

L.A. COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NUMBER 474

SEPTEMBER 20, 1993

SUMMARY

The knowing use by an attorney of a private investigator to contact prospective clients for referral to the attorney constitutes unethical solicitation. The fact that the attorney does not pay the private investigator for the referrals is not controlling.

FACTUAL BACKGROUND

Attorney (A) has been approached by private investigator (PI) with the following proposal: PI is aware of a potential claimant (C) who may have a claim against a particular defendant. PI proposes to meet with C, ascertain whether C is interested in pursuing a claim and, if so, recommend that C employ A. A would then independently interview C to determine if C wished to retain A. C would engage both PI and A through separate retainer agreements. Both retainer agreements will be contingent fee arrangements.

Both retainers would be paid by C if the contingency was fulfilled. In addition, A might employ PI to assist in the preparation of the case. These expenses would be treated as litigation costs and borne by C. It is anticipated that PI's case preparation work may result in the identification of other potential claimants who would be offered the same arrangement as C.

## DISCUSSION

Although the Inquiry raises a number of ethical issues,<sup>1</sup> the Committee's focus has been directed to whether the proposal, if accepted by A, would subject A to a charge of unethical solicitation.<sup>2</sup>

The solicitation of clients can constitute a violation of California Rules of Professional Conduct, Rule 1-400(C). Rule 1-400(C) bars solicitations made "on behalf of a member . . . to a prospective client. . . with whom the member . . . has no family or prior professional relationship. . ." Rule 1-400(B) defines "solicitation" as "any communication. . . [c]oncerning the availability of professional employment of a member. . . which is delivered in person or by telephone, unless the solicitation is [constitutionally privileged]."

"Communication," in turn, is defined in Rule 1-400(A) as "any message or offer made by or

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<sup>1</sup> Under the Rules of Professional Responsibility arrangements between lawyers and non lawyers may create actual or de facto partnerships prohibited by Rule 1-310 or may involve fee splitting prohibited by Rule 1-320, or both. Where the aggregate fee received by A and PI exceeds what would be a reasonable fee for A alone, a violation of Rule 4-200 may arise if any of PI's work, for which the client is being separately billed, would normally be considered part of the A's fee. *Cf. Ojeda v. Sharp Cabrillo Hosp.*, (1992) 8 Cal.App. 4th 1 (combined lawyer and medical-legal consulting firm contingent fee cannot exceed MICRA fee caps where medical-legal consulting firm provides services normally provided by lawyer). The employment by A of PI, who has an interest in the subject matter of the representation, raises potential conflicts which must be disclosed to the client (Rules 3-310(B), 3-500 and Bus. & Prof. Code § 6068(m)). Similarly, the use of PI in the dual role of case preparation assistant and finder of future clients raises a potential problem since PI is being paid by C for case work while PI and A are obtaining new clients as a result of PI's case work. A's intent to represent other claimants may present a potential conflict if that representation would in any material way reduce or hinder C's recovery. There may be problems with these issues under the Rules of Professional Responsibility which the Committee does not address in this Opinion.

<sup>2</sup> Unlawful solicitation of clients in particular contexts may also violate provisions of California law. *See, e.g.*, Cal. Bus. & Prof. Code §§ 6151-52; Cal. Pen. Code §549; Cal. Ins. Code §750.

on behalf of a member concerning the availability for professional employment of a member" including any use of firm name or professional designation of a member or a law firm.

Taken together, these rules prohibit any communications not constitutionally privileged delivered in person or by telephone with prospective clients made by or on behalf of a lawyer which involve the lawyer's availability to handle a matter or which involve the use of the lawyer's professional designation of such. In this matter, the use of PI to personally contact prospective clients on behalf of A would constitute a violation of 1-400(C). The knowing employment of a lay intermediary to obtain client referrals constitutes prohibited solicitation. See Urbano v. State Bar (1977) 19 Cal.3d 16, 19-20; Kelson v. State Bar (1976) 17 Cal.3d 1, 5-6.

PI's communication to C of A's availability would cause A to violate Rule 1-400(C). A knows that PI intends to solicit prospective clients for A; indeed, the agreement between A and PI is designed to achieve that end. PI's efforts here are on A's behalf. The fact that A would pay no money to PI for the referrals is not controlling; by its terms a violation of Rule 1-400(C) is not dependent on the payment of money for the referral. No compensation arrangement between A and PI may serve as a disguised inducement for a non attorney to solicit and refer clients to an attorney. Cf. Cain v. Burns (1955), 131 Cal.App.2d 439, 442 ("device of having [investigator's] fee paid out of [attorney's] general fund instead of directly from the attorney's fees upon which it was based, and of using the latter fees as a "scale" was merely subterfuge to attempt to get away from the inhibition [against fee splitting]" (brackets added). PI's compensation package is dependent upon A's prearranged

cooperation in representing clients referred by PI. Such an arrangement constitutes an inducement for PI to refer clients to A.

