

BOSTON BAR ASSOCIATION ETHICS COMMITTEE
OPINION 2012-01: LAWYER REFERRAL SERVICE PROCEDURE

SUMMARY

When a prospective client contacts a lawyer referral service operated or sponsored by a bar association, receives from the service a referral to a panel lawyer, and consents to a call-back from the referred lawyer, the referred lawyer may call the prospective client without violating the ban on in-person solicitation set forth in MRPC 7.3(d).

FACTS

The Boston Bar Association operates and promotes a Lawyer Referral Service (“LRS”) that endeavors to match members of the public in need of legal services with qualified lawyers desiring to handle their cases for a fee. Members of the public are able to contact the LRS, describe the issue prompting the inquiry, and receive a referral to a suitable lawyer in the relevant area of law, who has provided the LRS proof of malpractice coverage, and who has agreed to provide a reduced-price initial consultation (the “Referred Lawyer”).

From time to time, a referral is made but the prospective client does not contact the Referred Lawyer. The LRS proposes to provide to a Referred Lawyer the name and telephone number of the prospective client, so that the Referred Lawyer can call the prospective client to ask whether he or she still wishes to consult. The BBA’s Lawyer Referral Service Review Committee has requested a formal opinion as to whether Rule 7.3(d) of the Massachusetts Rules of Professional Conduct would prohibit the lawyer from making that call, provided that the LRS obtains the prospective client’s consent during initial intake.

DISCUSSION

MRPC 7.3(d) provides that “a lawyer shall not solicit professional employment for a fee from a prospective client in personal communication by telephone, electronic device, or otherwise.”¹ The term “solicit” contemplates “communications directed to specific individuals or groups for the purpose of obtaining business or securing employment.” *See In the Matter of Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104*, 398 Mass. 73, 83 (1986) (adopting former Disciplinary Rule 2-103, which is in all relevant respects identical to MRPC 7.3(d)). This certainly would cover a telephone call to a prospective client initiated by a Referred Lawyer who merely is told that the referral was made.

The Supreme Judicial Court determined in 1986 to continue the ban on in-person solicitation of prospective clients for reasons that remain compelling:

¹ Sub-section (e) of the Rule exempts communications to any member of the bar of any state or jurisdiction, to certain of the lawyer’s family members, to the lawyers’ former clients, and to organizations and persons in a commercial context. The Opinion assumes that these exemptions are inapplicable.

The risk of undue influence in connection with the direct in-person solicitation for a fee of prospective clients is far greater than with indirect solicitation. An individual confronted with a piece of mail from an attorney is not under pressure to respond immediately, or to engage in a dialogue about his legal needs. Such an individual may treat a written communication in the same manner as any other letter proposing a business transaction: if it is unwanted, he simply can throw it away. However, a person who is directly solicited is forced to respond immediately to the statements or personal inquiries of the lawyer. The attorney is in a position to engage the prospective client in discussion that is weighted in favor of the lawyer. In addition, there is no record about what is said, so the potential for abuse by lawyers is significant. Finally, a personal solicitation in most instances represents a greater invasion of privacy for prospective clients than does written solicitation.

In the Matter of Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104, supra, 398 Mass. at 82. To the same effect, *see* ABA Model Rules of Professional Conduct, Rule 7.3(a), Comment 1 (direct solicitations “subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. . . . The situation is fraught with the possibility of undue influence, intimidation, and overreaching.”).

At the same time, people in need of legal services must communicate with lawyers in order to hire them, and legitimately will wish to engage in in-person communication when selecting counsel. It is understood that “the prohibitions of [Rule 7.3(d)] do not, of course, apply to in-person solicitation after contact has been initiated by the prospective client.” *See* MRPC 7.3, Comment 4. In that situation, the prospective client has exercised a degree of control in the interaction. Accordingly, concern about potentially coercive or misleading communications in a personal interaction is reduced and gives way to the practicality of the situation and to a countervailing interest in promoting a responsive bar. In order to minimize the concerns underlying the ban on direct solicitation, however, a prospective client should be understood to have “initiated contact” only where he or she freely and unambiguously has communicated a desire to speak with the Referred Lawyer.

We agree with the 1981 Opinion of The Ethics Committee of the Massachusetts Bar Association, in which it concluded that a prospective client’s contacting a lawyer referral service does not, in itself, permit a Referred Lawyer to make in-person contact. MBA Ethics Op. No. 81-6 (April 14, 1981). To the same effect, *see* South Carolina Bar Association Ethics Advisory Opinions 93-21 (1993) and 03-03 (2003).

