

## Searching the Web To Find a Lawyer

BY LAZAR EMANUEL

Click on *Google* or any of the other search engines and search under Find a Lawyer. You'll find page after page of for-profit websites offering to connect you with a lawyer in your area. Some of these sites are practice-area-specific (e.g., patent law, copyright law, and matrimonial matters, personal injury claims). Some range over the entire panoply of legal services. Many of these sites recognize that it may be frustrating to a prospective client to click on an area of practice only to find an inscrutable list of lawyers' names and addresses. They ask the client to state the basic nature of her legal problem and then refer the client to a lawyer who has indicated to the website in advance that he is interested in handling that kind of matter. For this service, lawyers pay a fee based upon the extent of "the benefit" to the lawyer.

In Opinion 799 (9/29/06), the Committee on Professional Ethics of the NYSBA held that a New York lawyer may not participate in a website which bases its referrals on the client's statement of her legal problem. (In the month of October, 2006, two other states - Washington and Arizona - restricted the use by lawyers of website referral services.) The New York Committee found that these referrals violated the provisions of DR 2-103(B), forbidding payment by a lawyer to anyone for recommending his services.

The New York Committee said:

We find that the line is crossed ...when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, based on an analysis of that problem. For example, if a potential client describes a slip- and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers.... This conclusion applies whether the website's selection of counsel is the result of human intelligence or a computer program designed to respond to certain key words (e.g., if the potential client uses the words "injury", "doctor" or "fell" on an intake form, the program would characterize the problem as one of "personal injury" in order to recommend lawyers). Such activity is prohibited by other than a qualified lawyer referral service. DR 2 103(D).

[Editor's note: DR 2-103(D) limits qualified referral services to: a legal aid or public defender's office; a military legal assistance office; a referral service authorized by law or sponsored and approved by a bar association, and any bona fide organization which furnishes or pays for legal services for its members or beneficiaries.]

The "line" the Committee was referring to as having been "crossed", was the line between a traditional ad on paper (newspaper, yellow pages) and online directory services which base their referrals on a statement describing the nature of the client's matter.

The question is at what point an online "directory" website becomes a referral service for purposes of DR 2-103(B). For example, an online yellow pages that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area (e.g., to create a list of attorneys in "Albany" who do "personal injury" work) does not violate the rule.

The Committee's Opinion would require a New York lawyer to verify that a website which listed his name for a fee did not encourage a potential client to describe the nature of her claim, but limited its references to the lawyer's name, location, and practice area.

## **Contacting the Prospect Client by Telephone**

The NYSBA Committee went on to ask whether a lawyer who uses a Web referral service violates DR 2-103(A)'s prohibition against solicitation if he responds to the client by telephone. DR 2-103(A) would clearly appear to enjoin contact by telephone:

A lawyer shall not solicit professional employment from a prospective client:

1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client.

However, the Committee held, a telephone call in response to an inquiry by a prospective client is not a solicitation, but a permissible response to the client's "invitation." The Committee agreed with the New York City Bar that the client has invited the contact, and that an invited contact is not a "solicitation" within the meaning of the Code (N.Y. City Opinion 2000-1).

Nonetheless, the Committee said, "in view of the Code's express prohibition of telephone solicitation, we believe that follow-up contacts by phone must be preceded by a clear and unambiguous request from the potential client for telephone contact." Generally, it would not satisfy the prohibition against telephone contact that the website contain a statement that by using the website the prospective client was consenting to having one or more lawyers telephone her. On the other hand, it generally would be sufficient if the potential client were specifically asked to check a box requesting telephone contact.

## **Committee's General Comments & Guidelines**

In Opinion 799, the Committee offered a number of general recommendations and guidelines to lawyers who wish to register with an online search service:

1. A lawyer's public communications - including his listings on a website - must not be "false, deceptive or misleading." DR 2-101(A).
2. All advertising - including website listings - must include the lawyer's name, address and telephone number. DR 2-101(K). "...[T]he use of a web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101[K]").
3. The website listing service should:

- refrain from recommending the subscribing lawyer or from making claims about the competence or character of its subscribers;
  - refrain from claims that it will analyze the prospective client's legal problem in order to identify and recommend a suitable lawyer;
  - explain that its subscribing lawyers have paid to be listed with the service;
  - state the full name, office address and telephone number of each lawyer participating in the service;
  - specify the means of communication that its subscribers may use in response to the prospective client's posting;
  - provide for telephone contact only if the prospective client clearly and unambiguously authorizes the service to forward her request and telephone number to the attorney; and
  - advise all prospective clients that its services do not constitute legal representation or the practice of law.
4. In addition, a lawyer who subscribes to a website service should take reasonable measures to avoid the inadvertent disclosure by the prospective client of privileged information, including assuring that the website:
- afford the prospective client an opportunity to screen the list of lawyers who will be shown the prospective client's posting and to remove lawyers from the list;
  - reveal the prospective client's identity only to those subscribing lawyers selected by the prospect;
  - (and the lawyer) minimize the communication of confidential information between the lawyer and the prospective client until the lawyer has been retained and has completed an appropriate conflicts check;
  - caution the prospective client that the information provided to the service may not be protected by the attorney-client privilege, when that statement is applicable.

