

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion 689
September 2020**

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer use a nonlawyer employee to attract prospective clients to a booth in a public place operated by that nonlawyer employee?

STATEMENT OF FACTS

Immediately after several hail storms, a lawyer sets up a booth at a public venue. The booth is staffed by a nonlawyer employee of the lawyer's law firm. Signs at the booth advertise the firm's services in representing property owners/policyholders in first-party claims against insurance companies in property damage disputes. The booth displays photos of damaged property; the name, address, and telephone number of the law firm; and phrases such as "AFFECTED BY HAIL?"

The nonlawyer employee only speaks to individuals who approach the booth. Thus, none of these efforts consist of live, person-to-person contact initiated by the lawyer or nonlawyer employee.

When an individual approaches the booth, the employee distributes brochures that (1) communicate the same information as the booth's signs and (2) invite recipients to contact the law firm for more information about the law firm's services in representing policyholders/property owners in disputes with their insurance companies. The employee converses with visitors to the booth only upon request and orally communicates the same information as the brochures and signs.

These efforts are directed to the general public who can walk past the booth without taking a brochure or talking to the nonlawyer employee. Visitors to the booth are free to disregard the information they receive or to consider the information at a later time. Any cases resulting from such advertising efforts are handled on a contingent fee basis.

DISCUSSION

Although a nonlawyer employee of a law firm is not subject to the Texas Disciplinary Rules of Professional Conduct, Rule 5.03(a) provides that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]" Rule 5.03(b) also provides that:

“a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with . . . or has direct supervisory authority over such a person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person’s misconduct.”

Accordingly, if the lawyer orders, encourages, or permits conduct at the booth that would violate the Rules if engaged in by the lawyer, then the lawyer would be subject to discipline for violation of Rule 5.03(b).

Rule 7.03 addresses “Prohibited Solicitations and Payments.” One concern addressed by Rule 7.03 is that in-person contacts “can overbear the prospective client’s will, lead to hasty and ill-advised decisions concerning choice of counsel, and be very difficult to police.” Comment 1 to Rule 7.03.

Rule 7.03(a) prohibits a lawyer from engaging in in-person solicitation of a prospective client or nonclient regarding a matter arising out of a particular occurrence or event or series of occurrences or events. The Rule states, in pertinent part:

“A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact . . . seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer’s advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”

Although “solicitation” is not defined in the Rules, the Committee approves of the definition in Rule 7.3(a) of the American Bar Association’s Model Rules of Professional Conduct, which states:

“‘Solicitation’ or ‘solicit’ denotes 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.”

In previous opinions, this Committee has addressed the ethical implications of accepting referrals from third parties. *See e.g.* Professional Ethics Committee Opinion 573 (July 2006), Opinion 537 (May 2001), and Opinion 524 (May 1998). Here, however, the issue is that the lawyer through a nonlawyer employee is engaging prospective clients for employment, albeit only upon request.

The Committee concludes that the lawyer's plan to provide free information, or to use the nonlawyer staff to do so, does not violate Rule 7.03. A lawyer may also advertise the firm's services in representing property owners/policyholders in first-party claims against insurance companies and may do so through booth signs and brochures inviting the public to contact the law firm for more information about the firm's services. The lawyer or the nonlawyer employee may also orally communicate the same information to visitors to the firm's booth if the lawyer or nonlawyer do not initiate the conversation with prospective clients or nonclients but, instead, respond only if additional information is requested by prospective clients or nonclients. Attendees at the public event may pass up the booth entirely, disregard the information provided, or consider the information at a later time.

If the nonlawyer employee distributes information to members of the public only upon request, there is no violation of Rule 7.03. For example, providing telephone numbers or other contact information for government agency consumer helplines or agencies furnishing disaster relief to members of the public would not be prohibited. As the Committee has previously observed, a lawyer does not violate the Rules by offering and giving such free information. *See* Opinion 654 (March 2016) (concluding that lawyers may provide free information about bail bonds and arrest warrants). But, a lawyer may not direct nonlawyer employees to solicit prospective clients or nonclients by initiating in-person contact.

In addition to Rules 5.03 and 7.03(a), the nonlawyer employee's conduct also implicates Rule 7.03(b), which states:

"A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service"

Thus, the nonlawyer employee, whether paid by salary, hourly wage, or flat fee, may not be offered or paid any enhanced compensation or bonus tied to the number of new clients that the law firm enlists as a result of the employee's efforts.

Moreover, Rule 7.06(a) prohibits lawyers from accepting or continuing employment procured in a prohibited manner:

"A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other

person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.”

Finally, Rule 5.05(b) provides that a lawyer shall not “assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” The supervising lawyer should therefore ensure that the nonlawyer employee is not providing legal advice to those seeking information at the booth.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may direct a nonlawyer employee to staff a booth at a public venue and provide information to prospective clients or nonclients regarding professional employment to handle claims or lawsuits against insurance companies over property damage caused by severe weather events, provided neither the lawyer nor the nonlawyer initiates the contact by calling visitors to the booth or by talking about professional services with the visitor unless the visitor commences the conversation. The lawyer must also make reasonable efforts to ensure that the nonlawyer employee’s conduct complies with the lawyer’s professional obligations as required by the Rules. The lawyer may not pay the nonlawyer staff any bonus or additional compensation for enlisting one or more clients as a result of the nonlawyer’s work at the booth. Finally, the nonlawyer employee should not provide legal advice to those seeking information at the booth.