

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 501**

**April 13, 2022**

## **Solicitation**

*ABA Model Rule of Professional Conduct 7.3(a), amended in 2018, contains a narrowed definition of what constitutes a “solicitation.” Rule 7.3(b) delineates the type of solicitation that is expressly prohibited. Rules 8.4(a) and 5.3 extend a lawyer’s responsibility for solicitation prohibitions not only to actions carried out by the lawyer directly but also to the acts of persons employed by, retained by, or associated with the lawyer under certain circumstances.*

*Rule 5.3(b) requires lawyer supervisors to make reasonable efforts to ensure that all persons employed, retained, or associated with the lawyer are trained to comply with the Rules of Professional Conduct, including Rule 7.3(b)’s prohibition. Partners and lawyers possessing comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has training that reasonably assures that nonlawyer employees’ conduct is compatible with the professional obligations of lawyers. Under Rule 5.3(c), a lawyer will be responsible for the conduct of another if the lawyer orders or with specific knowledge of the conduct ratifies it, or if the lawyer is a manager or supervisor and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.*

*Rule 8.4(a) makes it professional misconduct for a lawyer to “knowingly assist or induce another,” to violate the Rules or knowingly do so through the acts of another. Failing to train a person employed, retained, or associated with the lawyer on Rule 7.3’s restrictions may violate Rules 5.3(a), 5.3(b), and 8.4(a).*

*Many legal consumers obtain information about lawyers from acquaintances and other professionals. The Model Rules of Professional Conduct are rules of reason. Recommendations or referrals by third parties who are not employed, retained, or similarly associated with the lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not generally constitute “solicitation” under Rule 7.3.*

## **Introduction**

In 2018, the American Bar Association adopted amendments to ABA Model Rule of Professional Conduct 7.3, defining solicitation in the text of the rule and creating new exceptions to the general prohibition against live, person-to-person solicitation of legal services where a significant motive is “pecuniary gain.”<sup>1</sup> The definition of solicitation under the current amended version of Model Rule 7.3 is:

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This opinion addresses solely the ABA Model Rules. Lawyers should consult the rules, opinions, and cases of the jurisdiction(s) in which they are practicing. Some states

a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.<sup>2</sup>

The ABA also amended the prohibition on solicitation to clarify that it applies only to “live person-to-person contact.”<sup>3</sup> The reason for restricting such in-person face-to-face, live telephone, or other real-time communications between a lawyer and potential client is set forth in Comment [2] to Rule 7.3:

A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

In addition to the other changes, the 2018 amendments broadened the exceptions to prohibited solicitation, and the Rule in paragraph (b) now permits solicitation by live person-to-person contact if the person contacted is a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

The Rule prohibits live person-to-person solicitation even when otherwise allowed if the person has made clear that the person does not want to be solicited by the lawyer or if “the solicitation involves coercion, duress or harassment” under paragraphs (c)(1) and (2).

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have not adopted or have modified the ABA Model Rule and their definition of solicitation may differ. *See, e.g.*, Fla. Bar R. 4-7.18(a), which prohibits any in-person or telephone solicitation with a significant motive of pecuniary gain of any person with whom the lawyer has no prior family or professional relationship, regardless of whether the lawyer knows the person needs legal services.

<sup>2</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3(a). Both “knows” and “reasonably should know” are defined terms in Rule 1.0 of the Model Rules. Knows means “denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Reasonably should know means “that a lawyer of reasonable prudence and competence would ascertain the matter in question.”

<sup>3</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3(b).

However, the prohibition does not preclude any communication “authorized by law or ordered by a court or other tribunal,”<sup>4</sup> nor does it prohibit a lawyer from being part of a group or prepaid legal service plan owned by someone other than the lawyer that enlists new members or sells subscriptions via live person-to-person contact where it is not known the persons need the services covered by the plan.<sup>5</sup> The latter exception also existed in the pre-2018 version of Rule 7.3.

Despite the 2018 clarifications, ambiguity remains concerning a lawyer’s ethical responsibility for the lawyer’s actions and for the actions of others who engage in live, person-to-person solicitation with specific individuals. The scope of “others” who might solicit on behalf of a lawyer could include, for instance, current employees of the lawyer, marketing firms hired by the lawyer, existing clients, former clients, friends and family of the lawyer, or even professional colleagues such as bankers, real estate agents, and accountants. Traditionally, lawyers often have obtained new clients because the firm’s existing clients tell their friends, business colleagues, or family members about positive lawyer-client experiences.<sup>6</sup> Many of these communications do not fall within the Rule 7.3 definition of “solicitation.”

