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February 2023 *Multnomah Lawyer Ethics Focus*

What Was Old Is New: Soliciting Clients Under RPC 7.3

Mark J. Fucile
Fucile & Reising LLP

On February 13, 1974, lawyer Albert Ohralik was picking up his mail at a post office near Cleveland when a postal worker mentioned that an automobile accident had occurred nearby on February 2 injuring two local young people. One was still in the hospital and the other was recovering at home. Ohralik, who did personal injury law, went to the hospital. The accident victim there was 18 years old and in traction. Ohralik tried sign her to a contingent fee agreement. Ohralik later did the same with the victim recuperating at home, who, although 18, had not yet graduated from high school.

Both victims later filed bar complaints against Ohralik. Ohralik was disciplined under Ohio's then-current rule generally prohibiting solicitation. Ohralik appealed to the United States Supreme Court—arguing that his conduct was protected commercial free speech in keeping with the Supreme Court's decision the year before in the seminal lawyer advertising case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Supreme Court disagreed and upheld the ability of regulatory agencies to limit direct in-person solicitation when it amounted to duress or harassment.

Mirroring, albeit to a lesser extent, the circuitous path of advertising regulation since *Bates*, the rules governing in-person solicitation since *Ohralik v.*

Ohio State Bar Assn., 436 U.S. 447 (1978), have attempted to define specific categories of permissible targets for in-person solicitation. Oregon initially followed this national approach but more recently distilled the regulatory footprint down to the constitutional core recognized in 1978—permitting most in-person solicitation unless it involves duress or harassment.

In this column, we'll first briefly survey that elliptical history for context and then turn to the remaining limits on in-person solicitation under Oregon RPC 7.3.

Historical Context

The principal Ohio rule that the U.S. Supreme Court addressed in *Ohralik* was patterned on ABA Model Code of Professional Responsibility DR 2-103(A), which was adopted by the ABA in 1969. That restriction followed ABA Canon 28, which was adopted in 1908 and prohibited "[s]trirring up strife and litigation[.]" In the wake of *Ohralik*, ABA Model Rule of Professional Conduct 7.3 as adopted in 1983 prohibited in-person solicitation (or the telephone equivalent) when it involved duress or harassment, or the target had otherwise told the lawyer they did not wish to be contacted. Model Rule 7.3, however, also continued to prohibit in-person solicitation more broadly unless it was directed to defined categories such as family or former clients. Amendments adopted in 2002 expanded the rule to include "real-time electronic contact" and added other lawyers to the

permitted targets. Further amendments in 2018 reframed the definition as "live person-to-person contact" regardless of form and added a "person who routinely uses for business purposes the type of legal services offered by the lawyer" to the permitted targets. The ABA rule, however, largely retained a general prohibition layered atop specifically permitted categories of direct contact.

Oregon's rules initially followed a similar trajectory with, if anything, even more twists beginning with former Oregon DR 2-104 and, more recently, Oregon RPC 7.3. In 2017, however, the Oregon State Bar proposed a sweeping change to RPC 7.3. The amendments returned the paradigm to the one essentially suggested in *Ohralik*: generally permitting in-person solicitation as long as it did not amount to duress or harassment (or the target had told the lawyer they did not wish to be contacted). The amendments were approved by the OSB House of Delegates in late 2017 and were adopted by the Supreme Court in early 2018.

Remaining Limits

Oregon RPC 7.3 now reads:

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

The 2017 OSB House of Delegates materials reflect the broad intent of the amendments:

> The proposed amendment eases the restrictions of ORPC 7.3, allowing lawyers to more freely engage with Oregonians, while retaining protections designed to protect consumers from overreaching and abuse.

The 2017 House of Delegates materials also note a remaining anomaly the Oregon State Bar could not address directly: ORS 9.510. That statute, with lineage dating back to the early 1900s, broadly prohibits solicitation of personal injury claims: "No attorney shall solicit business at factories, mills, hospitals or other places . . . on account of personal injuries to any person, or for the purpose of bringing damage suits on account of personal injuries." ORS 9.527(5), in turn, includes ORS 9.510 within the regulatory jurisdiction of the Oregon Supreme Court and there are reported disciplinary decisions citing ORS 9.510 (*see, e.g., In re Ruben*, 228 Or 5, 363 P2d 773 (1961)). Although the disciplinary cases citing ORS 9.510 largely pre-date modern commercial free speech law, it was mentioned on cautionary note in a 2021 Oregon State Bar ethics opinion (OSB Formal Op. 2021-196). Therefore, whatever constitutional clouds may hang over ORS 9.510, it remains "on the books" and cannot be discounted entirely.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.