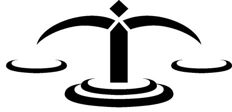

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6, 5.3, 5.4, 5.5, 7.1, 7.2, 7.3 and 7.4. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 06-02
July 2006

Topics Law firm use of marketing firm. Lawyer as speaker at community events. Use of non lawyer to screen potential clients.

Digest A lawyer is responsible for marketing firm's conduct that would be in violation of the Rules of Professional Conduct if engaged in by a lawyer, if the lawyer orders or ratifies such conduct.

Marketing firm, retained by a law firm, may distribute advertisements promoting the firm to potential clients through the mail, by posting on electronic bulletin boards and by delivering promotions door-to-door, but it may not have personal contact with the recipients in its distribution of the advertisements.

Law firm aids in the unauthorized practice of law if it permits marketing firm to screen the responses to the advertising and to forward only "promising" responses to the law firm.

Law firm may not compensate marketing firm on any basis related to the fees received by the firm from clients obtained through the marketing firm.

Lawyer may make appearances before civic and similar organizations in an effort to obtain clients.

Law firm may not assign nonlawyer employee to determine whether potential client has a claim.

Ref.: Illinois Rules of Professional Conduct,
Rules 1.6, 5.3, 5.4, 5.5, 7.1, 7.2, 7.3 and 7.4.

Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 115 S. Ct. 2371 (1995).

Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S. Ct. 1916 (1988).

Zanderer v. Office of Disciplinary Counsel of Supreme Court of Ohio¸ 471 U.S. 626, 105 S. Ct. 2265 (1985).

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912, 1919 (1978).

In re George C. Howard Jr., 188 Ill. 2d 423 (1999).

In re Francis M. Discipio, 163 Ill. 2d 515 (1994).

In re Raymond Bodkin, 21 Ill. 2d 458 (1961).

People ex rel. The Chicago Bar Association v. Barasch, 406 Ill. 253 (1950).

People ex rel. Illinois State Bar Association v. Schafer, 404 Ill. 45 (1949).

People ex rel. Chicago Bar Association v. Goodman, 366 Ill. 346 (1937).

People ex rel. The Illinois State Bar Association v. The Peoples Stock Yards State Bank, 344 Ill. 462 (1931).

Chicago Bar Association v. Kellogg, 338 Ill. App. 618 (1st Dist. 1949).

ISBA Opinions on Professional Conduct Nos. 01-05, 99-02.

FACTS

Law Firm wants to retain non lawyer Marketing Company to place radio and television ads and to distribute printed flyers (collectively, the "Advertising"). The proposed Advertising would inform the public of common situations which give rise to claims and would advise those who suspect they might have claims to either telephone or write the Marketing Company for an initial consultation.

The Marketing Company would screen the potential clients and forward promising responses to the Law Firm. In the alternative, the Law Firm is considering using the Firm's employees, who are not lawyers, to conduct this screening.

Law Firm desires to have the printed flyers (i) posted on public and, with permission, private bulletin boards; (ii) delivered door-to-door; and (iii) sent by U.S. mail both to persons included on legally available mailing lists and throughout targeted neighborhoods with residents likely to have claims.

The Marketing Company expects to make oral statements, not constituting legal advice, concerning the Firm to the recipients of the flyers when distributing the flyers door-to-door.

Not wanting to rely solely on Advertising, Law Firm would also like to send lawyers and representatives of the Marketing Company to speak at meetings of local clubs, church groups, and similar organizations on the fields of law in which the Firm practices. No legal advice, specifically targeted to any individual, would be given in the presentations.

For those persons forwarded by Marketing Company who become clients of the Firm, the Law Firm would, in addition to the amount it had agreed to pay Marketing Company for Advertising, pay to Marketing Company a percentage of the fees it ultimately received as a result of representing of the client.

DISCUSSION

This fact pattern presents many ethical issues related to advertising and a lawyer's responsibility for the actions of nonlawyer assistants.

Lawyers' Responsibility for Acts of Nonlawyer Assistants

Under Illinois Rule of Professional Conduct 5.3, lawyers, their law firms, and each partner must make reasonable efforts to ensure that any nonlawyer who is employed, retained, or associated with that lawyer or firm, conducts him or herself in a manner compatible with the professional obligations of the lawyer and law firm.

If a retained nonlawyer engages in conduct on behalf of the law firm that would be a violation of the Rules of Professional Conduct if done by a lawyer and the lawyer, partner, and law firm orders or ratifies the conduct the lawyer, partner, and law firm are responsible for the nonlawyer's conduct. Therefore, Law Firm should not ask Marketing Company to do anything on behalf of the Law Firm that the Law Firm would be prohibited from doing under the Rules of Professional Conduct.

This principle is confirmed in Rule 7.3, which governs a lawyer's direct contact with clients for the solicitation of business. The Rule applies to actions by lawyers "directly or through a representative."

The U.S. Supreme Court has recognized the need for the ethical restrictions on lawyers' solicitations of clients to extend to the use of retained agents. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 465, 98 S. Ct. 1912 (1978), ("Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems.").

Advertising Program: Flyer distribution

Rule of Professional Conduct 7.2 permits lawyers to advertise their services through

> ...public media, such as telephone directories, legal directories, newspapers, or other periodicals, billboards, radio or television, or through written communication.

These advertisements must (i) be retained by the lawyer for three years and (ii) include the name of at least one lawyer with the Law Firm responsible for the content of the communication.

