

## The Right and Wrong Way to Solicit Clients

David G. Keyko  
New York Law Journal  
02-03-2006

Canon 2 of the New York Code of Professional Responsibility states that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Of course, despite the First Amendment's protection of commercial speech, there are limits on what an attorney may do to attract clients.

The Disciplinary Rules under Canon 2, among other things, circumscribe a lawyer's ability to solicit professional employment and a lawyer's ability to pay referral fees to other lawyers.

Disciplinary Rule 2-103(A) is the primary rule governing how, from whom and even if an attorney may solicit business.[\[FOOTNOTE 1\]](#) It prevents lawyers from engaging in practices that are considered potentially overreaching and might bring disrepute on the bar. For example, DR 2-103(A)(1), prohibits a lawyer from contacting a potential client in person except where the prospect is someone with whom the lawyer already has close ties. The use of written and broadcast solicitations is regulated by DR 2-103(A)(2).

While attorneys are not permitted to compensate other lawyers whose only involvement is referring potential clients, DR 2-102(B), and may not split fees with non-lawyers at all, DR 3-102(A), attorneys are permitted to share fees with other attorneys under limited circumstances, DR 2-107(A). DR 2-107(B) covers splitting fees among lawyers who were once, but are no longer, members of the same law firm.

In-person and phone contacts are viewed as the most likely forms of solicitation to be subject to abuse and cause potential clients to feel uncomfortable. DR 2-103(A)(1), prohibits such solicitation unless the attorney is seeking employment from a close friend, relative, former client or current client. Prospective clients, who probably already feel overwhelmed by the circumstances giving rise to the need for legal services -- a death, accident or brush with the law, for example -- are protected from aggressive, potentially overbearing lawyers looking for work, at least those they do not know already.

If a lawyer is contacted by a potential client to discuss handling a new matter, of course the lawyer is free to persuade that prospective client to hire her. A lawyer when asked about her practice while golfing with a new country club member does not have to refuse to answer. The rules, however, do prevent a lawyer, after reading a story about a bad accident and realizing that she has met the victim at a PTA meeting years earlier, from calling that person in an attempt to be retained.

While a lawyer may solicit work from clients when a lawyer is about to switch firms, the lawyer's ability to do so is limited. Principles of fiduciary duty come into play in those circumstances. It is not a breach of those duties for a partner who is changing firms to inform the firm's clients with whom she has had a prior relationship about her departure, her new practice, and to remind clients they are free to retain counsel of their choice, but only after first telling the firm about her plan to leave.[\[FOOTNOTE 2\]](#) Lawyers are not permitted secretly to attempt to lure firm clients to retain the law firm they are about to join, or use deception in an effort to do so.

DR 2-103(A)(2) governs a lawyer's ability to solicit professional employment from prospective clients through "written and recorded communication." The term "written" refers to letters, fliers, newspaper advertisements, brochures and all other forms of written communications.[\[FOOTNOTE 3\]](#) "Recorded" refers to radio, television and other forms of broadcast advertisement, whether pre-recorded or live.[\[FOOTNOTE 4\]](#)

New York courts and ethics committees have yet to determine into which category -- in-person or written -- an e-mail solicitation would fall. While some states require lawyers who send solicitation letters to label the correspondence as advertisements, and place similar labels on the outside of envelopes, New York does not go so far.

DR 2-103(A)(2) does prevent a lawyer from soliciting professional employment from a prospective client by written or recorded communication under five circumstances.

- A lawyer is prohibited from engaging in any written or recorded communication that is false, deceptive or misleading.