Finally, the Committee warned that a lawyer subscribing to an internet search service should:

- avoid engaging in any form of "coercion, duress or harassment" DR 2-103(A)(2)(c);
- treat a prospective client with the courtesy and integrity expected of all lawyers. DR 1-102(A)(7).
- refrain from further retention discussions with the prospect if she evidences an unwillingness to engage the lawyer.

### **ABA: OK To Contact In-House Counsel**

The ABA has issued a new Ethics Opinion on an issue that has apparently never been decided in New York: May a lawyer representing a client in a matter communicate with the adversary's inside counsel about the subject of the matter without first obtaining the consent of the adversary's outside counsel? (Formal Opinion 06-443). The Opinion applies the terms "inside counsel" or "in-house counsel" to lawyers who are employees of an organization and who act as lawyers for the organization.

Model Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.  
[Editor's note: New York's DR 7-104(A) contains virtually the same language.]

As the ABA points out, the purpose of MR 4.2 was to foreclose communication between an opposing lawyer and relatively unsophisticated employees of an adversary who may be "in the position of making uninformed decisions or statements or inadequate disclosures harmful to the organization." To further this purpose, Comment 7 to MR 4.2 describes employees who are out of bounds to the opposing lawyer as "... a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

The ABA's opinion conforms to the statement in The Restatement (Third) of the Law Governing Lawyers that corporate inside legal counsel is not generally within the scope of the no-contact rule. The reasons cited for permitting access to inside counsel revolve essentially around three basic realities:

1. Inside counsel is not likely to make inadvertent disclosures harmful to his employer;
2. Inside counsel is in a position to foster settlements and mediate the details of a dispute;
3. Inside counsel can intervene to discourage improper or obstreperous tactics by outside counsel

The Opinion recognized, however, that inside counsel are sometimes off-limits to contact by the opposing lawyer. This occurs especially when the inside lawyer himself is a "constituent of the Organization" as defined in Comment 7, *supra*. Example: "when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute." Inside counsel is off-limits as well when he himself is a party to the action and is represented by the same outside counsel as the organization.

In New York, the issue of contact with in-house counsel was raised - but left unresolved - in *Tylena M. v. HeartShare Human Services*, 2004 WL 1252945, (S.D.N.Y. 2004). Defendant HeartShare moved to disqualify Tylena M's attorney, David Lansner, who admitted that he had contacted HeartShare's inside counsel without the permission of the company's outside counsel. His purpose in making contact was to advise HeartShare's inside counsel that the fees of its outside counsel were being paid by an excess-coverage insurance carrier and that its interests would be better served by aligning itself with plaintiff. Lansner argued that communication with inside counsel was "justifiable" because outside counsel's failure to challenge denial of coverage by the carrier raised concern's about counsel's loyalty; HeartShare's inside counsel was not a party to the litigation; and the facts did not raise any of the problems DR 7-104 was intended to prevent.

The Court denied the motion to disqualify. Relying on its essential hostility to disqualification of counsel, the court said it was not "general overseer of the ethics" of lawyers appearing before the court unless their

conduct "taints the trial." Motions to disqualify are particularly disfavored because disqualification has "an immediate adverse effect on the client by separating him from counsel of his choice" and because "disqualification motions are often interposed for tactical reasons." The court also found that HeartShare's counsel had not met the "heavy burden of proving facts required for disqualification", that there was no proof that Lansner 's contact with inside counsel had prejudiced the defendant, and that Lansner and his firm had spent significant time and energy on the matter and would "suffer severe prejudice" if they were disqualified.

The court also denied defendant's request to impose sanctions on Lansner himself, but it said, "In denying sanctions, however, the Court does not intend to suggest that it condones Mr. Lansner 's communication with HeartShare's in-house counsel" and it reminded defendant's counsel that they were free to report Lansner 's conduct to the appropriate disciplinary body.

### **Roy Simon's Comments**

In his discussion of DR 7-104 [Simon's New York Code of Professional Responsibility Annotated, 2006 edition, pp. 1057-58], Roy Simon discusses the pros and cons of permitting contact by opposing counsel with in-house counsel for the adversary. He distinguishes between large corporations with a sizeable in-house legal department and small, closely-held corporations in which a lawyer who happens to be either an owner or an officer doubles as in-house counsel. In the former case, the policies behind DR 7-104 are not likely to be threatened and contact may well be beneficial; in the latter case, communication with in-house counsel may lead to damaging admissions by the relatively unsophisticated in-house lawyer to the more sophisticated and experienced litigator representing the adversary, as well as to a breakdown of the relationship between the adversary and his outside counsel. As Professor Simon advises:

In between these extremes will fall many situations, each one different from the next. ... The result is that direct communications with an opposing party's in-house lawyers without the consent of its outside counsel are ethically risky. I do not think courts and disciplinary authorities should condemn all such communications, but until we receive definitive guidance from courts and ethics committees, the terrain will continue to be essentially unmarked.

The ABA's Opinion 06-443 has helped to define the terrain.

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