Rule 7.3 unconditionally prohibits a lawyer, directly or through a representative, from soliciting a nonlawyer to obtain business. "Solicit" is defined as "contact with a person other than a lawyer, in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient."

Rule 7.3 also lays out three limited exceptions to this broad prohibition. The relevant exception is addressed in Rule 7.3(a)(2), which states that a lawyer may solicit a prospective client

> ...by letters and advertising circulars, providing that such letters and circulars and the envelopes containing them are plainly labeled as advertising material.[1]

Therefore, the proposed flyers may be mailed, posted on billboards, and distributed door-to-door. The flyers may be targeted to people likely to have a possible claim. However, any door-to-door distribution may not include personal contact with the recipients because the limited exception to the solicitation prohibition created for letters and circulars does not alter the general prohibition against "in person" contact, "directly or through a representative."

This preclusion of the personal contact when distributing flyers is consistent with the U.S. Supreme Court's decisions. See, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24, 115 S. Ct. 2371, 2375 (1995); *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 473-78, 108 S. Ct. 1916, 1921-24 (1988); *Zanderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 641, 105 S. Ct. 2265 (1985) (personal solicitation by lawyers is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud"); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 457-58, 464-65, 98 S. Ct.

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[1] Illinois Rule of Professional Conduct 7.3 does not specifically refer to electronic communications. ABA Model Rule 7.3, however, does include "real-time electronic contacts." The ABA Rule requires that the beginning and ending of an electronic solicitation include the words "Advertising Material."

1912, 1919, 1923 (1978) ("Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.").

Advertising Program: Public appearances

A lawyer, or a representative of a marketing firm retained by a lawyer, may make appearances before civic and similar groups. Rule 7.3(a)(3) permits a lawyer to "initiate contact with a prospective client for the purpose of solicitation . . . under the auspices of a public or charitable legal service organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization." Copies of the firm's flyer may also be made available at such meetings. It is permissible for the lawyer to discuss a matter raised by any attendee who initiates a discussion with the lawyer.

In addition, not every communication by a lawyer with members of the public that might result in employment is a solicitation for employment. Thus, a lawyer who appears before civic and similar groups and merely discusses a particular area of the law, without expressly or in some direct manner seeking retention, is not engaged in the solicitation of employment for pecuniary gain.

Marketing Company Screening Prospective Clients

One of the essential roles of a lawyer is to review the facts presented by a potential client to determine whether the person has a legal claim. *In re George C. Howard, Jr.,* 188 Ill. 2d 423, 438 (1999); *In re Francis M. Discipio*, 163 Ill. 2d 515, 523 (1994); *People ex rel. The Chicago Bar Association v. Barasch*, 406 Ill. 253, 256 (1950); *People ex rel. Illinois State Bar Association v. Schafer*, 404 Ill. 45, 51 (1949); Opinion No. 99-2.

Advising an individual as whether he or she has a cause of action falls within the practice of law. *People ex rel. Chicago Bar Association v. Goodman*, 366 Ill. 346 (1937) ("giving an opinion as to the right to maintain an action against another" constitutes the practice of law); *People ex rel. The Illinois State Bar Association v. The Peoples Stock Yards State Bank*, 344 Ill. 462, 475 (1931); *Chicago Bar Association v. Kellogg,* 338 Ill. App. 618, 635 (1st Dist. 1949).

If the Marketing Company undertook such a screening role, it would be engaging in the unauthorized practice of the law, and Law Firm would be in violation of Rule 5.5(b). Rule 5.5 reads, a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Therefore, the role of the Marketing Company in screening responses to the Advertising must be limited to rejecting only those responses that are in a completely different field than the matters sought by the Advertising (*e.g.*, the advertising solicits personal injury cases and the respondent seeks help with a marital problem).

No legal knowledge or skill needs to be exercised in doing this. In such instances, the Marketing Company should advise the respondents that the Law Firm is not seeking the type of matter submitted, that no lawyer has reviewed the merits of the matter submitted, that no legal opinion was reached as to the merits of their matter, and that the respondents should consult with a lawyer of their choice if they want a legal opinion with respect to their matters.

Law Firm May Not Share Fees with Marketing Company

The proposed payment of a percentage of the legal fees collected by Law Firm from clients forwarded by Marketing Company is prohibited by Rules 5.4(a) and 7.2(b) of the Illinois Rules of Professional Conduct. Rule 5.4(a) reads, "A lawyer or law firm shall not share legal fees with a nonlawyer" except in certain situations not comparable to the facts presented. Rule 7.2(b) reads, "A lawyer shall not give anything of value to a person for recommending or having recommended the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication." See also, Opinion No. 01-05.

The effect of Rules 5.4(a) and 7.2(b) cannot be evaded by seeking to have Marketing Company paid under the exception provided in Rule 5.4(a)(3). Rule 5.4(a)(3) permits including nonlawyer employees in a Law Firm's compensation or retirement plan because that exception is expressly limited to nonlawyer employees.

Law Firm May Not Use Nonlawyer Employee to Screen Clients

Lawyers are permitted to delegate routine matters to nonlawyers in their office, including the preparation of various legal documents, as long as the lawyers properly provide direct supervision. See, Rule 5.3. A lawyer, however, may not delegate to a nonlawyer the lawyer's principal role of determining whether a claim exists because this requires the exercise of legal knowledge and skill.

Therefore, Law Firm could not delegate to a nonlawyer employee the determination of whether a person responding to the Advertising has a viable claim.

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