

Ethics Opinion

951027

FACTS:

Attorney represented an individual in proceedings before the Department of Labor, Employment Relations Division. The client had filed a claim against her employer for commissions earned but not paid after she had terminated her employment. During the proceedings, the employer admitted that he had failed to pay commissions earned by 25 of his other employees who had also terminated their employment.

Because the Department of Labor will not pursue the matter of the commissions withheld from the 25 employees unless *it* hears from them first, Attorney has decided to contact the employees in order to inform them that they each may have a cause of action against their former employer for the withheld commissions.

Attorney's law clerk, who will be contacting the employees on Attorney's behalf, will advise the employees that:

- (1) Based on the former employer's admission during the proceedings before the Department, they may have a cause of action against him for commissions earned but not paid;
- (2) That they may pursue this matter by filing a claim with the Employment Relations Division at the Department of Labor and Industry; and
- (3) That they may retain Attorney's law office, or another attorney of their choice to pursue this matter for them.

QUESTION PRESENTED:

Is the method and content of Attorney's contact with the 25 former employees proper?

SHORT ANSWER: Yes, qualified.

DISCUSSION:

The facts here involve Montana and ABA Model Rule of Professional Responsibility 7.3. The Montana Rule provides:

Direct Contact with Prospective Clients. A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment, if:

- (a) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person *is* such that the person cannot exercise reasonable judgment in employing a lawyer;
- (b) the person has made known to the lawyer a desire not to receive a communication from the lawyer; or

- (c) the lawyer reasonably should know that the communication involves coercion, duress or harassment;
- (d) the lawyer reasonably should know that the person *is* already represented by another lawyer.

The Montana rule is concerned with a lawyer contacting a prospective client for the purpose of obtaining professional employment. Here, Attorney's communication is arguably informative only; Attorney's only mention of his services will be in the context of informing the prospective clients of a choice between Attorney's services and other attorneys' services.

Assuming, arguendo, that Attorney's communication *is* for the purpose of obtaining professional employment, subsections (a) - (d) are nonetheless not involved. There is no indication that Attorney knows or should know that the mental state of any of the former employees precludes any one of them from exercising reasonable judgment; there is no indication that any of the former employees have indicated to Attorney a desire not to receive a communication from him; there is no indication that the communication involves coercion or duress; and, there *is* no indication that any of the former employees are represented by another lawyer. Thus, Attorney has complied with Montana rule 7.3.

However, Montana's rule *is* different from the ABA's rule, and, as Montana has adopted many of the ABA's rules in the past and may adopt ABA rule 7.3 in the future, a discussion of Attorney's conformity with ABA rule 7.3 is cautionary here. Paraphrasing ABA rule 7.3(a), a lawyer may not by live telephone contact solicit employment from a prospective client when a significant motive for such contact is the lawyer's pecuniary gain. Thus, the ABA rule is fairly strict in terms of telephonic communication with a prospective client. Comment [1] to the rule explains: "There *is* a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter."

Assuming Attorney's intended communication will be telephonic, it is still arguable that such communication is informative only, and not for the purpose of obtaining professional employment and pecuniary gain. As well, it may be noteworthy that Attorney's law clerk, not Attorney, will be communicating with the former employees. However, despite these factors, the hard line taken by the rule regarding telephonic communication, as indicated by the Comments, would seem to behoove Attorney to issue written communication to the former employees.

ABA rule 7.3(b) allows solicitation of employment through written communication as long as the prospective client has not indicated a desire not to be contacted by the lawyer, and the solicitation does not involve coercion or duress. In addition, 7.3(c) commands that every written communication soliciting employment from a person known to need legal services include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication. Thus, to safely abide by ABA rule 7.3, Attorney here should issue his communication to the former employees in written form, and should include the words "Advertising Material."

CONCLUSION:

Attorney's communication, whether written or telephonic, will comply with Montana Rule 7.3 for two reasons:

(1) the communication is arguably informative, and is not being issued for the purpose of obtaining employment; and

(2) even if the communication *is* being issued for the purpose of obtaining employment, subsections (a) - (d) of 7.3 are not implicated here.

However, because Montana may very well adopt ABA rule 7.3 in the future, Attorney should be aware of the differences between the present Montana rule and the ABA rule, and should understand how to conform communications to prospective clients to the ABA rule. In order to conform the communication at issue here to the ABA rule, it should be in writing and should include the words "Advertising Material" on the envelope and at the beginning and ending of the communication.

THIS OPINION IS ADVISORY ONLY