

# Ethics Opinion

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**FACTS:** During discovery proceedings on behalf of her client, Attorney learned that the opposing party had been and is currently engaged in illegal discriminatory activities against Native Americans. The judge determined that this issue was irrelevant to the case, and Attorney was therefore unable to obtain records indicating the names of those persons who had been discriminated against by party X. Because these persons do not know that they have been discriminated against, and because Attorney does not know their names, Attorney intends to take out advertisements in local area newspapers stating that if any Native Americans have had business contacts with specific results with party X during a certain period of time, they may have a cause of action against party X for discrimination. Attorney also intends to include in her advertisement that these Native Americans may contact her law firm for possible representation.

**QUESTION PRESENTED:** Would Attorney's proposed advertisement, as described, violate Rule 7.3?

**SHORT ANSWER:** No.

**DISCUSSION:** The facts and question presented here involve Rule 7.3, Direct Contact with Prospective Clients. Montana's Rule 7.3 states, in full:

A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment, if:

- (a) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer;
- (b) the person has made known to the lawyer a desire not to receive a communication from the lawyer;
- (c) the lawyer reasonably should know that the communication involves coercion, duress, or harassment;
- (d) the lawyer reasonably should know that the person is already represented by another lawyer.

While the facts supplied to us indicate that one of the purposes of Attorney's intended advertisement is to inform certain persons of their potential cause of action, it can also be inferred from these same facts that another purpose of this advertisement is to obtain professional employment. Therefore, if subsection (a), (b), (c), or (d) applies here, Attorney's advertisement would violate Montana Rule 7.3.

However, the facts indicate that subsections (a)-(d) do not apply here. In addition, Attorney's proposed advertisement is in conformance with the policy behind the Rule, which is to protect a lay person from a lawyer's honed skills of persuasion during a one-on-one conversation, and ensure that the lay person can exercise his or her own judgment in choosing a lawyer. Here, of course, Attorney intends only indirect, written contact with the potential clients. The significance of the distinction between direct, in-person, and indirect, written communication with potential clients was explained by the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In *Zauderer*,

"the Supreme Court afforded First Amendment protection to newspaper advertising by a lawyer seeking to solicit product liability cases from women who had used the Dalkon Shield. The Court strongly suggested that the key distinction is between in-person solicitation and print advertising, rather than between general advertising and "targeted" communications. The Court [stated] in *Zauderer* that print advertising "poses much less risk ... it will lack the coercive force of the personal presence of a trained advocate."

Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* at 883 (vol. 2, 2d ed., 1994) (citing *Zauderer*, 471 U.S. at 642).

Another aspect of print advertising was discussed by the South Carolina Ethics Committee in its Opinion 91-06 (April 1991). In that opinion, the South Carolina Committee held that a lawyer could advertise his services in a local newspaper, "provided that the advertisements do not create unjustified expectations about results the lawyer can achieve for clients and the language of the advertisements is not false or misleading." Here, there is no indication that Attorney's proposed advertisement will create any unjustified expectations, while there is every indication that the contents of the advertisement will be truthful.

Thus, Attorney's proposed advertisement would comply with Montana Rule 7.3.

**THIS OPINION IS ADVISORY ONLY**