



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6, 2.1, 7.3, and 8.4. 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. 97-01
July 18, 1997**

Topic: Solicitation of business; breach of confidentiality

Digest: A lawyer may request the names of potential customers for his employer bank from another lawyer, but should not coerce the other lawyer to produce such names. A lawyer may give the names of his clients to a bank as potential customers for banking services, but must first obtain consent of his clients to do so.

Ref.: Illinois Rules of Professional Conduct 1.6, 2.1, 7.3 And 8.4(a)
ISBA Advisory Opinions on Professional Conduct Nos. 90-01, 90-02, 92-16, 94-08 and 96-02

FACTS

A lawyer is vice president and general counsel for XYZ bank. Lawyer A's functions include expanding the business of the bank, and retaining outside law firms to perform various legal services for the bank. Lawyer A requires that all outside law firms used by the bank submit quarterly business referral reports which state the names of all persons or entities referred by the law firms to the bank for bank services. Lawyer A's request for the reports includes a statement thanking the outside law firms for any business referrals and telling them, "Believe me, your efforts will not be unrewarded."

Lawyer B, a lawyer who performs legal services for the bank, refers a client to the bank and names the client on the business referral report. Lawyer B does not inform the client that he intends to use the client's name on the business referral report or that Lawyer B may be rewarded by the bank as a result of the referral.

QUESTIONS

1. Do Lawyer A's actions violate the Illinois Rules of Professional Conduct?
2. Do Lawyer B's actions violate the Illinois Rules of Professional Conduct?

OPINION

At first glance, Lawyer A appears to be engaging in the improper solicitation of business; however, "solicitation," as defined in the Rules of Professional Conduct, does not apply to this situation. Rule 7.3 contains the definition of solicitation. Rule 7.3 states, "The term 'solicit' means contact with a person other than a lawyer...." Lawyer A is contacting Lawyer B (and other lawyers who perform outside services for A's bank). In addition, Rule 7.3 defines solicitation as a lawyer seeking professional employment. Lawyer A is not soliciting names for his own use as a lawyer, but as potential customers for his bank.

The problem with A's conduct is that he appears to be coercing the names from the other lawyers. Lawyer A is making non-specific promises that their cooperation "will not be unrewarded." Accompanying these promises is the unstated threat that lack of cooperation might result in losing their employment by the bank. Directing a lawyer's conduct in this way may impair that lawyer's exercise of independent professional judgment, putting that lawyer in violation of Rule 2.1. Rule 2.1 discusses the lawyer as advisor, and states in part, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

Therefore, while Lawyer A is not soliciting professional employment for himself, which would be a violation of the Rules, he is coercing other lawyers into certain conduct, and possibly forcing other lawyers to be in violation of the Rules. This would be a direct violation of Rule 8.4(a)(2), which states, "A lawyer shall not...induce another to engage in conduct, or give assistance to another's conduct, when the lawyer knows that conduct will violate these Rules."

Lawyer A's scheme is similar to others which have been discussed in prior opinions of this Committee. Opinion 92-16 concerns an IRS agent who stated he would "do what he could to further the career" of a lawyer, if the lawyer reduced certain fees. The Committee was of the opinion that the lawyer could not give reductions in fees. Opinion No. 94-08 concerns a lawyer who obtained referrals in return for the payment of "marketing" or "consultation" fees to a non-lawyer. The Committee was of the opinion that this arrangement compromised the professional independence of the lawyer (and also involved questions of fee-splitting and the unauthorized practice of law.) Opinion No. 90-02 concerns a lawyer who insisted that his client appoint a specific bank as fiduciary on the client's estate plan, because the bank was also a client of the lawyer's. The Committee was of the opinion that this was professionally improper.

Lawyer A appears to be asking the other lawyers to offer the names of non-clients as well as clients, since the referral reports ask for the names "of all persons or entities." The other lawyers could certainly list non-clients; that would be within the realm of accepted marketing practices.

Lawyer B, however, in giving his clients' names to the bank without their knowledge, is breaching his confidential relationship with them. No person who engages the services of a lawyer would assume that the lawyer would then offer their name to outside entities as potential customers. Many users of legal services would not want it known that they need legal services. Thus, it would be a breach of confidentiality. In addition, the arrangement as presented puts Lawyer B in the position of selling his "customer list," much like credit card companies sell their cardholders' names to retailers, etc.

A similar situation was discussed in ISBA Opinion No. 90-01. There, the implementation of a legal assistance program of the Illinois Department of Employment resulted in revealing to the IDDES the names of people who had inquired about the service but who had not taken advantage of it. The revealing of the names was not made with the permission of the individuals. In the opinion of the Committee, the revelation of the names should not have been made without the consent of the individual.

The general rule of confidentiality of information is Rule 1.6. This Rule clearly states that a lawyer shall not use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure. In this situation, the lawyer cannot assume that the client wishes his relationship with the lawyer known to others. Thus, Lawyer B must assume that revealing his clients' names would be a breach of confidentiality until he finds out otherwise.

Lawyer B should inform his clients that he wishes to give their names to the bank for the bank to contact them regarding bank services, and should do so before he gives their names to the bank. Absent obtaining affirmative consent of the client, Lawyer B is prohibited from giving their names to Lawyer A.

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