When analyzing the actions of others and whether the lawyer is responsible for those actions, Rule 8.4 and Rule 5.3 are relevant. Rule 8.4(a) provides that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” In other words, a lawyer cannot do through another person that which the lawyer could not do directly. Rule 8.4(a) does not impose responsibility on a lawyer who has no knowledge of someone else’s actions. For culpability the lawyer must “knowingly assist or induce another,” or knowingly do so through the acts of another, which means, for the purpose of solicitation, the lawyer must knowingly permit, ask, direct, or encourage someone to solicit on the lawyer’s behalf.

The Committee interprets Rule 8.4(a) as subjecting a lawyer to discipline for the conduct of another only if the lawyer knows of the other person’s conduct and in some way requests or authorizes the conduct. This reading is consistent with agency principles. It would be manifestly unfair and illogical to hold a lawyer responsible for another’s actions that the lawyer does not even know about. This reading is consistent with both *The Restatement of Law Governing Lawyers* § 5, *Professional Discipline*, and Hazard, Hodes & Jarvis, *The Law of Lawyering* § 69.05, 4<sup>th</sup> ed.

Model Rule 5.3 addresses a lawyer’s responsibilities regarding nonlawyer assistance by persons employed or retained by or associated with the lawyer. Model Rule 5.3(b) requires lawyers with direct supervisory authority over a nonlawyer whom the lawyer employs, retains, or is associated with (collectively referred to as “employees” in this opinion for ease of reading) to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Lawyers who are managers of firms<sup>7</sup> must ensure that the firm “has in effect measures giving reasonable assurances that the nonlawyer’s conduct is compatible with the

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<sup>4</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3(d).

<sup>5</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3(e).

<sup>6</sup> See, e.g., *2019 Clio Legal Trends Report*, CLIO (2019), <https://www.clio.com/resources/legal-trends/2019-report/> (noting that thirty-two percent of consumers surveyed sought lawyer referrals from friends and family and sixteen percent sought referrals from a lawyer).

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(c) (definition of a “firm”).

professional obligations of the lawyer.”<sup>8</sup> A lawyer is responsible for ethics violations of an employee, according to Rule 5.3(c), but only if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Thus if a lawyer knows of specific unethical conduct by an employee and either directed that conduct, ratifies the conduct after the fact, or fails to take reasonable remedial measures after the fact, the lawyer violates Rule 5.3(c), among other rules.

Under Rule 5.3, a lawyer with supervisory responsibility over the nonlawyer employees must discuss ethical rules with these employees to ensure that they understand the limitations on their conduct imposed by the fact of their employment with the law firm. Just as a supervisory lawyer must explain the ethical duty of confidentiality to employees, the supervisory lawyer must likewise explain the requirements of Rule 7.3 to refrain from improper solicitation on behalf of the lawyer. However, what constitutes a prohibited “solicitation” on behalf of the lawyer versus merely making a recommendation about the lawyer can be complicated.

This opinion examines various solicitation scenarios, some of which involve employees and agents of lawyers, in light of the 2018 amendments to Model Rule 7.3, and provides guidance for lawyers in determining what activities are permissible.

### **Hypothetical 1**

A lawyer obtains a list from the local sheriff of persons arrested within the last week, calls them on the telephone, and offers to provide general legal services. None of the arrestees are lawyers. The lawyer also does not personally or professionally know, nor is lawyer related to, any of the arrestees. Does the conduct violate Rule 7.3?

Answer: Yes. The conduct is prohibited solicitation under Rule 7.3(b). The communication was initiated by the lawyer. It was directed to specific persons whom the lawyer knows or reasonably should know need legal services in a particular matter. The communication offers to provide, or reasonably can be understood as offering to provide, legal services. The offer to provide “general legal services” reasonably can be understood by a prospective client as offering to provide legal services for a particular matter of which the lawyer has knowledge, i.e., the arrest. The communication by telephone was live and person-to-person, falling within the ambit of the Rule<sup>9</sup> and was made for the lawyer’s pecuniary gain. None of the exceptions in Rule 7.3(b) are applicable. Therefore, the lawyer’s conduct is prohibited solicitation.

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<sup>8</sup> MODEL RULES OF PROF’L CONDUCT R 5.3(a).

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. [2].

## Hypothetical 2

A lawyer with direct supervision over a law firm's marketing department hires a professional lead generator to obtain client leads. The lawyer signs an agreement with the lead generator to pay a flat monthly fee for leads in mass tort cases. The agreement includes no information on how the lead generator obtains leads, nor does the lawyer provide any direction or limitation on how the lead generator does so.

The lead generator pays its employees to "lurk" in online chat rooms set up for family members and survivors of aviation disasters, medical device and drug product liability matters, and other possible mass torts. The lead generator also pays its employees to research the family members and survivors and telephone those persons to inform them of the lawyer's experience and availability in mass tort cases. The lead generator also asks these same persons if they would like to be represented in their cases.