The Rhode Island Supreme Court’s Ethics Advisory Panel has concluded, to the contrary, that by calling a bar association referral service, a potential client has initiated contact with the referred lawyer so that follow-up in-person solicitation is permitted. *See* R.I. Sup. Ct. Ethics Adv. Panel, Op. No. 98-16 Request No. 761 (December 9, 1998):

The Panel is of the opinion that the established policies and procedures of the Bar Association's Lawyer Referral Service adequately serve to eliminate the potential for abuse and overreaching inherent in direct solicitation. In addition to these procedural safeguards, an overriding consideration in this inquiry is the fact that the purpose of the Bar Association's Lawyer Referral Service is to make legal services readily available to the public.

While this reasoning has some force, and we have no doubt that the LRS process lessens the chances for overreaching, we are not convinced that individuals who merely contact the LRS for a referral have thereby consented to direct in-person contact with the Referred Lawyer. The client may wish, for example, to conduct independent inquiry regarding the Referred Lawyer before deciding whether to initiate contact. In that circumstance, receiving a call from the Referred Lawyer would be unseemly and possibly confusing. The individual may have contacted other lawyers about possible representation, or may be wavering, for perfectly legitimate personal reasons, about whether to pursue legal rights or advice at all. In these and other circumstances, contact by an LRS panel lawyer may be unwelcome and carry a risk of coercion or invasion of privacy.

Equating the act of requesting a referral from the LRS to "initiating contact" with a particular lawyer also may diminish the operation of bar-sponsored referral services as primarily a public, consumer oriented service. Bar association lawyer referral services are oriented first and foremost as a public service -- making unbiased referrals to qualified lawyers -- and only secondarily as a service to member lawyers.² It is on that assumption, we expect, that the Massachusetts Rules of Professional Conduct permit lawyers to enter into financial arrangements with bar association lawyer referral services that are prohibited with private referral services. *See* MRPC § 7.2(f). The Boston Bar Association LRS, in particular, is promoted as the only service in Greater Boston meeting the American Bar Association Standards for Lawyer Referral and is so designated on the ABA website providing local directories of lawyer referral services. Those Standards, set forth in the ABA *Model Supreme Court Rules Governing Lawyer Referral Services* (1989), comprise nine attributes of a qualified lawyer referral service that serve to emphasize and preserve the public service orientation. It is important that distinction be made between the public service of the LRS and the private attorney-client interaction that may ensue.

The precise issue presented here, however, concerns a proposed practice in which the LRS would ask in the ordinary course of its intake interview, when contact information is requested, whether the prospective client consents to a call-back from the Referred Lawyer. In addressing this issue, it is important to keep in mind that the LRS is intended to function primarily on behalf of the prospective client in facilitating a referral. It is also important to ensure that potentially

² *See* ABA Model Rules of Professional Conduct, § 7.2, comment 6 (qualified lawyer referral services "are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.").

vulnerable individuals are free from any subtle pressure to agree to a call back, and that consent is clearly given and remains in place throughout the interaction with the LRS. But we also recognize that some people who call the LRS may view the option to receive a call-back as a welcome convenience to them.

If the LRS client does freely and unambiguously agree during LRS intake that the Referred Lawyer may call him or her, then the situation is difficult to distinguish from a prospective client leaving a message at a law office asking for a return call on a potential legal matter (which clearly would qualify as initiating contact). In both cases, it would seem that the prospective client has manifested a definite desire to speak to a particular lawyer to explore possible representation. Asking a person seeking a lawyer referral whether he or she would like a call-back from the Referred Lawyer is also consistent with the LRS' mission of matching clients in need of service with qualified attorneys interested in providing those services, and with some care can be accomplished naturally in an intake interview without pressure.

Accordingly, it is our opinion that a lawyer who participates in a lawyer referral service operated, sponsored or approved by a bar association may contact by telephone a prospective client if the service has informed that lawyer that the prospective client has consented to the follow-up call, and further provided that the referral service operates under published procedures ensuring that:

- the prospective client is asked if he or she freely consents to being called back by the Referred Lawyer and is informed that there is no obligation to give that consent; and
- a written record is made by the LRS that the prospective client consented.