



# NEW YORK STATE BAR ASSOCIATION

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## New York State Bar Association Committee on Professional Ethics

Opinion 1014 (8/4/2014)

**Topic:** Solicitation; client recommendation

**Digest:** Lawyer may contact prospective client recommended by current client when prospective client has made known that lawyer should contact the prospective client and the lawyer did not make any payment or give any other consideration to the current client for the recommendation.

**Rules:** 1.0(a), 7.2, 7.3, 8.4(a)

### QUESTION

1. May a lawyer contact a prospective client who is detained in jail, prison or an immigration holding center when a current client advises the lawyer that the prospective client desires the lawyer to contact him as a result of the current client's recommendation, for which no payment or other consideration was made?

### FACTS

2. A lawyer's current client is being held in a detention center and has recommended the lawyer to a fellow detainee. The prospective client has told the lawyer's client that he would like the lawyer to contact him to discuss his defense. The client has given the prospective client's name and telephone number to the lawyer and advised the lawyer that the prospective client would like the lawyer to contact him. The lawyer neither requested that the client make any recommendations nor did the lawyer make any payment or give any other consideration to the client.

### OPINION

3. The traditional manner of obtaining new clients has from early days been the recommendation of satisfied clients. The original Canon 27 of the ABA Canons of Professional Ethics adopted in 1908 provided in part that "[T]he most worthy and effective advertisement possible, even for young lawyers... is the establishment of a well-merited reputation for professional capacity and fidelity to trust." "The best way to build a practice is to work hard and conduct yourself ethically. In short time you will win the approval of clients, other lawyers, and judges; with their approval will come recommendation and success." Raymond L. Wise, *Legal Ethics* 137 (1970).

4. The vast majority of people do not know a lawyer. It is natural for one to ask a neighbor, an acquaintance, a business associate, a fellow worker or even a fellow prisoner or detainee not only for a recommendation, but in many instances an introduction to their lawyer.

5. Where nothing of value is given to the person recommending the lawyer, the proscription of Rule 7.2(a) and its predecessor DR 2-103(B) that provide that a 'lawyer shall not compensate or give anything of value to a person . . . to recommend . . . a client or as a reward for having made a recommendation resulting in employment by a client . . .' is inapplicable. The recommendation by the lawyer's current client was unsolicited and nothing was paid to the client by the lawyer. Gratuitous referrals from current and former clients were never viewed as unethical. ABA Inf. 1298 (1974). Indeed the title of Rule 7.2 is "*Payment for Referrals.*"

6. Comment [1] to Rule 7.2 which provides that "[l]awyers are not permitted *to pay* others for channeling professional work" (emphasis added) similarly places the prohibition on the fact of a payment or reward. As stated in Roy D. Simon, *New York Rules of Professional Conduct* 1633 (2014 ed.) "[a]lawyer must not pay cash or any other form of compensation to anyone or any entity for referring business to the lawyer unless one of the exceptions to subparagraphs (a)(1) and (a)(2) applies." The vice that these rules address is the *payment* to what have been described as "touts," "runners" and "ambulance chasers." If there is no payment involved the proscription is not applicable.

7. Not surprisingly we find no Rule that prohibits a lawyer from contacting a prospective client who has requested the lawyer do so on the recommendation of a current client.

8. The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is *advertising initiated by* or on behalf of a lawyer. Rule 7.3(b). Here the contact with the potential client was not initiated by or on behalf of the lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm (*as opposed to a communication made in response to an inquiry initiated by a potential client.*)" (Emphasis added). Here the current client, without prompting by the lawyer, recommended the lawyer to a fellow detainee. Even though the lawyer's contact with the prospective client might be considered an advertisement under Rule 1.0(a), the contact by the lawyer to the prospective client is being made at the request of the prospective client and thus has not been *initiated* by the lawyer. This is no different than a lawyer returning a voice mail message left by a prospective client or a response by a lawyer to a request for proposals to provide legal services. There is nothing improper in returning a request to be contacted. It has been summarized that "a response to a prospective client is not a solicitation." *Simon* at 1699. If upon the initial contact with the prospective client it is apparent that the prospective client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

9. Under the Code of Professional Responsibility, which governed the conduct of lawyers until April 1, 2009, this Committee determined that it was not ethically improper for a lawyer to accept referrals from real estate brokers. N.Y. State 467 (1977). Under the Rules of Professional

Conduct, which replaced the Code, we have determined that it is not improper to accept referrals from accountants and bankers. N.Y. State 988, ¶7 (2013). In these instances there was no consideration paid by the lawyer for the referrals.

10. We conclude that the question is not who made the referral, but rather whether the lawyer initiated the solicitation or paid the person for the referral. If the lawyer neither initiated the solicitation of the proposed client nor paid for the referral, the lawyer may accept the proposed client. Thus, the inquiry is answered in the affirmative. The lawyer may contact a prospective client that a current client advises wants to be contacted by the lawyer, provided the lawyer neither initiated the contact nor paid for the referral. The same conclusion was reached in N. Y. City 2000-1 (2000), Texas Opinion 623 (2013), Boston Opinion 2012-01 (2012) and Rhode Island Opinion 98-16 (1998).

11. Nevertheless, a lawyer cannot instigate a current client or anyone else to solicit a specific client for the lawyer if the lawyer could not directly solicit the prospective client under Rule 7.3(a). The lawyer cannot do indirectly through the acts of a third- party that which he is forbidden to do. Rule 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"). N.Y. State 988, ¶6 (2013). On the other hand, it is not improper to encourage clients and others to recommend the lawyer to their friends if they know someone who needs a lawyer.

## **CONCLUSION**

12. It is not unethical for a lawyer to contact a prospective client who has advised a current client that the prospective client would like the lawyer to contact him after the current client recommended the lawyer, provided that the lawyer has not paid or given anything of value to the current client for the recommendation.

(3-14)