



April 3, 2015

Kathleen Schoen, Director of Local Bar Relations and Access to Justice
Colorado Bar Association
1900 Grant Street, Suite 900
Denver, CO 80203

Re: February 24, 2015, CBA Ethics Committee Inquiry

Dear Ms. Schoen:

Thank you for your inquiry to the Colorado Bar Association Ethics Committee (“the Committee”) dated February 24, 2015. This letter is provided by the Committee in response to your request for guidance.

Your inquiry concerns free clinics and ask-a-lawyer programs, where individual members of the public may meet with and seek basic legal advice from volunteer lawyers. These programs do not screen for financial eligibility. Some attendees may be indigent and cannot afford to hire the lawyer offering advice; some attendees are not indigent, however, and they might be able financially to retain the volunteer lawyer. Volunteer lawyers generally do not know whether attendees are or are not indigent .

You note that in many cases, the legal issue an attendee presents is far more complicated than can be addressed at the clinic, and the lawyer knows—and is required to advise the attendee—that the attendee faces legal circumstances that necessitate a more in-depth consultation than the time and subject-matter constraints that a free clinic permit. *See* Colo. RPC 6.5 cmt. [2]. You ask whether the volunteer lawyer may, in such a situation, hand business cards to this attendee or otherwise make available the lawyer’s contact information

in light of Colo. RPC 7.3(a). This rule, in general, bars lawyers from soliciting professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Colo. RPC 7.3(a) permits in-person solicitation of a prospective client when the lawyer's pecuniary gain is not a "significant motive" for the solicitation. This exception to the rule exists because the serious potential for abuse is not present when lawyers who communicate with prospective clients are motivated to do so by considerations other than their own financial gain. Colo. RPC 7.3(a) cmt. [4]. A volunteer lawyer who offers to provide the clinic attendee further assistance on a pro bono basis, then, may present his or her business card without violating Colo. RPC 7.3(a).

Less straightforward is when a volunteer lawyer wishes to charge an attendee, whether at the lawyer's regular rate or a lower rate for modest-means prospective clients, for a subsequent in-depth consultation. The analysis requires a definition of "solicit." Because the Colorado Rules of Professional Conduct do not provide such a definition, the Committee looks to Comment 1 of ABA Model Rule 7.3, which emphasizes that a lawyer solicits professional employment when the lawyer *initiates* the communication. That comment states:

A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation . . . if it is in response to a request for information

As a leading ethics commentator has remarked, this comment "broke no new ground but put the definition in sharp relief." Hazard and Hodes, *The Law of Lawyering*, § 61.02 (4th Ed. 2014); *cf.* Colorado Code of Professional Responsibility, Definitions (repealed effective Jan. 1, 1993) (defining "solicitation" as "any unrequested communication to a nonlawyer,

directly or indirectly, initiated by a lawyer” for the purpose of seeking professional legal employment).

The ABA comment’s definition of solicitation draws a line between a communication initiated by the lawyer, on one hand, and the lawyer’s response to a request for information, on the other hand. The policies reflected in the commentary to Colo. RPC 7.3 support this distinction. Comment 1 warns against the risk of “undue influence, intimidation, and over-reaching” when, during a direct interpersonal encounter, a trained advocate importunes a layperson who, overwhelmed by his or her circumstances, “may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately.” Cmt. [1], ABA Model Rule of Professional Conduct 7.3. *Accord* Arizona Op. 02-08 (Sept. 2002)(“The *sine qua non* of an ‘in-person’ solicitation within the meaning of ER 7.3(a) is the initiation of contact by a lawyer with a member of the public in such immediate circumstances of time and place that the person would reasonably feel pressured, intimidated, or importuned.”).

The Committee believes that such potential for abuse exists when a volunteer lawyer initiates a targeted discussion regarding further consultation or representation by offering the clinic attendee the volunteer lawyer’s business card before the attendee has approached the lawyer with questions. A mere visit to the clinic is not a request for information that would thereby permit the lawyer to offer his or her legal services for compensation. The attendee may, therefore, feel pressure, whether real or imagined, to agree to contact the lawyer in exchange for immediate assistance. The attendee may also experience difficulty in evaluating all available alternatives in the lawyer’s presence.

In contrast, these concerns are greatly reduced if the attendee requests information from the volunteer lawyer, and the volunteer lawyer, having determined that the legal issue posed is more complicated than can adequately be addressed in the time allotted, responds to that request. In that case, the volunteer lawyer may either refer the clinic attendee to a bar referral service or offer his or her business card or contact information for additional consultation, either pro bono or for a fee. As noted in an Arizona State Bar ethics opinion regarding a lawyer's proposal to sponsor a booth at a business exposition, "[t]he decision to make contact must always be made by the public, not by the lawyer." Arizona Op. 02-08 (Sept. 2002). Once a clinic attendee approaches a volunteer lawyer for legal advice, however, the volunteer lawyer may respond to and offer the attendee written materials, provided that such exchange does not involve coercion, duress, or harassment. *See id.* Especially considering the Constitutional backdrop to the regulation of attorney solicitation, the Committee agrees with the views expressed in the Arizona ethics opinion.

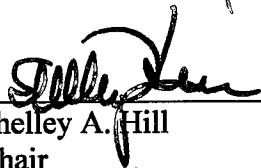
The Committee appreciates the opportunity to provide input on your inquiry and hopes that the above opinion provides you some framework for your issue.

This letter is issued for advisory purposes only and for the limited purpose of providing guidance on the ethical issues raised in your inquiry. This letter is not in any way binding on the Colorado Supreme Court or the Office of Attorney Regulation Counsel.

Please note that the Committee is considering whether to prepare a formal opinion addressing this topic, which would consider the issue you raise in much greater detail. Alternatively, the Committee may select this letter opinion for publication as an anonymous abstract summarizing the subject matter. In that event, you will be provided a copy of the

final draft of the abstract and an opportunity to advise the Committee whether you believe the abstract reveals the identity of the parties involved.

Yours very truly,



Shelley A. Hill
Chair