of the lawyer, the lawyer's solicitation of members to the group would be an associational activity protected by the First and Fourteenth Amendments of the United States Constitution and could not be proscribed by Rule 7.3(a).

The lawyer's personal interest in the outcome of the litigation may materially limit the ability to adequately represent the group and its members. Additionally, the lawyer's representation of multiple parties in the same matter may give rise to a conflict of interest. If such potentials for conflict of interest are present, the lawyer may only undertake the representation if permitted by Rule 1.7(b) of the Utah Rules of Professional Conduct after obtaining the informed consent to the representation from each member of the group.

Factual Background: An attorney was opposed to certain commercial development in the community where the attorney resided. When the planning commission approved the development, the attorney appeared pro se to appeal personally the decision to the appropriate administrative

authority.

The attorney's administrative appeal was denied. The attorney announced the intent to form a citizens' group and to become the nominal plaintiff in an action to set aside the administrative determinations and to enjoin the development. The attorney made in-person solicitations of persons opposed to the development to join the citizens' group and to contribute funds to pay for legal fees. The attorney informed the persons solicited to join the group that the attorney intended to act as the group's lawyer and to be compensated for the legal services.

Analysis:

I. Solicitation

Whether a lawyer may ethically engage in in-person solicitation of persons to join a citizens' group under these circumstances requires a two-step analysis: (1) whether the conduct violates Rule 7.3(a) of the Utah Rules of Professional Conduct; and (2) whether the solicitation is protected by the First and Fourteenth Amendments of the United States Constitution.

Rule 7.3(a) prohibits in-person solicitation of professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's own pecuniary gain.² It is assumed for the purposes of this analysis that: (1) the citizens' group is an informal unincorporated group;³ and (2) the persons solicited to the group included persons with whom the lawyer had no family or prior professional relationship.⁴

Using these assumptions, the lawyer's conduct would violate Rule 7.3(a) if a significant motive for the solicitation of such persons was the lawyer's pecuniary gain.

In representing an informal unincorporated group, a lawyer represents each of the members of the group unless the agreement with the clients provides otherwise.⁵ In soliciting members to a citizens' group, a lawyer would be soliciting employment from a prospective client if the lawyer intended to represent the group.

Whether a significant motive for a lawyer's solicitation of members to a group in this context is the lawyer's own pecuniary gain mandates a factual analysis of the lawyer's motives. Clearly, if a lawyer's sole motive is to procure professional employment and to establish a fund for payment of the lawyer's legal fees, Rule 7.3(a) would be violated. On the other hand, if a lawyer's principal motive in soliciting membership in a citizens' group in this context is

to organize an effective and efficient means to advance the legal rights of a commonly interested group, then an incidental but nonsignificant motive to procure professional employment in the process would not rise to a violation of Rule 7.3(a).

If a significant motive for a lawyer's solicitation of members to a group to advance legal rights is the lawyer's pecuniary gain, the lawyer's solicitation would be constitutionally protected if the citizens' group is a bona fide association to advance common legal rights and is not a sham association formed by the lawyer for the purpose of solicitation of professional employment or an association so controlled or dominated by the lawyer that it is the lawyer's alter ego. In *NAACP v. Button*,⁶ the United States Supreme Court held that the State of Virginia, under its power to regulate the legal profession, could not prohibit the NAACP or its staff attorneys conducting meetings to apprise citizens of their rights to desegregated schools and to solicit clients who would act as parties in suits to be financed by the NAACP. The solicitation activities of the NAACP and its staff attorneys were modes of political expression and association protected by the First and Fourteenth Amendments of the United States Constitution.⁷ In *Brotherhood of Railroad Trainmen v. Virginia*,⁸ *United Mine Workers v. Illinois Bar Association*,⁹ and *United Transportation Union v. State Bar of Michigan*,¹⁰ the Supreme Court held that the principle of *NAACP v. Button* extended beyond political expression and association and included bona fide associational activities to economically and effectively advance economic claims.¹¹ In 1978, the Supreme Court decided *In re Primus*¹² and *Ohralik v. Ohio State Bar*¹³ to delineate further the constitutional limits of state regulation of lawyer solicitation.

In *Primus* the lawyer had been invited to speak to a group of welfare mothers who had been sterilized as a condition to continued receipt of welfare benefits. The lawyer described to the group their legal rights and later wrote a letter to one of the attendees advising her that the American Civil Liberties Union (ACLU) had agreed to provide representation to the sterilized mothers without fee. While the lawyer was a cooperating lawyer with the local branch of the ACLU, she received no compensation for her work on behalf of the ACLU. The South Carolina Bar Association punished the lawyer for soliciting a client on behalf of the ACLU. Finding that the lawyer's actions were "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than derive financial gain,"¹⁴ the Supreme Court found that her conduct was protected by the First Amendment rights of expression and association. The Supreme Court could find no meritorious distinction between the conduct in *Primus* on behalf of the ACLU and the conduct in *NAACP v. Burton* on behalf of the NAACP.

