



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1221 (03/31/2021)

Topic: Lawyer reaching out to former clients

Digest: A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3, but they are subject to the more general provisions in Rule 8.4(c) forbidding misrepresentation.

Rules: 1.0(a), 7.1, 7.3, 8.4(c)

FACTS

1. The inquirer formerly worked at a law firm as an attorney practicing in the elder law area. After notifying the firm that she would be leaving to join another firm, the inquirer sent notice of her impending departure to approximately 1,100 of her current and former clients, most of whom were elderly or disabled. That notice, approved by the firm she was leaving, included a “Client File Retention/Transfer Instruction” form, also approved by the firm, that provided the clients with three options: (1) remain at the inquirer’s old firm; (2) follow the inquirer to the new firm and have the client file and unused client funds transferred to the new firm; or (3) request that the file and unused client funds be returned to the client.

2. Shortly after the inquirer’s departure, a number of clients who she had been representing advised her that they wished to follow the inquirer to her new firm, and they provided the inquirer with the appropriately completed and signed Client File Retention/Transfer Instruction making that election. The inquirer also received word from dozens of other former clients who advised her that they, similarly, had elected to follow the inquirer to her new firm but had sent their completed and signed Client File Retention/Transfer Instruction to her former firm.

3. The inquirer states that despite her repeated requests over a period of several months, her former firm has not provided her with a list of the clients who have notified the former firm of their election to follow the inquirer to her new firm, and her former firm also has not forwarded their files or transferred their funds. The inquirer notes that many of her elderly or disabled former clients do not have the technical capability to locate her or her new law firm through an online search.

QUESTION

4. May the inquirer reach out and contact directly the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans?

OPINION

5. We note at the outset that this inquiry raises issues of contract and partnership law. Our opinion does not address those issues because they are questions of law and are, therefore, beyond the jurisdiction of this Committee. *See, e.g.*, N.Y. State 1134 ¶ 6 (2017). Furthermore, the Committee only addresses the conduct of an inquirer. Therefore, this opinion does not address the conduct of the lawyers in inquirer's former firm.

6. As a purely ethical matter, the inquirer may reach out and directly contact the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans. This communication would not violate the rules governing advertising and solicitation because it would be neither an "advertisement" nor a "solicitation" as those terms are defined in the Rules of Professional Conduct (the "Rules").

7. The term "advertisement" is defined in Rule 1.0(a) as follows:

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

8. Although Rule 1.0(a) excludes "existing clients" but not former clients, the Rules have been interpreted to exclude former clients as well in some circumstances. Rule 7.1, Cmt. [7] says: "Communications to former clients that are germane to the earlier representation are not considered to be advertising." *See also* N.Y. State 1129 ¶ 8 (2017); N.Y. State 848 ¶ 11 (2011); *see also* N.Y. County 748 (2015); N.Y. City Bar 2015-7 (2015); *see generally* Rule 7.1, Cmt. [6] ("Not all communications made by lawyers about the lawyer or the law firm's services are advertising.").

9. Nor would the inquirer's communication to her former clients be a "solicitation." Because "[a]ll solicitations... are advertisements with certain additional characteristics ... [b]y definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1]. Therefore, communications by a lawyer to former clients that are germane to the lawyer's earlier representation of such former clients are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3. *See* N.Y. State 1129 ¶ 18. In any event, even if Rule 7.3 applied, it expressly does not prohibit solicitations to a former client. *See* Rule 7.3(a) ("A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, *former client* or existing client") (emphasis added).

10. In N.Y. County 679 (1990), the Committee specifically addressed the word "germane," stating:

[T]he word must be given its ordinary meaning of “closely related” or “relevant”. *See* Random House Dictionary (Unabridged ed. 1967). We believe employment or advice may be closely related because it concerns the prior matter or because the subject matter or issues are the same.

11. The inquirer’s communications to her former clients, of course, must be truthful. As Rule 8.4(c) states: “A lawyer or law firm shall not ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” *See also* Comment [6] to Rule 7.1 (“All communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law.”); N.Y. State 1184 ¶ 11 (2020).

12. The inquirer’s proposed communications, which are germane to her earlier representations of the former clients she seeks to contact, are therefore permissible, and are not governed by the rules governing advertising or solicitation, but are subject to the more general provisions of Rule 8.4(c).

CONCLUSION

13. A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject either to the advertising provisions in Rule 7.1 or to the solicitation provisions in Rule 7.3, but the communications are subject to the more general prohibition against “misrepresentation” in Rule 8.4(c).

(03-21)