

The State of South Carolina



Opinion 1826-90
P276

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

August 12, 1986

The Honorable John G. Richards
Chief Insurance Commissioner
Department of Insurance
P. O. Box 100105
Columbia, South Carolina 29202-3105

Dear Commissioner Richards:

In a letter to this Office you requested an opinion regarding what constitutes solicitation pursuant to Section 38-63-180(f) of the Code. Such provision was included in the 1985 act, codified as Sections 38-63-10 et seq. of the Code, which provided for the licensing and regulation of bail bondsmen and runners by the State Insurance Department. Section 38-63-180(f) states:

No bail bondsman or runner may: ... solicit business in any of the courts or on the premises of any of the courts of this State, in the office of any magistrate or in or about any place where prisoners are confined. Loitering in or about a magistrate's office or any place where prisoners are confined is prima facie evidence of soliciting.

Pursuant to Section 38-63-350 of the Code, the violation of such provision is punishable by a fine of not more than five hundred dollars or imprisonment for not more than six months, or both. Also, as you indicated, Section 38-63-160 of the Code places the administrative disciplinary duty of revoking or suspending licenses issued to bondsmen or runners for violations of Sections 38-63-10 et seq., upon the State Insurance Department.

In your letter you referenced several factual situations descriptive of actions by bondsmen and questioned whether such should be considered as "solicitation" in violation of Section 38-63-180(f). You indicated that some individuals defend such actions as constituting advertising practices not violative of

The Honorable John G. Richards
Page 2
August 12, 1986

such provision. Referencing such, you have asked where does permissible advertising end and solicitation for purposes of Section 38-63-180(f) begin?

As to what may be considered to constitute "solicitation" as referenced in Section 38-63-180(f), an absolutely definitive answer is not available. In Jackson v. Beavers et al., 118 S.E. 751 (1923), the Georgia Supreme Court dealt with an attack on a provision of the Georgia bail bond law which stated:

... professional bondsmen shall not by themselves, or himself, agents or employees, solicit business as such bondsmen, or shall either one of them lounge about or around prisons or places where prisoners are confined, or the courts, for the purpose of engaging in or soliciting business as such bondsmen. 113 S.E. at 751.

It was asserted that such provision failed to define what is meant by the language "solicit business as such bondsmen" and, as a result, such provision was so indefinite and uncertain as to be void. The Court, however, found it unnecessary to describe the type activities prohibited by such provision and summarily dismissed the plaintiff's allegation stating:

(t)his contention is without merit. Dictionaries, lay and legal, define the meaning of the word 'solicit' and this act itself defines the meaning of the business of such bondsmen. Thus the meaning of this language can be rendered clear. 118 S.E. at 752.

Other courts have found specific situations to constitute solicitation by bondsmen. In People v. Rabinowitz, 97 N.Y.S.2d 260 (1950), it was held that a statute which prohibited solicitation of bail bonds for profit by unlicensed persons was violated where an unlicensed person by advertising, business cards, or otherwise held himself out as being in the bail bond business. In People v. Smith, 97 N.Y.S.2d 896 (1950), the court determined that where an unlicensed person's name appeared in connection with a bail bond sign in an office, such was "solicitation" within the meaning of the statute referenced in Rabinowitz.

The Washington Supreme Court in the case of In re Winthrop, 237 P. 3 (1925) determined that an attorney's conduct in offering to furnish prisoners in jail cash bail and to thereafter represent them at trial for a stated consideration

The Honorable John G. Richards
Page 3
August 12, 1986

constituted "soliciting" in violation of the canons of ethics regulating the profession. In its decision the court defined "solicit" as

... to ask from with earnestness; to make petition to; to endeavor to obtain; to awake or excite to action; to appeal to; to invite. 237 P. at 4-5.

The precise conduct referenced by the court was as follows:

... very promptly after one was arrested and put in the city jail, whether in the day time or at night, whether the person knew or had ever heard of the respondent or not, the respondent promptly appeared and, if unacquainted, presented his card, saying that he was a lawyer, and sometimes asking how much money the prisoner had, would say that for a stated consideration he would furnish cash bail at once and attend to the trial of the case when it came up in the police court. The offer would be accepted, the respondent would put up cash bail and the prisoner be liberated. 237 P. at 4.

In People v. Framer, 139 N.Y.S.2d 331 (1954) the court in considering whether certain conduct violated an ordinance prohibiting the solicitation of contributions without a license defined the word "solicit" as

... to approach for something, to ask for the purpose of receiving; to endeavor to obtain by asking; to importune or implore for the purpose of obtaining; to awake or incite to action by acts or conduct intended to and calculated to incite the giving. The only thing that is necessary is that the means employed for the asking of something, whether by oral or mute conduct, justify the person importuned or implored in treating the request as a serious request that such person be moved to action. 139 N.Y.S.2d at 337.

The preceding discussion outlines how certain courts have defined "solicitation" in various contexts. However, as stated, this Office is unable to provide an absolutely definitive answer as to what constitutes "solicitation" pursuant to Section 38-63-180(f).

The Honorable John G. Richards
Page 4
August 12, 1986

Such a determination would involve the determination of factual questions. This Office has repeatedly stated that an opinion of this Office is inadequate to resolve factual questions. See: Opinion of the Attorney General dated November 15, 1985. Also, as noted, such provision prohibits solicitation in any courts or on the premises of any court. As to exactly what activity is prohibited by such, it is well-recognized that a judge has broad discretion in overseeing the conduct of individuals in his courtroom. Therefore, while this Office can provide a general response as to whether certain activities have been construed to be "solicitation," a particular judge must still resolve the matter as to whether certain actions in his courtroom constitute "solicitation" within the prohibition of Section 38-63-180(f).

While the cases cited above may be instructive to the Commission in determining what constitutes "solicitation" pursuant to Section 38-63-180(f), of course, it would be a matter for the Commission to enforce such provision with respect to a particular factual situation. I would note that, pursuant to Section 38-63-20, the Commission is authorized to promulgate regulations to enforce the purposes and provisions of the referenced statutes. Ideally, such regulations could describe in detail what types of activity would constitute "solicitation" in the noted circumstances and, therefore, place those individuals affected on notice as to what is prohibited by the referenced provision. In this regard, it is well-recognized that courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one that the court would adopt in the first instance. See: Opinion of the Attorney General dated September 12, 1985.

If there are any questions concerning the above, please advise.

Sincerely,


Charles H. Richardson
Assistant Attorney General

CHR/an

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions