

Law Clerk Accepting Payments for Referrals Is Unacceptable

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To the Forum:

I am an attorney working for one of the federal courts in New York State. When I first began working with the court about a year ago, one of the clerks who handles criminal case intake took me under his wing and guided me through my first year. We became close friends over the last year, and he even attended my wedding. As a result, we developed a very trusting relationship, but he recently revealed something that I feel compelled to report.

A few days ago, I took the clerk out to lunch to thank him for staying late to help me sift through piles of discovery the past week. Over lunch, the clerk mentioned that the job is “so worth it,” because he has a side hustle that more than doubles his salary. When I asked him what he meant, he disclosed that he refers criminal defendants who have court-appointed counsel to private defense lawyers by giving them their business card or calling the lawyers directly. These defense lawyers pay the clerk thousands of dollars per referral in cash under the table.

When I asked how long he had been doing this, the clerk replied, “Much longer than you’ve been here. I’ve got a book full of lawyers that I refer to. You wouldn’t believe the killing I’ve made. I didn’t buy that car on a court clerk’s salary alone, I’ll tell you that,” and gestured toward his Mercedes in the parking lot. The look of shock on my face must have made him nervous as he then said, “You can’t tell anyone though. I’ll get in a lot of trouble. If you want, I can loop you in.” I told him I would think about it – though I certainly was not thinking about it.

This side hustle doesn’t sound legitimate – possibly criminal – and I know that there must be applicable ethical rules and even criminal statutes that prohibit this aside from a duty to report.

Sincerely,

N.T. Toby Trusted

Dear N.T. Toby Trusted:

Your instincts are absolutely correct, and the situation you find yourself in is fraught with ethical and legal implications. The referral scheme orchestrated by the court clerk and the participating defense attorneys is not just shady; it’s potentially criminal and, most certainly, a breach of ethical rules. Let’s dive into the intricacies of this issue.

It is crucial to address several important ethical considerations that apply to your situation. One key ethical rule in this context is Rule 3.5 of the New York Rules of Professional Conduct. This rule aims to preserve the “impartiality of tribunals and jurors”¹ and prohibits lawyers from seeking to or causing “another person to influence a judge, official or employee of a tribunal by means

prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan” Essentially, it forbids lawyers from trying to influence court personnel, such as judges, officials or employees, by means prohibited by law. The American Bar Association has a similar Rule 3.5 which more simply prohibits lawyers from “engag[ing] in conduct intended to disrupt a tribunal.” Both rules prohibit lawyers from “seek[ing] to influence a judge, juror, prospective juror or other official by means prohibited by law.”²

In this case, the defense attorneys’ payments to the court clerk for client referrals clearly “disrupt[s] a tribunal.” This could lead to favoritism towards certain attorneys, jeopardizing the fairness of proceedings. Federal court clerks are tasked and trusted with storing and maintaining confidential information, conducting legal research, preparing memos, proofreading and filing judge’s orders and opinions, and communicating with counsel. What if one day one of the attorneys offers the clerk even more money to ensure an order is decided in a way favorable to that attorney’s client? Or perhaps even worse, the clerk provides the defense attorney with confidential information about a witness. The ways in which this referral system interferes with the court’s impartiality are limitless, and the defense attorneys here are in clear violation of Rule 3.5. As for the clerk, the rule specifically calls out court employees in stating that such “employee[s] of a tribunal” are not permitted to accept such monetary gifts from lawyers, so he too has violated this rule.

