

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-12
(October 2010)

This inquiry involves a solicitation issue. Physicians employ a consulting firm that monitors police reports and then contacts injured persons to see if they need medical treatment. The consulting firm through an investigator will also obtain relevant photographs and statements from the injured. The representative of the consulting firm inquires as to whether the injured person has an attorney. If not, the representative will obtain an executed fee agreement and forward the relevant documents to different attorneys on a revolving basis. The assigned attorney is then required to pay a flat fee to the consulting firm. The inquirer asks whether the Pennsylvania Rules of Professional Conduct (the “Rules”) permit such an arrangement.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer provides in part that:

(a) ...a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued...

The Comment to the Rule provides in part that:

Scope of Representation Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.

Rule 5.3 Responsibilities Regarding Non-lawyer Assistants provides in part that:

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.

...

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...

The Comment to the Rule provides in part that:

[1] Lawyers generally employ assistants in their practice including...investigators ...Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

...

[2] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.4 Professional Independence of a Lawyer provides in part that:

(a) A lawyer or law firm shall not share legal fees with a non-lawyer...

Rule 7.3 Direct Contact with Prospective Clients provides in part that:

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term "solicit" includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

...

Comment [1] to the Rule provides that:

[1] There is a potential for abuse inherent in direct solicitation, including in-person, telephone or real-time electronic communication, by a lawyer of prospective clients known to need legal services. These forms of contact subject the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) 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;

(1) Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

There are multiple reasons why the arrangement as described by the inquirer is unethical. Standing alone, Rule 7.3(a) prohibits the conduct since an intermediary (the consulting firm) is engaged in direct solicitation by phone. The rationale behind the prohibition and its application to this inquiry is made clear by the Comment to the Rule. It does not matter that the consulting firm is hired by physicians rather than the inquirer. The consulting firm still is engaging in prohibited telephonic solicitation as an intermediary for the inquirer as well as any of the other lawyers who receive clients in this fashion. The specific prohibition in the Rule on the use of an intermediary (in this case one that is professionally trained) clearly places the inquirer in violation of Rule 7.3a should he accept referrals that come as a result of the conduct in question.

The violation is again present in reviewing Rule 5.3, specifically 5.3(c)(1). By accepting a referral obtained via unethical solicitation from the consulting firm,

the attorney is ratifying the third party's conduct which conduct is in direct violation of the Rule. Furthermore, each of these violations is compounded by the prohibition, contained in Rule 8.3a, which prohibits an attorney from engaging in unethical conduct through the acts of a third party.

The issues noted above address the violation on prohibited solicitation. However, the Committee notes that there are further issues that arise under the Rules, distinct from the form of solicitation. Thus, even if the solicitation were done in a permitted fashion, i.e. in writing as permitted by Rule 7.3b, other elements of the proposed referral scheme also contain ethical barriers.

There is the potential for a violation of Rule 7.3b if the injury of the potential client is so severe that the potential client falls within the prohibited class as described in 7.3(b)(1).

It is clear under Rule 1.2 that an attorney must clearly communicate with a client what the scope and goal of representation are from the start of the attorney-client relationship. The fact that the individual sent out to meet with the prospective client has that client sign a fee agreement with the attorney before meeting with the attorney, and in fact acts without any direct supervision from the attorney, thwarts the requirements of the Rule. There is no way for the attorney to determine whether the client's stated goal is or is not an acceptable one. In addition, there is no way for the client to obtain direct information from the attorney prior to agreeing to the attorney's representation. Furthermore, since the "investigatory work" is being done by an individual prior to the client hiring the attorney, there could in fact be a problem with an inadvertent waiver of the attorney-client privilege.

In conclusion, the consulting firm and its investigators engage in too much activity prior to the attorney even being aware of the case and identity of the potential client. The set-up does not allow for the attorney to conduct a proper conflict of interest check prior to there being a signed representation agreement. It also does not allow the attorney to make his or her own determination as to whether what the client wants to obtain is possible, permissible, legal or advisable.

Finally, the Committee has a grave concern regarding the payment by the attorney of the fee to the consulting firm. Clearly, fee splitting with a non-attorney is prohibited by Rule 5.4. While the inquiry tries to couch the payment to the consulting firm for the fee as payment for "investigative services," that a flat fee is paid and that non-legal services were provided do not standing alone make the payment permissible. Other factors which would affect that determination include the amount of the payment, the amount of time spent by the investigator, and whether the flat fee is in any way dependent upon the size of the possible recovery in the case. The payment should be reasonably related to the value of

the services provided. If not, it can easily be seen as a subterfuge to avoid the prohibition against fee sharing with a non-lawyer.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board on the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.