

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-6 Issued June 14, 2002

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: When an Ohio attorney learns that a notice of appeal is filed in an Ohio court, the attorney may contact the Ohio counsel for either the appellant or appellee to convey an interest in serving as appellate counsel. The attorney-to-attorney contact may be in person, by telephone, mail, or e-mail.

Ohio disciplinary rules do not prohibit an Ohio attorney from contacting by telephone, mail, or e-mail the out-of-state counsel for an out-of-state corporation to offer assistance as local counsel in a matter filed in Ohio; however, such contact would be improper if in violation of the rules of the other state. Advice regarding another state's rules may be sought from the appropriate authority in that state. This Board's authority under Gov.Bar R. V § 2(C) is to advise only upon Ohio's rules.

Ohio disciplinary rules do not prohibit an Ohio attorney from using direct mail solicitation to inquire whether an out-of-state corporate party is represented by counsel, provided that the solicitation complies with the requirement of DR 2-101(F)(2) and DR 2-101(F)(4); however, such contact would be improper if in violation of the rules of the other state. Also, Ohio disciplinary rules do not prohibit an Ohio attorney from using e-mail communication to inquire whether an out-of-state corporate party is represented by counsel, provided that the e-mail solicitation complies with the direct mail solicitation restrictions as completely as possible within the limits of the e-mail technology; however such conduct would be improper if in violation of the rules of the other state. The use of in-person or telephone communication to inquire whether an out-of-state corporate party is represented by counsel is improper under DR 2-101(F)(1).

OPINION: This opinion addresses questions regarding an attorney soliciting legal business from other attorneys.

1. When an Ohio attorney learns that a notice of appeal is filed in an Ohio court, is it proper for the attorney to contact by telephone, fax, mail, or e-mail the Ohio counsel for either the appellant or appellee to convey an interest in serving as appellate counsel?
2. When an Ohio attorney learns that an out-of-state corporation is named as a defendant in a civil suit in Ohio, is it proper for the attorney to

contact by telephone, fax, mail, or e-mail the corporation's out-of-state counsel to offer assistance as local counsel?

3. When an Ohio attorney learns that an out-of-state corporation is named as a defendant in a civil suit in Ohio but is unaware of whether the defendant has counsel, is it proper for the attorney to contact by telephone the corporate party to obtain information as to the identity of the party's counsel in a matter?

The inquiring lawyer learns of cases filed in court either through reviewing a printed court index or a court Web Site index. When a notice of appeal is filed in the court, the inquiring lawyer would like to contact the Ohio counsel listed as representing the appellee or appellant to convey an interest in serving as appellate counsel in the matter. When an out-of-state corporation is sued in an Ohio Court, the inquiring lawyer is interested in contacting the corporation's out-of-state lawyer to convey an interest in serving as local counsel in the matter. The lawyer asks whether such communication is proper.

Question One

When an Ohio attorney learns that a notice of appeal is filed in an Ohio court, is it proper for the attorney to contact by telephone, fax, mail, or e-mail the Ohio counsel for either the appellant or appellee to convey an interest in serving as appellate counsel?

Communications by a lawyer are regulated by the publicity rules of the Ohio Code of Professional Responsibility, DR 2-101 through 2-105. Several of these rules address a lawyer's communications with other lawyers. DR 2-102(A)(1) & (2) and DR 2-105(A)(3) permit lawyers to announce availability to provide legal services.

DR 2-102(A) A lawyer may use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, that are in dignified form and comply with the following:

- (1) A professional card of a lawyer identifying the lawyer by name and as a lawyer and giving the lawyer's addresses, telephone numbers, law firm name, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates and may be used for identification.
- (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a

lawyer or law firm. It shall not state the nature of the practice except as permitted under DR 2-105.

DR 2-105(A)(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience.

DR 2-101(B) Subject to the limitations contained in these rules: (3) Brochures or pamphlets containing biographical and informational data that is acceptable under these rules may be disseminated directly to clients, members of the bar, or others.

Thus, the use of professional announcement cards or other written communication from lawyers to lawyers announcing availability to provide legal services is appropriate under these rules. *See e.g.*, Ohio SupCt, Bd Comm’rs on Grievances and Discipline, Op. 87-004 (1987) (advising “[a] lawyer may announce his or her availability to act as a consultant to, or associate of other lawyers, provided the announcement complies with the Code of Professional Responsibility.”)

Lawyer to lawyer professional announcement cards or other similar written communications are to be in dignified form as required under DR 2-102(A) and DR 2-105(A)(3). Announcements or written communications appearing to “hustle” business from a lawyer who is representing a client in a particular matter are not likely to result in employment of the soliciting lawyer.

Lawyer to lawyer professional announcement cards or other lawyer to lawyer written communications are subject to the general rules that govern publicity, such as the requirement of DR 2-101(A)(1) that communication not contain any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement. However, lawyer to lawyer written communications are not subject to the specific restrictions placed on direct mail solicitation in DR 2-101(F)(2), (F)(4), or (H)(1) for these rules protect laypersons who are subjects of targeted direct mail communications by lawyers, not lawyer to lawyer communications. DR 2-101(F)(2) applies to communication addressed to “persons or groups of persons who may be in need of specific legal service by reason of a circumstance, condition, or occurrence that is known or, upon reasonable inquiry, could be known to the soliciting lawyer or law firm.” DR 2-101(F)(4) applies to communication mailed to a party who has been named a defendant in a civil action. DR 2-101(H)(1) applies to communication sent to a prospective client or relative of a prospective client within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

Lawyer to lawyer communication by telephone or in person is also ethically appropriate to convey a lawyer’s availability to provide legal services. DR 2-101(F)(1) does not apply to a lawyer’s communication with another lawyer. [DR 2-101(F)(1): “A lawyer

shall not make any solicitation of legal business in person or by telephone, except as provided in DR 2-103 and DR 2-104.”]