The lawyer receives a report from the lead generator with a list of 10 new clients and says to the lead generator, "I don't know what you are doing, and I don't care! Keep 'em coming!" The lead generator responds, "We just call the people who are online discussing accidents." The lawyer does not inquire further, signs the clients sent by the lead generator, and continues to use the lead generator. Does the conduct violate any rules?

Answer: Yes. The telephone calls were initiated by the lead generator on behalf of the lawyer based on the contractual relationship between the lawyer and the lead generator. The telephone calls were directed to specific persons who the lawyer knows needed legal services in a particular matter. The lead generator's communications offered to provide, or reasonably could be understood as offering to provide, legal services for the matter.

The communications were live and person-to-person and made for the lawyer's pecuniary gain. Therefore, the communications were prohibited solicitations and did not qualify for any of the exceptions under Rule 7.3(b). The lawyer learned that the lead generator offered to provide legal services on the lawyer's behalf, using impermissible direct telephone solicitation, and still accepted the client leads. The lawyer therefore is responsible for the lead generator's conduct under Rules 7.3(b) and 8.4(a) when the lawyer accepted the clients, knowing they were obtained in contravention of Rule 7.3.

The lawyer, with direct supervision over the lead generator, has made no effort to ensure that the lead generator, specifically hired to generate clients, understood and would conform its actions to be compatible with the lawyer's professional obligations. By failing to train the lead generator concerning the limitations on direct solicitation contained in Rule 7.3, the lawyer violated Rule 5.3(b), and by accepting the leads, knowing they were generated through prohibited solicitation, the lawyer ratified the conduct of which he had knowledge and violated Rule 5.3(c).<sup>10</sup> If the lawyer also was a partner or a lawyer with comparable managerial authority in the firm, Rule 5.3(a) would require the lawyer to "make reasonable efforts to ensure that the firm has in effect measures giving

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<sup>10</sup> The Committee notes that in Formal Op. 491 this Committee found a lawyer to have "knowledge" when the lawyer consciously, deliberately failed to inquire into the facts of a matter.

reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

### Hypothetical 3

A paralegal at a law firm works as a paramedic on weekends. As part of the paralegal's employment agreement with the firm, the paralegal lists the paramedic work as outside employment. To explain away any perceived conflict, the paralegal maintains that "not only does the outside employment not conflict with law firm work, but *it also contributes by bringing in new firm business.*"

No lawyer at the law firm apprised the paralegal of any prohibitions or limitations on soliciting firm business. The paralegal hands the law firm's business cards to injured people transported by the ambulance from accident scenes and states that the firm handles accident cases and is available to help them. When the firm agrees to represent new clients, the firm requests that the new clients list where they heard about the firm. Several new clients state they received business cards from the paralegal during the paralegal's paramedic work.

After being told by the paralegal of how the law firm's cards were being distributed, the paralegal's direct supervisory lawyer congratulated the paralegal on bringing in new business and promised a bonus as a reward. Does the conduct violate any Rules?

Answer: The conduct is a prohibited solicitation under Rule 7.3(b). The paralegal initiated live person-to-person contact, on behalf of the law firm employer, with injured persons being transported from an accident scene whom the paralegal knew had a specific need for legal services. Further, the law firm ratified this solicitation by knowing how the clients were solicited and still accepting clients from the paralegal's solicitation. The paralegal's communications were for the pecuniary gain of the law firm, and the injured persons could reasonably have understood the communications as offering legal services.

None of the exceptions to the prohibition on live person-to-person solicitation in Rule 7.3(b) are present - employment as a paramedic is not the type of existing business or professional relationship that permits live, person-to-person solicitation.

No lawyer at the firm made any effort to train or ensure that the paralegal's conduct comported with the professional obligations of a lawyer. In fact, the paralegal's supervisory lawyer has knowledge of the specific conduct and has ratified the conduct by speaking of it approvingly and suggesting the paralegal would receive a bonus for bringing in new clients. Therefore the supervisory lawyer has violated Rules 5.3(b) and (c).

Because no partner or managing lawyer has in place measures giving reasonable assurances that nonlawyers' conduct is compatible with the professional obligations of the lawyer, they have violated Rule 5.3(a).<sup>11</sup>

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<sup>11</sup> For a full discussion of Rule 5.3 and the duties of partners, managers, and supervisory lawyers working with nonlawyer assistance, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

Again, lawyers have an obligation to train employees of a law firm on the ethical obligations of the lawyers so that the nonlawyer employees' conduct comports with those ethical obligations. All employees of a law firm need training on such ethics topics as confidentiality, conflicts of interest, communication requirements, diligence, avoiding the unauthorized practice of law, *and* refraining from impermissible "solicitation," among other things.