While illegal behavior is generally a matter of criminal law, it is also an obvious violation of RPC Rule 8.4, which prohibits a lawyer from “engag[ing] in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.” As lawyers, we are held to a higher standard of honesty. It is safe to say that paying a court clerk for client referrals certainly constitutes illegal conduct that would adversely reflect on a lawyer’s – or anybody’s – honesty.³

As will be further explained below, bribing a public official violates federal law. Of course, in committing such a crime, the defense attorneys are obtaining clients in an illegal and dishonest way. This affects their fitness to practice law in that they were taking advantage not only of a court clerk, but of defendants who are seemingly unable to pay for private counsel as the lawyers and the clerks targeted defendants with court-appointed counsel. Lawyers are trusted to advocate for clients, not take advantage of them. Who knows what the clerk and the lawyers told these defendants to persuade them to hire them rather than continue with their free counsel? It’s possible – if not likely – that the clerk bent the truth about the defense attorneys’ capabilities or even disparaged other lawyers to encourage defendants to hire one of the attorneys paying him. The attorneys’ payments

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encouraged such dishonesty and illegal behavior as well. Lawyers are called to respect the courts and the justice system, and the defense attorneys' behavior here threatened the court's neutrality and ability to function the way it is meant to. How can someone who undermines the justice system in such a way be trusted to practice within it?

Moving on to the solicitation aspect, RPC Rule 7.3 comes into play. This rule addresses solicitation and recommendation of professional employment by lawyers. Solicitation, in essence, involves lawyers advertising their services to a specific target audience with the primary aim of financial gain. The rule defines solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Section (a)(2)

"While not necessarily bound by the ethics rules in the same way the attorneys are, clerks must comply with the United States Courts' Code of Conduct for Judicial Employees."

(iv) specifically prohibits solicitation by a lawyer "(2) by any form of communication if (iv) the lawyer knows or reasonably should know that the . . . physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer." Rule 7.3 prohibits this if the lawyer knows that the recipient he or she is targeting is in a position that may make him or her unable to think clearly about hiring the lawyer.⁴

In this case, the defense attorneys are indeed motivated by financial gain, as evidenced by their willingness to pay substantial amounts for referrals. Moreover, they are targeting a vulnerable group: criminal defendants who likely cannot afford private counsel and have court-appointed attorneys. This situation puts these defendants in a compromised position, making it difficult for them to exercise reasonable judgment. Therefore, the defense attorneys may well be found in violation of RPC 7.3. Their "advertisement" for purposes of this rule is the clerk's referrals. Additionally, the lawyers are using this means of advertisement to target a specific group: criminal defendants with court-appointed counsel. The violation of RPC 7.3 arises here in that the lawyers know that the targeted group – the criminal defendants – may not be in an "emotional or mental state" that would allow them to "exercise reasonable judgment in retaining a lawyer" for several reasons. The first is that these criminal defendants were likely assigned court-appointed counsel

because they cannot afford private counsel. They are facing time in prison and might be vulnerable to persuasion to hire counsel if, say, they are promised a discounted rate for a private defense attorney that a court clerk is recommending. It is conceivable that criminal defendants facing significant jail time may, as an act of desperation, make a hasty decision to hire the first attorney suggested to them. Because the defense attorneys here know – or reasonably should know – that they are targeting highly vulnerable people as clients, their conduct could, in our view, run afoul of RPC 7.3.

While not necessarily bound by the ethics rules in the same way the attorneys are, clerks must comply with the United States Courts' Code of Conduct for Judicial Employees. This code of conduct states that a "judicial employee should never influence or attempt to influence the assignment of cases or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so." The clerk is certainly in direct violation of this code as he favored the attorneys who paid him. Further, the clerk directly influenced the assignment of cases by taking them out of the hands of the court-appointed counsel and placing them in the hands of the private defense attorneys.⁵

Beyond ethical violations, the behavior of both the defense attorneys and the court clerk are certainly prohibited by law, and all involved risk facing federal criminal charges. The case of *U.S. v. Figueroa and Del Valle* serves as an alarming precedent. In that case, a clerk and an attorney who paid substantial sums for referrals were charged with various offenses, including conspiracy to bribe and unlawfully compensating a federal employee and federal employee bribery. Federal law explicitly makes it a crime to bribe public officials and witnesses, which could apply to this situation given the financial transactions involved.⁶ The clerk and defense attorneys here may certainly be charged with these same crimes if an investigation so leads. 18 U.S.C. Section 201 makes it a crime to bribe public officials and witnesses.⁷ 18 U.S.C. Section 203 makes it a crime to "knowingly" give, promise or offer "any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered is or was" a federal officer or employee.⁸ While the clerk may mask the severity of his behavior by calling it a "referral" business, this conduct would likely be considered a bribe in violation of U.S. law in that the attorneys gave something of value – money – to the clerk – a public official – in exchange for potential clients. In other words, the attorneys compensated the clerk – a federal employee – for "representational services as an attorney" to these criminal defendants.

