



New York State Bar Association Committee on Professional Ethics

Opinion 988 (10/25/13)

Topic: Lawyer Advertising; Solicitation

Digest: A lawyer may forward a cover letter describing his practice accompanied by a third party brochure containing helpful information of general applicability and the lawyer's contact information to nonlawyer professionals, such as accountants and bankers, in the hope that these professionals will consider referring their clients to the lawyer if a need arises.

Rules: Rules 7.1, 7.2, 7.3, 7.4, 7.5.

FACTS

1. The inquirers are practicing attorneys licensed in New York State who wish to market their services by sending brochures to local accountants and bankers with a cover letter stating that their practice includes estate planning, trusts and estates, and elder law. The brochures, which are purchased from a national publisher, are entitled "2013 Federal Tax Pocket Guide," and "2013 Personal Planning Guide," and include, among other things, various tax rate tables, estate tax planning techniques and tax laws. The brochures will have the inquirers' firm information printed on the cover.

2. The inquirers are not seeking to solicit the accountants and bankers to become clients. Rather, they hope that as these accountants and bankers meet with their own clients, they may recommend the inquirers if such clients are in need of legal services. The inquirers candidly admit that they are "[e]ssentially...hoping to gain these accountants and bankers as referral sources." In addition, the cover letter to the bankers will advise them to call the inquirers if they have general questions on which they can provide assistance, but they do not plan to charge the bankers for that assistance.

QUESTION

3. May a lawyer forward a cover letter describing his practice accompanied by a third-party brochure containing helpful information of general applicability and the lawyer's contact information to nonlawyer professionals, in the hope that these nonlawyers will recommend the lawyer's services if the nonlawyer determines that a particular client is in need of the lawyer's services?

OPINION

4. Rule 1.0(a) of the New York Rules of Professional Conduct (“Rules”) provides that an “advertisement” includes “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.” The cover letters the inquirers plan to send to various accountants and bankers are advertisements governed by various rules, including Rule 7.1 (“Advertising”), Rule 7.4 (“Identification of Practice and Specialty”), and Rule 7.5 (“Professional Notices, Letterheads, and Signs”). *See* N.Y. State 848 (2010) (concluding that law firm’s contemplated educational newsletter was an attorney advertisement within the meaning of Rule 1.0(a) after considering three factors: “(i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication”).

5. If the above rules are satisfied, the lawyers are permitted to mail cover letters describing their practice with third party brochures to nonlawyer professionals in the hope that these professionals will consider referring their clients to the lawyers if a need arises. Since a lawyer can ethically enter into a nonexclusive reciprocal referral agreement, a lawyer’s mere forwarding of cover letters and brochures to nonlawyer professionals with whom the lawyer does not intend to enter into a reciprocal referral arrangement, in the hope that it may one day lead to a new client is, by analogy, also permitted by the Rules.¹

6. Rule 7.3, entitled “Solicitation and Recommendation of Professional Employment,” defines a “solicitation” as any “advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.” Rule 7.3(b). Rule 7.3(a) prohibits a lawyer from engaging in solicitation by in-person contact unless the recipient of the solicitation is a close friend, relative, former client or existing client. Rule 7.3(a) (1). Since the inquirers cannot personally solicit the prospective clients they are seeking, as they had no prior relationship with them, they may not do so through the acts of a third party, such as an accountant or banker. Rule 8.4(a) (“A lawyer or law firm shall not...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.”); *see* N.Y. State 887 (2011) (law firm could not authorize nonlawyer marketer to meet with or call prospective clients who are acquaintances of the marketer in order to promote the firm’s services, because doing so would violate Rule 7.3(a)(1) unless the prospects were close friends, clients or former clients of the law firm); N.Y. State 885 (2011) (“Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer’s communications.”).

7. Thus, the inquirers could not expressly request that the accountants or bankers hand out

¹ In N.Y. State 765 (2003), we noted that under former DR 1-107 and DR 2-103(B), a lawyer “may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent.” In N.Y. State 870 (2011), we opined that the reasoning of N.Y. State 765 applied under current Rules 5.7 and 5.8 and that a lawyer could enter into a nonexclusive reciprocal referral arrangement with a debt reduction company.

the inquirers' brochures to their clients and ask their clients to contact the inquirers. However, there is no ethical prohibition for the accountant or banker to refer the client to the lawyer or hand the lawyer's brochure to the client when they perceive that their client needs legal advice, or in response to the client's request for a legal advice. *See* Rule 7.3, Cmt. [2] (“a communication made in response to an inquiry initiated by a potential client” does not constitute a solicitation).

8. However, Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client. To the extent the inquirers are offering to answer questions from bankers free of charge in exchange for the banker recommending the inquirers' services, such conduct violates Rule 7.2(a)'s prohibition. *See* N.Y. State 942 (2012) (Rule's prohibition is violated if the inquiring lawyer would be giving something of value to nonlawyer firm in exchange for client referrals, such as a reduced fee); N.Y. State 741 (2001) (attorney, who was required to pay substantial dues to organization in exchange for membership that entitled the attorney to referrals from the organization's members, and was required to make referrals to those members, would be transferring something “of value” in order to obtain referrals in violation of current Rule 7.2(a)).

9. Finally, Judiciary Law section 479 provides, in pertinent part, that it is unlawful to solicit legal business, or to solicit a retainer authorizing an attorney to perform or render legal services, on behalf of an attorney. Whether the inquirers' proposed conduct is in violation of this statute is a question of law beyond the jurisdiction of this Committee. *See* N.Y. State 942; N.Y. State 927 (2012).

CONCLUSION

10. A lawyer may forward a cover letter describing his practice with a brochure to nonlawyer professionals, such as accountants and bankers, in the hopes that these professionals will consider referring their clients to the lawyer if a need arises.