In *Ohralik*, the lawyer had learned that two persons with whom he was casually acquainted had been injured in an automobile accident. He then contacted both (one was contacted while still in traction in the hospital) and he obtained their agreement to engage him on a contingency fee. The court distinguished the case from *Primus* and *NAACP v. Button*, stating "Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or exercise of associational freedom" ¹⁵ The Court distinguished the case from *United Transportation Union v. State Bar of Michigan*, *United Mine Workers v. Illinois State Bar*, and *Brotherhood of Railroad Trainmen v. Virginia*, stating: "Nor can he compare his solicitation to the mutual assistance in asserting legal rights [at issue in these cases]" ¹⁶ The Supreme Court held that a state may constitutionally discipline a lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to impose dangers that the State has a right to prevent."¹⁷ The Supreme Court went on to state that a state may adopt a prophylactic rule categorically banning all such in-person solicitations and may constitutionally punish violations even in the absence of explicit proof or findings of harm or injury.¹⁸

Primus and *Ohralik* are cases on opposite extremes. The conduct in *Primus* concerned a strong ideological interest and no pecuniary interest while the conduct in *Ohralik* concerned a strong pecuniary interest and no ideological interest.¹⁹ Whether a lawyer's conduct may be proscribed by solicitation rules when the solicitation is in furtherance of protected associational activities but a significant motive for the solicitation is pecuniary gain was not decided in *Primus* or *Ohralik*.

The Supreme Court did offer some guidance. In *Primus*, the Supreme Court recognized that, while the purpose or motive of the speaker is normally not central to First Amendment protections, it does bear on the distinction between conduct that is "an associational aspect of 'expression' and other activity subject to plenary regulation by government."²⁰ The court noted in *Primus* that the speech was part of associational activity intended to advance "beliefs and ideas," while the lawyer in *Ohralik* was not engaged in associational activities for the advancement of beliefs or ideas, but his purpose was the advancement of his own commercial interests.²¹ The Court then observed: "The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, . . . but that is no reason to avoid the undertaking."²²

After *Primus* and *Ohralik*, in dual-motive cases, the courts have focused on the legitimacy of the alleged associational activities and upon whether the lawyer's activities present the same dangers the ban on solicitation sought to

prevent.²³ The motive of the lawyer and the character of the expression are central to assessing the legitimacy of the associational activity and the dangers of the conduct.

The Supreme Court recognized in *Primus* that solicitation on behalf of an association that is "a mere sham to cover what is actually nothing more than an attempt by a group of attorneys to evade a valid state rule against solicitation for pecuniary gain" will not receive constitutional protection.²⁴ Furthermore, associations or not-for-profit corporations so controlled and dominated by attorneys that they become the attorney's alter ego would not insulate an attorney from the solicitation rules.²⁵

If, however, the associational interests advanced by the solicitation activities of the lawyer are legitimate, the courts have held the solicitation activities to be constitutionally protected even in cases where there was a significant motive for pecuniary gain.²⁶ It appears from these authorities that a state may not proscribe in-person solicitation if the solicitation involves bona fide political expression or an exercise of associational freedom, or is undertaken on behalf of a legitimate association united to assert legal rights as effectively and economically as practicable.²⁷ This is true even if a significant motive for the solicitation is the lawyer's pecuniary gain.

II. Conflict of Interest

Two potential conflicts of interest are present when a lawyer agrees to represent an informal group of which the lawyer is a member in the common assertion of legal rights: (1) the lawyer's own interests with regard to the subject matter may materially limit the lawyer's ability to represent other members of the group; and (2) the interests of some group members may be in conflict with those of other group members.

If a lawyer's own interests and the interests of each member of the group regarding the subject matter are entirely congruent and cannot reasonably be expected to diverge, an actual or potential conflict of interest is not present. Rule 1.7(b) requires as a threshold that the representation of the client "may be materially limited" by the lawyer's own interests or the lawyer's responsibilities to other clients.

If a conflict of interest is present or the potential for a conflict of interest is reasonably probable, Rule 1.7(b) prohibits the representation unless: (1) the lawyer reasonably believes the representation will not be adversely affected by the lawyer's own interest or the lawyer's responsibilities to other clients; and (2) each client consents after consultation. The lawyer's belief that the representation will not be adversely affected is tested by the objective standard of a disinterested lawyer. When "a disinterested lawyer would conclude that the client should

not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."²⁸

The consultation required for an effective consent to the actual or potential conflict of interest requires a full disclosure of the actual or the potential conflict and a discussion of its implications to the clients. In the context of multiple representations of parties in the same matter, Rule 1.7(b) requires that the consultation include an explanation to each client of the implications of the common representation and the advantages and risks involved. The comment to Rule 1.7 identifies the following conflicts that may arise in cases of representations of multiple parties in the same matter: (1) conflict by reason of discrepancy in the parties' testimony; (2) incompatibility in positions and relation to an opposing party; or (3) on the facts there are substantially different possibilities of settlement of the claims or liabilities in question.²⁹

In the factual context of this opinion, it may well be that the lawyer's representation would be materially limited by the lawyer's own interests or by the lawyer's responsibilities to other members of the group. If the facts lead to this conclusion, the representations would require an informed consent to the representation by all clients represented in accordance with Rules 1.7(b)(1) and 1.7(b)(2). An informed consent to the representation requires that the lawyer disclose to the clients the possible limitations upon the lawyer's representation of the clients.³⁰

Footnotes

1. Rule 7.3(a) defines "in-person solicitation" to include in-person and telephonic communications directed to a specific recipient.