Because the supervisory lawyer has knowledge of the paralegal's actions, the supervisory lawyer also has violated Rule 8.4(a) by knowingly violating Rule 7.3 through the acts of another.<sup>12</sup>

#### Hypothetical 4

A lawyer asks a personal friend and colleague who is a banker to provide the lawyer's name and contact information to any banking customer or employee that the banker thinks might need an estate plan. Does the lawyer violate any Rules?

Answer: The conduct does not violate Rule 7.3 because the actions are not solicitation as defined by paragraph (a). The lawyer did not target a specific person the lawyer knew or reasonably should have known was in need of legal services in a particular matter, nor communicate or direct communications with that person. The lawyer has no authority over the banker's conduct, does not control either the content of any communication the banker makes nor even whether any communication occurs at all. The banker's communication with bank customers should not reasonably be construed as an offer to provide legal services, because the banker is not authorized to make that offer on behalf of the lawyer. The communication, if one occurs at all, is a recommendation, the type of "word-of-mouth" referral that is permissible under Rule 7.3. Moreover, because the lawyer is not directing what the banker should say and the banker's customers are not speaking directly to the lawyer, the lawyer's request to the banker is permissible.<sup>13</sup>

Similarly lawyers who build their practices based on referrals by satisfied clients may suggest to clients that if they are happy with the lawyer's services, the clients should give the lawyer a favorable review online and let their friends and family know about the lawyer. Such satisfied client recommendations to the public or directly to the client's friends and family are permissible.

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<sup>12</sup> This opinion only addresses application of the ABA Model Rules to these scenarios. Lawyers also should be cognizant of any statutes or other law addressing solicitation. Solicitation can be barred or limited by law as well as rule. *See, e.g.*, 49 U.S.C. §1136(g)(2) (banning solicitation of victims or family members of air carrier accidents occurring in the U.S. by lawyers or their employees, agents, or representatives within 45 days of the accident); Fla. Stat. §877.02 (barring solicitation on behalf of lawyers by certain persons including a person "in any capacity attached to any hospital, sanitarium, police department, wrecker service or garage, prison or court, or for a person authorized to furnish bail bonds, investigators, photographers, insurance or public adjusters").

<sup>13</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. [7] ("This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.").

The Rule's concern about a potential client feeling pressured by live, person-to-person contact by a lawyer is not present where the banker's customers or the former clients' acquaintances receive information about the lawyer's services.

Many legal consumers obtain information about lawyers from acquaintances and/or other professionals such as bankers, accountants, and real estate agents.<sup>14</sup> The Rules of Professional Conduct are "rules of reason."<sup>15</sup> Recommendations or referrals by third parties who are not employees of a lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not constitute "solicitations" under Rule 7.3. To suggest that Rule 7.3 prohibits a lawyer's colleagues in other professions or satisfied clients from providing information about a lawyer's services to other people is not realistic or consistent with the purpose of the Rule.

### Conclusion

The current version of Model Rule 7.3(a) contains a narrowed definition of what constitutes a "solicitation." It is a "communication initiated by or on behalf of a lawyer that is directed to a specific person" that is known, or reasonably should be known, to be in need of "legal services in a particular matter *and* that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter."

Rule 7.3(b) delineates the type of solicitation that is expressly prohibited—"live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain"—unless the potential client is one of the noted exceptions to that prohibition.

The prohibition applies not only to actions carried out by a lawyer directly but also to persons employed by, retained by, or associated with the lawyer under certain circumstances.

Lawyers with supervisory responsibility have a duty to supervise and train all persons employed, retained, or associated with the lawyer to ensure compliance with the Rules of Professional Conduct, including Rule 7.3(b)'s prohibition. Partners and lawyers possessing comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has training that reasonably assures that nonlawyer employees' conduct is compatible with the professional obligations of lawyers. This includes training employees to refrain from impermissible solicitation of potential clients on a lawyer's behalf.

Under Rule 5.3, a lawyer will be responsible for the conduct of another if the lawyer orders, or with specific knowledge of the conduct ratifies it, or if the lawyer is a manager or supervisor and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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<sup>14</sup> See 2019 *Clio Legal Trends Report*, *supra* note 6 (showing that nine percent of consumers surveyed found lawyer referrals from other professionals).

<sup>15</sup> MODEL RULES OF PROF'L CONDUCT, PREAMBLE [14].



Under Rule 8.4(a) a lawyer must not “knowingly assist or induce another,” to violate the rules or knowingly do so through the acts of another, which means, for the purpose of solicitation, that the lawyer must not knowingly permit, ask, direct, or encourage someone to engage in impermissible solicitation on the lawyer’s behalf.

Satisfied clients or third parties not employed by the lawyer may share with others their opinions and recommendations about the lawyer. The lawyer may even request such appropriate communications by clients and others. Such satisfied client recommendations to the public or directly to the client’s friends and family are permissible.

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

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