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Trials&TRIBULATIONS

Practitioners: Use caution when soliciting clients

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One of the more complex portions of the New York Code of Professional Responsibility relates to the regulation of advertising and solicitation.

All New York lawyers are aware of DR 2-101 [22 NYCRR § 1200.6], which comprehensively regulates attorney advertising. The controversy surrounding the tension between the First Amendment and the dignity and reputation of the profession is well known.

The provisions of DR 2-103 relating to solicitation, however, have received less attention. Those rules are equally important, and lawyers who are unaware of them could unwittingly stumble into a violation.

Solicitation is defined as a special type of advertising directed to a specific recipient or group of recipients, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain. DR 2-103(B). All solicitations are advertisements, but not all advertisements are solicitations. A communication that is not an advertisement is, by definition, not a solicitation. EC 2-17.

DR 2-103(A) is the major anti-solicitation provision in the code, and covers both non-written and written solicitation. Subdivision (1) of DR-103(A) is a clear ban on all solicitations "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."

Subdivision (2) prohibits solicitation "by any form of communication," including those covered in subdivision (1), in five specified cases:

- When the communication violates DR 2-101(A) [false, deceptive or misleading statements or violations of a disciplinary rule]; DR 2-103(G), or DR 7-111 [each of which bans contacts within 30 days of an accident];
- When the recipient conveys a desire not to be solicited by the lawyer;
- When the solicitation involves coercion, duress or harassment;
- When the lawyer should know the recipient's condition will impair reasonable judgment in retaining a lawyer; or

• When the lawyer expects, but does not disclose, that the matter will be handled by another, unaffiliated lawyer.

DR 2-103(C) through (K) set forth other provisions regarding the content, timing, filing and retention of written solicitations, which are beyond the scope of this article. Instead, I will focus on non-written solicitations.



The prohibition in DR 2-103(A)(1) applies to lawyer-initiated solicitation. A lawyer may solicit a client's business if the client initiated the contact. In that context, let's examine the elements of the non-written solicitation prohibition in DR 2-103(A)(1).

The blanket prohibition on "in-person" solicitation of strangers is consistent with *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), which held that such an outright ban is a constitutional "prophylactic measure."

The ban on solicitation through telephone contact is a bit tricky. While a live conversation over the telephone clearly is prohibited, recorded telephone calls — such as computer-dialed solicitations that request the recipient's

name and number for further information — are questionable. While a recorded call does not involve the potential for overbearing persuasion calculated to prompt a snap decision, concerns could arise if it offers a discount or other incentive for immediate action. The issue remains undecided in New York.

What is meant by the prohibition on solicitation "by real-time or interactive computer-accessed communication?" Computer-accessed communication is defined in the code as that disseminated through the use of a computer or related electronic device [see 22 NYCRR §1200.1(l)]. The code does not define "real-time" or "interactive," however.

The ethical considerations provide guidance. EC 2-22(c) states: "ordinary e-mail and Web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a Web site, which are not a live response, are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

We can only imagine what future technology may hold. Our guid-

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ance should be based on the rule's rationale, i.e., a desire to protect prospective clients from "the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a prospective client to hire the attorney without adequate consideration." EC 2-22(a).

Turning to the ban's exceptions, DR 2-103(A)(1) allows solicitations to "a close friend, relative, former client or existing client." With some obvious ambiguity as to the meanings of "close friend" and "relative," caution is advised. Also, the terms "former client" and "existing client" may raise issues warranting careful consideration. When an attorney is changing law firms, for instance, what communications may be made, either before or after the change, to clients to whom the lawyer was providing service? Certain obligations within DR 2-110(A)(2) require "due notice of withdrawal" to a client, but an issue may arise as to whether the client was the firm's or the individual lawyer's. After departure, solicitation of the former client raises similar, and additional, issues.

While the term "existing client" should be clear, a recent supreme court decision dealt with the question as to employees of a

corporate client. In *Rivera v. Lutheran Medical Center*, 866 N.Y.S.2d 520 (Kings Co. 2008), the law firm representing the corporate defendant contacted a few of its employees who witnessed the incident being litigated, offering to represent them. The court found such action violated DR 2-103(A)(1), and held that the employees, mere witnesses as opposed to participants in the event, did not qualify for the existing client exception.

Solicitation also is governed by several provisions of the state's Judiciary Law. Sections 479 and 481 make the solicitation of legal business unlawful for attorneys and laymen and Section 485 classifies such violations as misdemeanors. Solicitations in the wake of airline accidents also are regulated by 49 USC §1136(g), which bars contact before the 45th day after the accident.

I urge practitioners to consult the rules for other, specific situations.

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