Further, under the ethical rules, there is no bar to a lawyer sending an e-mail to another lawyer announcing availability to provide legal services. As with regular mail, a lawyer’s e-mail to another lawyer is not subject to targeted direct mail solicitation restrictions.

The sending of unsolicited facsimiles announcing a lawyer’s availability to provide legal services is not recommended. The sending of unsolicited facsimiles announcing legal services may implicate both state and federal law prohibiting facsimile transmission of unsolicited advertisements.

Under state law, “[n]o person shall transmit an advertisement to a facsimile device unless the person has received prior permission from the owner or, if the device is leased, from the lessee of the device to which the message is to be sent to transmit the advertisement; or the person has a pre-existing business relationship with such owner or lessee.” Ohio Rev. Code Ann. § 4931.55(B) (West 1995). Under state law, “[a]dvertisement’ means a message or material intended to cause the sale of realty, goods, or services.” Ohio Rev. Code Ann. § 4931.55(A)(1) (West 1995).

Under federal law, “[i]t shall be unlawful for any person within the United States—to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” 47 U.S.C. § 227(b)(1)(C)(1994). Under federal law, “[t]he term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4)(1994).

In conclusion, the Board advises as follows. When an Ohio attorney learns that a notice of appeal is filed in an Ohio court, the attorney may contact the Ohio counsel for either the appellant or appellee to convey an interest in serving as appellate counsel. The attorney-to-attorney contact may be in person, by telephone, mail, or e-mail.

Question Two

When an Ohio attorney learns that an out-of-state corporation is named as a defendant in a civil suit in Ohio, is it proper for the attorney to contact by telephone, fax, mail, or e-mail the corporation’s out-of-state counsel to offer assistance as local counsel?

Ohio disciplinary rules do not prohibit an Ohio attorney from contacting by telephone, mail, or e-mail the out-of-state counsel for an out-of-state corporation to offer assistance as local counsel in a matter filed in Ohio; however, such contact would be improper if in violation of the rules of the other state. Advice regarding another state’s rules may be

sought from the appropriate authority in that state. This Board's authority under Gov.Bar R. V § 2(C) is to advise only upon Ohio's rules.

Question Three

When an Ohio attorney learns that an out-of-state corporation is named as a defendant in a civil suit in Ohio but is unaware of whether the defendant has counsel, is it proper for the attorney to contact by telephone the corporate party to obtain information as to the identity of the party's counsel in a matter?

When an Ohio attorney learns that an out-of-state corporation is named as a defendant in a civil suit in Ohio but is unaware of whether the defendant has counsel, the attorney should not contact in person or by telephone a corporate party to inquire whether the corporation is represented by counsel. DR 2-101(F)(2) states "[a] lawyer shall not make any solicitation of legal business in person or by telephone, except as provided in DR 2-103 and DR 2-104." No exceptions in DR 2-103 and 2-104 are applicable to this inquiry.

Contact by direct mail is proper under Ohio's rules if the applicable direct mail solicitation restrictions are heeded; provided that, the conduct is proper under the rules of the other state. DR 2-101(F)(2) applies to communication addressed to "persons or groups of persons who may be in need of specific legal service by reason of a circumstance, condition, or occurrence that is known or, upon reasonable inquiry, could be known to the soliciting lawyer or law firm." DR 2-101(F)(4) applies to communication mailed to a party who has been named a defendant in a civil action. DR 2-101(H)(1) applies to communication sent to a prospective client or relative of a prospective client within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death. The restrictions of DR 2-101(F)(2) and DR 2-101(F)(4) are applicable to the question presented. The attorney knows that the corporation is in need of specific legal services and the corporation is named as a defendant in a civil suit.

Contact by e-mail is also proper under Ohio's rules, if the applicable direct mail solicitation restrictions are heeded; provided that, the conduct is proper under the rules of the other state. An e-mail inquiring whether a corporate defendant is represented by counsel should comply with the direct mail restrictions as completely as possible within the limits of the e-mail technology. Since there is no envelope on which to place the required DR 2-101(F)(2)(e) recital "ADVERTISEMENT ONLY," it will satisfy the rule to place this language on the Subject Line of the e-mail as well as in the text of the e-mail. If possible, this language should appear in no smaller than 10 point type and in red ink. If it is not possible, customary black type will suffice on the e-mail subject line and in the e-mail text for the "ADVERTISEMENT ONLY" recitals.

In conclusion, to Question Three, the Board advises as follows. Ohio disciplinary rules do not prohibit an Ohio attorney from using direct mail solicitation to inquire whether an out-of-state corporate party is represented by counsel, provided that the solicitation

complies with the requirement of DR 2-101(F)(2) and DR 2-101(F)(4); however, such contact would be improper if in violation of the rules of the other state. Also, Ohio disciplinary rules do not prohibit an Ohio attorney from using e-mail communication to inquire whether an out-of-state corporate party is represented by counsel, provided that the e-mail solicitation complies with the direct mail solicitation restrictions as completely as possible within the limits of the e-mail technology; however such conduct would be improper if in violation of the rules of the other state. The use of in-person or telephone communication to inquire whether an out-of-state corporate party is represented by counsel is improper under DR 2-101(F)(1).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.