The Inquiry also recites that PI may contact other "victims" pursuant to investigation of C's claim. It is contemplated by the Inquiry that those other "victims" may decide to retain A. The knowing contacting of potential clients in person or by telephone to inform those individuals of the lawyer's availability to represent them would constitute a violation of Rule 1-400(C) even though that there was an additional reason for the contact. The presence of an ancillary, valid motive for contacting potential claimants would not serve to justify the solicitation since A is aware, before PI contacts the potential clients, of the strong possibility that PI will refer those individuals to A for representation. "An attorney who contacts accident victims for legitimate investigative purposes is not barred from representing them if requested to do so, but it is misconduct to directly solicit such employment." Rose v. State Bar (1989), 49 Cal.3d 646, 659. Here, the contact between PI and other potential claimants is pursuant to a prior arrangement between A and PI that PI will solicit clients on the same basis as made with respect to C. This constitutes improper solicitation. The presence of this arrangement between A and PI justifies treating the communication to potential claimants of A's availability as one made "on behalf of a member." Rule 1-400(C).

Because the Inquiry addresses issues that may in other contexts touch on protected constitutional speech or permitted direct communications with prospective clients, it is important to note what this Opinion does not address.

First, the Supreme Court has held that solicitation of clients may be protected by the First Amendment when conducted by a public interest group to advance constitutional and

public policy issues. See In re Primus (1978) 436 U.S. 412. In Primus, the lawyer involved was a cooperating attorney for the ACLU who addressed a group of women who had been sterilized as a condition of continued receipt of government benefits under the Medicaid Program. The lawyer advised the women of their legal rights and suggested that a lawsuit was possible. Following the meeting, the lawyer sent a letter to one of the women who had been present, advising her that the ACLU would provide her with free legal representation should she institute suit against the doctor who performed her sterilization surgery. For this the lawyer was disciplined. The Supreme Court reversed. The Court placed primary emphasis on the absence of financial motivation by the lawyer.<sup>3</sup> The Court emphasized that any fees generated by ACLU sponsored litigation (such as court awarded fees under 42 U.S.C. § 1988 (Civil Rights Litigation) or 28 U.S.C. § 2412 (Equal Access to Justice Act)) would go to the ACLU not the cooperating attorney. The Court specifically declined to state whether the result would be different if the attorneys were allowed to share in the award of attorney's fees. 436 U.S. at 431, n. 24. In this matter there is no intimation that the solicitation of clients is being conducted by a public interest group to advance constitutional or public policy issues.

Second, the California Supreme Court held in Jacoby v. State Bar (1977) 19 Cal.3d 359 that "(a) communication is not 'primarily directed' toward solicitation unless viewed in its entirety, it serves no discernible purpose other than the attraction of clients. If a legitimate purpose appears on the face of a publication or in the demonstrated motivation of

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<sup>3</sup>Rule 1-400(B), California Rules of Professional Conduct incorporates the Primus standard by tying a prohibited solicitation to the presence of pecuniary gain on the lawyer's part.

an attorney, the publication must receive at least prima facie First Amendment protection." Id. at 371. Jacoby did not deal with a live in person solicitation, as is presented by the Inquiry, but with a lawyer's cooperation with the publication of a newsworthy topic. See Leoni v. State Bar (1985) 39 Cal.3d 609, 623-624. Hence, on its face Jacoby is not controlling. See Ohralik v. Ohio State Bar Association (1978) 436 U.S. 447, 455-456 (state prohibition of live in person solicitation of clients is not barred by First Amendment). Moreover, here the sole motivation for the solicitation is the attraction of clients. Consequently, the prohibition of such conduct violates neither the letter nor the spirit of Jacoby.

Third, California courts have recognized that class action plaintiffs may engage in precertification communications to potential class members to involve them directly in the litigation. See Atari, Inc. v. Superior Court (Carson) (1985) 166 Cal.App. 3d 867, 872. Communication is allowed, however, only where the "court has been given the opportunity in advance to assure itself that there is no specific impropriety." Id. Here, the Inquiry neither proposes that the litigation will be maintained as a class action nor that the form and content of proposed communications to prospective clients will receive advance judicial review. See also Gulf Oil Co. v. Bernard (1981) 452 U.S. 89 (interpreting Rule 23, Fed. R. Civ. Proc. as allowing direct contact of potential class members when necessary to proceed under the Rule).

Fourth, the Inquiry does not propose the use of a State Bar approved Lawyer Referral Service. See California Business & Professions Code § 6155. Nor does it involve a legal services program sponsored by an organization protected by the First Amendment. See,

e.g., United Transportation Union v. Michigan State Bar (1971) 401 U.S. 576 (upholding right of union representative to visit injured union members and solicit them to retain union-selected private lawyers).

The United States Supreme Court recently held in Edenfield v. Fane (1993) 113 S. Ct. 1792 that the First Amendment invalidated Florida's per se rule barring solicitation by CPAs. The Court was careful, however, to recognize that each profession may be subject to different levels of state regulation. 113 S. Ct. at 1802. This Committee expresses no opinion whether the Court's opinion in Edenfield would be likewise dispositive of state regulation of attorney solicitation of clients whether directly or through intermediaries.

The opinion is advisory only. The Committee acts on specific questions submitted "ex parte" and its opinions are based on such facts as set forth in the Inquiries submitted.