Regarding your role in this dilemma, RPC 8.3 requires that if you, as a lawyer, know that another lawyer has committed a violation that raises substantial questions about their honesty, trustworthiness or fitness as a lawyer, you must report this knowledge to a tribunal or other relevant authority. Given the gravity of the violations by the defense attorneys, reporting this misconduct is not only your ethical duty but also the right thing to do to uphold the integrity of the legal profession and the justice system. Specifically, the rule requires that a “lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”⁹

In conclusion, the situation you have described involves a web of ethical violations, potential criminal activity and a profound impact on the impartiality of the court. Reporting these violations is essential to maintain the trust and fairness of our legal system. You are not only obligated to do so but also would be contributing to the preservation of the principles our profession holds dear. The attorneys’ conduct here raises substantial questions as to their “honesty, trustworthiness, [and] fitness as a lawyer.” While you are required to report a violation of the Rules, you should feel under these circumstances that you are also doing the right thing.

Sincerely,

The Forum by

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a young attorney named Iam Abel. I opened Abel Law in 2020. I hired my twin sibling, Sheis Cane, as my paralegal. Sheis Cane (Cane) also took the bar but failed.

One of the first cases that I signed up was Maybie Tomorrow’s (Maybie) personal injury case in March 2020. Cane conducted the intake interview. Although I was out of the office that day, I spoke with Maybie by telephone during the interview to obtain information about her accident, injuries and employment status.

I instructed Cane to “work up” the file – get police reports, medical reports, etc. Once we obtained the

necessary information (it took years due to COVID-19 pandemic delays), I reviewed the file and drafted the Summons and Complaint in November 2022.

On Dec. 1, 2022, I met virtually with Maybie via Zoom to review everything including documents I previously sent her to review. On Dec. 30, 2022, we had a second Zoom meeting, during which she signed a Verification to the Summons and Complaint, which I notarized after she showed me her driver’s license. We also discussed what Maybie thought would be a good settlement offer. Maybie stated she would accept “nothing less than \$500,000” as she was still in pain, undergoing medical treatment and out of work. My firm then served and filed the Summons and Complaint.

A few months later, on March 10, 2023, the defendants made an offer of \$600,000, so I gladly accepted on behalf of Maybie, reasoning that she would be happy because it was \$100,000 more than she wanted (and because I was behind on my bills). I asked Cane to call Maybie to tell her the good news and to obtain releases, etc. However, Cane could not reach Maybie.

Unbeknownst to me, on April 1, 2023, Cane cut and pasted Maybie’s signature from another document, then used my notary stamp and signature stamp on the documents. My office sent the documents to the defense counsel, and we are awaiting the settlement proceeds.

I received a call from Maybie’s daughter, stating that Maybie passed away on March 1, 2023, one month before she allegedly signed the settlement documents! Needless to say, I was unaware of Maybie’s death, so I confronted Cane. She admitted what she did. I fired Cane on the spot.

HELP!! What am I professionally obligated to do? How do I handle this situation?

Sincerely,

Iam Abel

Endnotes

1. See New York State Bar Association New York Rules of Professional Conduct (2021), Rule 3.5.
2. See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_5_impartiality_decorum_of_the_tribunal/.
3. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 8.4.
4. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 7.3.
5. <https://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees>
6. <https://www.justice.gov/usao-sdny/press-release/file/1577221/download>; <https://www.reuters.com/legal/legalindustry/ny-court-employee-lawyer-charged-with-trading-client-referrals-cash-2023-03-30/>.
7. 18 U.S.C. § 201.
8. 18 U.S.C. § 203.
9. New York State Bar Association New York Rules of Professional Conduct (2021), Rule 8.3.