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COMMITTEE ON
ETHICS AND PRACTICE GUIDELINES**

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Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
521 E. Locust
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RE: Opinion regarding Class Action Solicitation
Opinion No. 07-03

Dear Mr. Dinkla

We have been asked to revisit Opinion 93-13 concerning advertising for potential class action clients. May a lawyer, using any or all forms of media which are allowed by the Iowa Rules of Professional Conduct and in the manner allowed by the rules advertise for clients who may have a claim or cause of action that could be brought as a class action.

Initially we note that the prior Committee has issued three opinions regarding class action matters. The initial opinion, of February 21, 1979, No. 79-11 concerned solicitation of prisoners regarding a potential class action. It prohibited the practice on the basis that (at that time) direct mail solicitation was prohibited. With the adoption of Iowa Code of Professional Responsibility DR 2-101(4)(b) and (c) Opinion 79-11 is no longer relevant. The second opinion regarding class action occurred later that year in December 27, 1979, No. 79-75 and concerned what a class action client could do to associate others in the

class. The opinion attempted to set a protocol that lawyers could use in associating members for a class action. It stated:

It is the rule in the case of any proposed class actions that the individual client must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences has been given by the attorney or attorneys involved. DR 2-104(5) is specific in stating that a lawyer "may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder." Your suggestion that your client contact "those other injured parties and have them contact their own attorney, and then have the attorney contact" you would appear to be the best and most acceptable solution to your client's dilemma. It is apparent that while this method is apparently practical and proper, it is subject to abuse. We would suggest that you meet with your client and advise her exactly what you feel is necessary in order to properly prosecute the lawsuit. Then, as aforementioned, you should afford a full explanation of all of the foreseeable consequences. Obviously, you cannot allow any client to directly solicit business for you. We feel that if you make a full disclosure to your client of all of the requirements, facts, circumstances, costs, liabilities, and potential for recovery, your client can then determine what action, if any, she chooses to take. We would suggest that if she does wish to contact other potential members of the class, she should be advised that she should instruct said individuals to contact his or her own attorney who might then wish to contact you.

Of significance is the fact that Opinion 79-75 is premised upon the fact that the lawyer already has a client and a determination has been made by the client and lawyer that there is a potential class action. The opinion is simply concerned with how the client may solicit other potential class action members. In that regard, it is premised upon DR 2-104(A)(5) which is now identical to Iowa Rule of Professional Conduct 32:.7.8 (a)(3)(c):

If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Four years later, the Committee issued Opinion 93-13 entitled "Class Action: Advertising." By this time, the Iowa Code of Professional Responsibility had been amended to adopt rules governing solicitation by mail, i.e. DR 2-101(B)(4)(b) and (c). A close read of Opinion 93-13 is important:

Opinion: Solicitation advertising by mail is provided for in DR 2-101(B)(4)(b) and (c) of the Iowa Code of Professional Responsibility for Lawyers. You ask whether, pursuant to the last paragraph of DR 2-101(B)(4)(b), this committee can authorize such advertising other than by mail in connection with "a potential class action."

The last paragraph of DR 2-101(B)(4)(b) does not authorize the committee to change the Disciplinary Rules. It only authorizes the committee, after review of matter submitted, to make a finding as to whether the copy in the advertisement is false, deceptive or misleading.

It is the opinion of the committee that DR 2-104(A)(5) prohibits an Iowa lawyer from advertising for employment to represent clients in a class action. (Emphasis added)

The specific question being addressed in Opinion 93-13 has been underlined and was simply whether any other form of direct solicitation was authorized beside mail. The Committee was correct in its view regarding its limited authority. It concluded that DR 2-104(A)(5) prohibited an Iowa lawyer from advertising for employment to represent clients in a class action. In understanding the conclusion it is important to appreciate the scope of DR 2-104(A)(5), now I.R. Prof. C. 32:8.(a)(3)(c). By the very wording of the rule, it applies to situations where the lawyer already has an existing client who has made the determination that there is a potential class action claim and is merely attempting to assemble a sufficient number of other individuals who can be joined together to institute class action proceedings. The narrow issue addressed by the rule and Opinion 93-13 is how that is to be accomplished. Strangely Opinion 93-13 fails to mention Opinion 79-75 which gives specific guidance on the issue.

With that background we turn to the question before the Committee: May a lawyer, using any or all forms of media which are allowed by the Iowa Rules of Professional Conduct and in the

manner allowed by the rules advertise for clients who may have a claim or cause of action that could be brought as a class action. The answer is "yes." We see nothing in the rules that limits the use of certain methods of advertising or marketing to certain types of cases. It is not the nature of the case or claim that regulates the conduct, rather it is the manner in which it is pursued that is regulated. The manner in which matters are pursued may be indirect such as those enumerated in Rule 32:7.2 (b)(c)(d) and (e) or direct such as those authorized by Rule 32:7.3 concerning direct contact. Opinions 93-13 was premised upon the concept that a lawyer was using this direct contact method of advertising which is limited to direct mail and specifically prohibits direct "in-person" solicitation, "live" telephone or "real-time" electronic solicitation.

We see nothing in the Rules that prohibits a lawyer from using any or all of the indirect forms of advertising allowed by Rules 32:7.2 (b)(c)(d) and (e) with content consistent with Rule 32:7.2(h) (1)(iii) and Rule 32:7.(I) in an attempt to attract clients who, after a full explanation of the risks inherent in class action litigation and being otherwise fully informed give their informed consent to authorize pursuits of a class action.

Opinion 79-11 is reversed, Opinion 79-75 is re-affirmed and Opinion 93.13 is limited to those situations where the lawyer is engaged in solicitation in accordance with I.R.Prof. C. 32:7.(b)

For the Iowa State Bar Association Committee on Ethics and Professional Standards

Very truly yours,



Nick Critelli