

**PROFESSIONAL ETHICS COMMITTEE FOR
THE STATE BAR OF TEXAS
Opinion No. 623**

February 2013

QUESTIONS PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted to telephone a real estate agent's client concerning possible legal employment after the real estate agent informs the lawyer that the client has requested the lawyer to call? Is this contact permitted if the real estate agent is included in a group of business acquaintances of the lawyer to whom the lawyer regularly provides entertainment and small holiday gifts that are consistent with customary community standards and that are not related to recommendation or employment of the lawyer?

STATEMENT OF FACTS

Lawyer represents a real estate title insurance company in real estate transactions. A real estate agent works frequently with Lawyer on title insurance matters. While working with a client in a real estate transaction, the real estate agent is asked by the agent's client to help the client find a lawyer to work on a matter unrelated to the real estate transaction. After the real estate agent suggests Lawyer as someone who might be able to handle the transaction, the client asks the real estate agent to contact Lawyer and ask Lawyer to call the client. The real estate agent contacts Lawyer as requested by the client, and in response Lawyer calls the agent's client. As a result of the call made by Lawyer the real estate agent's client hires Lawyer to represent him in the matter.

In accord with customary practice in the community and to build personal goodwill with business acquaintances, Lawyer from time to time entertains and makes small holiday gifts to real estate agents and other persons with whom Lawyer has business dealings. The real estate agent who suggested Lawyer's name to the agent's client is among those receiving such entertainment and holiday gifts from Lawyer.

DISCUSSION

The issues under the Texas Disciplinary Rules of Professional Conduct raised by the facts presented are whether Lawyer's conduct involves prohibited contacts with potential clients to seek legal employment or prohibited payments to another person for soliciting legal employment. Rule 7.03 of the Texas Disciplinary Rules prohibits in the following terms, with exceptions not relevant in these circumstances, certain contacts by a lawyer with potential clients and payments by a lawyer for the purpose of soliciting legal employment:

"(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) 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. . . .

(b) 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

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person

. . . .

(f) As used in paragraph (a), 'regulated telephone or other electronic contact' means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. . . ."

In addition, Rule 8.04(a)(9) provides that a lawyer shall not "engage in conduct that constitutes barratry as defined by the law of this state[.]" The term "barratry" is defined in section 38.12 of the Texas Penal Code, entitled "Barratry and Solicitation of Professional Employment," as follows:

"(a) A person commits an offense if, with intent to obtain an economic benefit the person:

(1) knowingly institutes a suit or claim that the person has not been authorized to pursue;

(2) solicits employment, either in person or by telephone, for himself or for another;

(3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client;

(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;

(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or

(6) accepts or agrees to accept money or anything of value to solicit employment."

In addition, section 38.12(b)(3) of the Texas Penal Code provides that it is a violation of section 38.12 if a licensed person knowingly accepts professional employment that results from solicitation prohibited by section 38.12(a). Section 38.12(d) provides further that it is an offense for a lawyer to communicate in writing, in person or by telephone for the purpose of soliciting

legal employment from someone who has not sought to employ the lawyer if the communication relates to certain specified circumstances or involves certain types of coercive or deceptive conduct. Section 38.12(c) provides that “[i]t is an exception to prosecution under Subsection (a) or (b) that the person's conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court.”

As relevant to the factual situation here considered, the actions that are prohibited by Rule 7.03 and Rule 8.04(a)(9) of the Texas Disciplinary Rules are (1) a lawyer’s personal contact for the purpose of obtaining legal employment with a potential client who has not requested the contact and (2) payment of anything of value by a lawyer to any person for the purpose of soliciting employment of the lawyer. In the opinion of the Committee, nothing in the circumstances considered constitutes either unsought contact by a lawyer for the purpose of obtaining employment or payment for solicitation of legal employment.

In the situation considered, the client asks the real estate agent to contact Lawyer and to request that Lawyer call the client. Since Lawyer’s call to the real estate agent’s client is requested by the real estate agent acting on behalf of the client, Lawyer is not calling to seek employment from a person who has not sought Lawyer’s services.

The fact that the real estate agent is among the recipients of entertainment or small holiday gifts from Lawyer does not result in a violation of Rules 7.03 and 8.04(a)(9) provided that the entertainment and gifts to the real estate agent are not excessive by community standards and are not related to recommendation or employment of Lawyer. In these circumstances it would not be possible to conclude that Lawyer had transferred anything of value to any person, including the real estate agent, for the purpose of soliciting legal employment.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is permitted to telephone a real estate agent’s client concerning possible legal employment after the real estate agent informs the lawyer that the client has requested the lawyer to call. This conclusion would not change if the real estate agent is included in a group of business acquaintances of the lawyer to whom the lawyer regularly provides entertainment and small holiday gifts that are consistent with customary community standards and that are not related to recommendation or employment of the lawyer.