- Like the new federal rules limiting phone solicitation, a lawyer may not send targeted letters or fliers to people who have previously expressed to the lawyer that they do not wish to be solicited by that lawyer.
- Lawyers may not engage in written or recorded communication that involves coercion, duress or harassment. This prohibition is aimed at a lawyer's use of high-pressure salesmanship, bullying or intimidation tactics that may lead a layman to believe that something bad will happen if he does not hire the lawyer.
- Individuals who are elderly, have recently been injured or experienced emotional trauma, or are in some way mentally impaired, may not have the capacity to make sound judgments in choosing an attorney. For this reason, the rules protect those who are vulnerable from being preyed upon by attorneys in search of fees. Thus, it is unethical for a lawyer knowingly to target such individuals through written solicitation.
- A lawyer who knows that she or a lawyer at her firm will not be performing the work on the matter solicited may not engage in written or recorded solicitation unless she discloses that the legal work will be performed by a lawyer who is not part of her firm. It, therefore, is not improper for an attorney to solicit a matter she intends to refer to another lawyer, as long as the written or recorded communication discloses that fact.

An attorney is permitted to send mass solicitation mailings. For example, a lawyer may solicit by mail potential participants in a class action litigation,[\[FOOTNOTE 5\]](#) but such a solicitation must comply with all the provisions of DR 2-107(A)(2). These solicitations are also subject to the filing and retention requirements of DR 2-101(F).[\[FOOTNOTE 6\]](#) Therefore, at the time the lawyer sends mass solicitation letters, she must file a copy of the letter with the Department of Disciplinary Committee. The lawyer must also retain a list of the names and addresses of all persons whom she solicited for at least one year.

#### SHARING FEES

"Referral" fees may only be paid by one lawyer to another where "fee sharing" is possible. DR 2-107(A) provides that a lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or an associate of the lawyer's firm, unless three criteria are met.

First, the client must consent to employment of all the lawyers who will be sharing the fees after full disclosure that the lawyers will be dividing the fees among themselves. Second, the division of the fees must be proportionate to the services performed by each lawyer or, the lawyers must agree with the client in writing that each lawyer has assumed joint responsibility for the representation. "Joint responsibility" has been described as assuming liability "for each other's ethical violations and for each other's legal malpractice, breaches of fiduciary duty, breaches of contract, and other improper conduct."[\[FOOTNOTE 7\]](#) This may be a high price to pay for a share of the fees and so it behooves the lawyers to be sure they are confident in the quality of each other's work before entering into such agreement. Third, the total fees paid to the lawyers must not exceed reasonable compensation for all legal services they rendered the client.

Thus, it is ethical for a lawyer to receive a share of the fees after referring a client to another lawyer even though the referring attorney will not be performing substantial services in connection with that client's case. The client, however, must be provided with an agreement in writing that each lawyer assumes joint responsibility and the client must not be charged extra because of the referring lawyer's fee. Although lawyers may share legal fees with other lawyers, it is unethical for an attorney to share legal fees with non-attorneys.

DR 2-107(B) exempts former associates and former partners from these requirements. Accordingly, if a lawyer leaves her firm, the law firm may pay future profits the firm makes to the lawyer who has left without having to secure the consent of clients. The departing lawyer need not assume joint responsibility or perform any work for her former firm's clients in return for receipt of such profits. This provision permits law firms to fund retirement programs for their lawyers from future earnings of the firm.

*David G. Keyko is a partner in the litigation department of the New York office of Pillsbury Winthrop Shaw Pittman. Mia R. Martin, an associate with the firm, assisted in the preparation of this article.*

#### :::::FOOTNOTES:::::

**FN1** Sections 479, 481 and 482 of the New York State Judiciary Act are anti-solicitation statutes that should also be consulted.

**FN2** See N.Y. County Lawyers Ass'n Ethics Op. 679 (1991); Ass'n of the Bar of the City of N.Y., Ethics Op. 80-65 (1982); see also, *Graubard Mollen Dannel & Horowitz v. Moskowitz*, 86 N.Y.2d 112, 120 (1995).

**FN3** See Roy Simon, "Simons New York Code of Professional Responsibility Annotated," DR 2-103, p.228 (2005).

**FN4** Id.

**FN5** See N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 676 (1995).

**FN6** Id.; see also *In re von Wiegen*, 63 N.Y.2d 163 (1994).

**FN7** See Roy Simon, "Simons New York Code of Professional Responsibility Annotated," DR 2-107 at p.329.