



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 7.3(a)(2) with its Comment [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 Number 84-12
March 22, 1985**

**Topic: Solicitation;
initiating contact**

Digest: Attorney may initiate contact with existing clients to advise them of potential claims and may accept employment resulting therefrom.

Ref: Rules 2-103(a) and 2-104; EC 2-3 and 2-4;
ISBA Opinion Nos. 853 and 727

FACTS

The inquiring attorney represents a plaintiff in an action for alleged fraud involving a pension fund. The suit has been brought in the alternative as a class or derivative action, but the class has not yet been certified. The plaintiff now desires to withdraw from the action which will thus be dismissed unless continued on behalf of other potential claimants not presently thereto.

The attorney inquires whether he may contact existing clients who are additional potential claimants in order to advise them of the lawsuit and represent any of them who may decide to join it as "substitute" plaintiffs.

QUESTION

Whether the inquiring attorney may, by private communication with his existing clients, advise them of the lawsuit and solicit their representation as additional plaintiffs therein.

OPINION

Rule 2-104 prohibits the acceptance of employment resulting from unsolicited advice to obtain counsel or take legal action "if the advice was given under circumstances which would be violative of Rule 2-103." Rule 2-103(a), in turn, provides that:

"(a) A lawyer shall not by private communication, except as provided in (b) below, directly or through a representative, recommend or solicit employment of himself, his partner or his associate for pecuniary gain or other benefit and shall not for that purpose initiate contact with a prospective client."

In a prior opinion, this Committee dealt with a similar question involving a lawsuit where class certification had not been granted, and decided that the attorney for the existing plaintiff was prohibited by Rule 2-103(a) from soliciting other potential claimants, by means of private communication, to join as additional parties plaintiff. [ISBA Opinion No. 853].

Although not expressly stated, Opinion No. 853 implies that the proposed solicitation was directed to parties not presently clients of the soliciting firm. Here, the inquiring attorney proposes to contact only certain existing clients who are already parties to litigation involving the subject pension fund.

Thus, the issue presented is whether the prohibitions of Rule 2-103(a) are limited to the solicitation of "prospective clients" only, or whether they include existing clients as well.

This Committee has previously, in its Opinion No. 727, referred to the "inartful manner" in which Rules 2-103 and 2-104 have been drafted. Taken literally, Rule 2-103(a) appears to contain two partially overlapping prohibitions: (1) soliciting employment, by private communication, from any party whether or not an existing client [except as permitted by Rule 2-103(b)]; and (2) initiating contact with a prospective client for the purpose of employment, whether by private communication or other means.

However, it seems unlikely that the provisions of the Rule were meant to be interpreted or applied disjunctively. For example, despite the wording of the second portion of the Rule, initiating contact with a prospective client by means of attorney advertising is permissible in certain situations referred to in Rule 2-101.

Also, the reference to Rule 2-103(b) in the first portion of Rule 2-103(a) appears to limit the application of that portion to prospective clients, since Rule 2-103(b) is itself expressly so limited. Correspondingly, if the first portion of the 2-103(a) prohibition included existing clients, the exceptions under 2-103(b) would not be available as to them.

Thus, an attorney would be allowed to initiate contact with a relative or close friend who was not a

client, but could not initiate contact with one who was.

Accordingly, it appears that the prohibitions of Rule 2-103(a) are in their entirety limited to communication with prospective, rather than existing, clients and it may be noted that the provisions of EC 2-3 and 2-4 also limit the restriction on solicitation by personal communication to "non-clients."

Although it may be argued that even an existing client is a "prospective" one with reference to representation in any new matter, we do not believe that this is the intent of the Rule, particularly when, as here, the additional representation apparently bears a substantial relation to the current representation.

Therefore, there appears to be no prohibition against the solicitation by the inquiring attorney of his existing clients for the designated purposes.

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