

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No: 10-07

Topic: Solicitations Directed to
Persons Facing Criminal
Charges

Digest: Solicitation letters targeted
to persons facing criminal
charges must comply with
Rules 7.1 and 7.3

Rules: 7.1; 7.3

QUESTION

May an attorney send solicitation letters directly to individuals facing criminal charges, the identities of whom he has learned from an examination of public records?

DISCUSSION

The proposed solicitation letter is subject to both the rules governing “Solicitation and Recommendation of Professional Employment” (Rule 7.3) and those governing Advertising (Rule 7.1). Based on a review of these rules, the proposed solicitation letter raises the following Issues:

Issue 1:

Pursuant to Rule 7.3 (a)(2)(iv), solicitation by any form of communication is prohibited if “the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer.”

The soliciting attorney would not be able to evaluate the physical, emotional or mental state of the individuals to whom he proposes to send solicitation letters, because such information is presumably not provided in the public information he is using to locate the individuals. The attorney might not be able to evaluate whether he is sending solicitation letters to individuals who may be young or otherwise unable to “exercise reasonable judgment in retaining a lawyer.” The anonymous nature of the attorney’s proposed blanket mailing to criminally charged individuals would seem to make compliance with Rule 7.3 (a)(2)(iv) problematic.

Issue 2:

Pursuant to Rule 7.3(f), “any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient’s potential legal need.”¹

The proposed letter is subject to Rule 7.3(f) because the written letter is directed toward pre-determined recipients (individuals facing criminal charges) and is prompted by a specific occurrence both involving and affecting the recipient (being charged with a criminal offense and appearing on a publicly available list obtained under the Freedom of Information Laws).

The proposed solicitation letter does not comply with Rule 7.3(f) because it fails to disclose how the lawyer obtained the identity of the recipient and learned of the recipient’s legal need.

Issue 3:

Rule 7.1(a)(1) requires that such letter may not contain “statements or claims that are false, deceptive or misleading.” The proposed solicitation letter begins with the statement, “As we all know, _____ is a crime in New York State, which has been receiving increased attention in the media.”

That opening statement could potentially be false, deceptive or misleading, because it appears intended to characterize whatever criminal offense the recipient is charged with as one that “has been receiving increased attention in the media.” This blanket statement, as applied to any particular criminal offense, may be inaccurate.

The solicitation letter also states that “police, prosecutors and the Court are now also taking a harder look at the accused.” Similar to the preceding comment, it might not provide an accurate statement as applied to every criminal offense for which an individual could be charged.

Issue 4:

The second paragraph of the attorney’s solicitation letter states, “For over 25 years, our office has represented the accused, trying hundreds of criminal matters and settling countless more, throughout Western New York.” These assertions characterize the quality of the law firm in positive terms and create expectations of positive results. According to Rule 7.1(d), when an advertisement/solicitation makes such a characterization, it must comply with Rule 7.1 (e), and would also require the inclusion of a disclaimer: “Prior results do not guarantee a similar outcome.” This letter fails to include the required disclaimer.

¹ *This attorney solicitation letter is also subject to the rules governing advertising. See Rule 7.3, Comment [1]. Issues 3, 4 and 5 below relate to the advertising rules set forth in Rule 7.1. There are many requirements that go beyond the scope of this opinion, such as the filing and retention requirements of Rule 7.3(c)(1) and (3) and Rule 7.1(k). A lawyer engaging in solicitations must comply with all applicable rules concerning them, not only the provisions addressed in response to the issues raised in this opinion.*

Issue 5:

The attorney's solicitation letter fails to comply with Rule 7.1 (f), requiring that the notation "ATTORNEY ADVERTISING" be placed on the letter.

CONCLUSION

A lawyer should not send a solicitation letter to a prospective client if the lawyer knows or reasonably should know that the recipient is unlikely to be able to exercise reasonable judgment in retaining a lawyer. Where a solicitation is made in writing to a predetermined recipient as the result of a specific occurrence involving the recipient, the letter must disclose how the lawyer obtained the recipient's identity and learned of the recipient's potential legal need. Solicitations, like other advertisements, may not contain statements or claims that are false or misleading and must include the disclaimer "prior results do not guarantee a similar outcome" if the solicitation creates expectations of positive results. A solicitation letter should include the notation "attorney advertising" where required by Rule 7.1(f). Finally, a lawyer engaging in solicitations must comply with all other applicable provisions of the Rules of Professional Conduct, including, without limitation, Rule 7.3 ("Solicitation and Recommendation of Professional Employment") and Rule 7.1 ("Advertising").