2. After the United States Supreme Court's decision in *Shapiro v. Kentucky Bar Association*, 486 U.S. 466, (1988), Utah's Rule 7.3 was amended to permit targeted mailings to specific recipients concerning specific causes of action, subject to a few limitations stated in Rule 7.3(b). A lawyer may ethically solicit persons to join a citizens' group under these circumstances by direct targeted mail subject to the limitations of Rule 7.3(b).

3. If the group is a non-profit corporation and a lawyer solicits donations for the prosecution of the litigation as an officer of the corporation, Rule 7.3(a) may not be applicable. In such circumstances, the solicitation may not be directed to a prospective client, as the lawyer may represent the corporation, not the donors.

4. Rule 7.3(a) permits in-person solicitation of family members and the current and prior clients of the lawyer.

5. ABA/BNA Lawyers' Manual on Professional Conduct 91:2007 (1988). But *see* ABA Model Rule of Professional Conduct 1.13. Utah did not adopt Model Rule 1.13, which chose the "entity theory" of representation rather than the "group theory," even in the case of unincorporated associations. Model Rule 1.13, Comment. Due to the informality of the group, in the absence of an agreement providing otherwise, the members of the group would likely believe the lawyer represented each of them.

6. 371 U.S. 415 (1963).

7. 371 U.S. at 428-29.

8. 377 U.S. 1 (1964) (union had a constitutional right to advise injured members to obtain legal advice and to recommend specific lawyers to represent them).

9. 389 U.S. 217 (1967) (union had constitutional right to hire attorneys on a salary basis to assist members of the union in filing and prosecution of workers' compensation claims).

10. 401 U.S. 576 (1971) (union may recommend legal counsel to members who agree not to charge fees in excess of 25% of recovery).

11. *Id.* at 580. "The Michigan Supreme Court failed to follow our decisions in *Trainmen, United Mine Workers and NAACP v. Button* . . . upholding the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable."

12. 436 U.S. 412 (1978).

13. 436 U.S. 447 (1978).

14. *Primus*, 436 U.S. at 422.

15. *Ohralik*, 436 U.S. at 458.

16. *Id.*

17. *Id.* at 449.

18. *Id.* at 466-67. *See Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466, 475 (1988).

19. *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979).

20. 436 U.S. at 438 n.32 (citation omitted).

21. *Id.*

22. *Id.* (citation omitted).

23. *In re Appert*, 315 N.W.2d 204 (Minn. 1981); *Woll v. Attorney General*, 409 Mich. 500, 297 N.W.2d 578 (1980);

In re Teichner, 75 Ill. 2d 88, 387 N.E.2d 265 (1979); *Woll v. Attorney General*, 116 Mich. App. 791, 323 N.W.2d 560 (1982).

24. 436 U.S. at 428 n. 20.

25. *Great Western Cities, Inc. v. Binstein*, 476 F. Supp. 827, 835 (N.D. Ill. 1979) (citation omitted), *aff'd*, 614 F.2d 775 (7th Cir. 1979). In *Great Western Cities* an attorney and others formed an association of lot owners claiming to have been defrauded by a development company in the sale of lots. The development company sought to enjoin the association's solicitation of additional lot owners as members of the association. The Court held that so long as the association was not a sham and an alter ego of the attorneys representing the association, its solicitation activities were constitutionally protected and could not be restrained as an unlawful solicitation under rules regulating the activities of bar members.

26. *Woll v. Attorney General*, 409 Mich. 500, 297 N.W.2d 578 (1980); *In re Teichner*, 75 Ill.2d 88, 387 N.E.2d 265 (1979). In *Teichner*, the Supreme Court of Illinois found that an attorney called to the site of a distant accident by a pastor and community leader as part of his community relief program, responded to the call with primarily a pecuniary motive. But the Supreme Court of Illinois still concluded that the attorney's constitutionally protected right to engage in associational activities of a bona fide relief project immunized him from discipline for soliciting clients as part of the project.

27. ABA, Annotated Model Rules of Professional Conduct 323 (1984).

28. Rules of Professional Conduct 1.7, cmt., "Consultation and Consent."

29. *Id.*, cmt., "Conflicts in Litigation."

30. In this context, Rule 1.7(b) may require disclosure of the fact that the lawyer's interests as a member of the group in the prosecution of litigation may differ from the interests of other group members because the lawyer is being paid by the group for professional services.

Rule Cited:

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