

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 91-17**

Issued August 16, 1991

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

*[Not current-subsequent rule amendments to DR 2-103, eff. Jul. 1, 1996.]*

**SYLLABUS:** An attorney may write a union representative requesting that the attorney's firm be considered for recommendation of employment to the union membership provided that the union is a bona fide organization described in the Code of Professional Responsibility. DR 2-103(C) (2) and DR 2-103 (D) (1) through (4). However, the attorney must not compensate or give any thing of value to the organization to recommend or secure employment or as a reward for having made a recommendation resulting in employment by a client, except that the attorney may pay the usual and reasonable fees or dues charged by any of the bona fide organizations described within the Code. DR 2-103 (B). Further, the person to whom the recommendation is made must be a member or beneficiary of the union; and if the attorney accepts employment which results from recommendation by the union to its members, the attorney must remain free to exercise his/her professional judgment on behalf of the client. DR 2-103 (C) (2) (a) and (b).

**OPINION:** The question presented is whether an attorney may write a union representative requesting that the attorney's firm be considered for recommendation of employment to the union membership.

Disciplinary Rule 2-103 of the Code of Professional Responsibility (Code) provides rules regarding the recommendation of professional employment and places limitations on solicitation by attorneys. Disciplinary Rule 2-103(C), set forth below, allows attorneys to request referrals from bar associations and to cooperate with legal service activities of certain offices and organizations.

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

- (2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:
  - (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
  - (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

Code of Professional Responsibility DR 2-103 (C).

Further, Disciplinary Rule 2-104 (A) (3) expressly states that "[a] lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103 (D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein."

The legal assistance organizations that a lawyer may cooperate with under DR 2-103 (C) (2) and whose members the lawyer may represent under DR 2-104 (A) (3) are listed in DR 2-103 (D) (1) through (4) as follows: (1) a legal aid office or public defender office operated or sponsored by either a duly accredited law school, a bona fide non-profit community organization, a governmental agency, or a bar association; (2) a military legal assistance office; (3) a lawyer referral service operated, sponsored, or approved by a bar association; and (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries and complies with conditions listed within the rule. For purposes of this opinion, the Board proceeds on the assumption that the union is a bona fide organization meeting the conditions listed within DR 2-103 (D) (4) (a through g).

Traditionally, in-person solicitation by lawyers to prospective clients for purposes of securing employment has been prohibited. Disciplinary Rule 2-103 (A) still enforces this view: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, except as provided in DR 2-101 [publicity provisions of the Code]." Policy arguments against in-person solicitation raise concerns regarding potential overreaching, duress and undue influence on individuals as well as concerns regarding diminishing the integrity of the legal profession

through solicitation activities that promote litigation, increase unnecessary or fraudulent claims, and increase competition aimed at profit-making. In keeping, this Board has previously advised that the Code does not allow an attorney to request referrals from organizations that are not lawyer referral organizations operated, sponsored, or approved by a bar association, or that do not fall within any other exceptions to the Code's DR 2-103 (C) prohibition against referrals. Ohio Sup.Ct, Op. 88-009 (1988).

However, in contrast, there are policy, legal and constitutional arguments favoring at least some forms of solicitation. For example, there are policy arguments that solicitation facilitates the professional duty to make counsel available. There are also legal and constitutional arguments that solicitation involves speech that is subject to First Amendment protection. These views have resulted in case law and disciplinary rules which regulate solicitation but which do not ban it totally. For disciplinary rules, see DR 2-103, DR 2-104, EC 2-1 and the broad mandate of Canon 2 of the Code that "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." For case law, see Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (solicitation for pecuniary gain by written communication to potential clients known to face specific legal problems afforded protection as commercial speech under First Amendment); In re Primus, 436 U.S. 412 (1978) (written solicitation by ACLU attorney to inform an individual of her legal rights and to offer free legal representation afforded protection under First and Fourteenth Amendments); NAACP v. Button, 371 U.S. 415 (1963) (solicitation by NAACP lawyers of victims of racial discrimination to participate in test cases and to prosecute cases on a per diem basis protected by First Amendment. But see, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (in-person solicitation by attorney to an individual in the hospital and at home can be banned). See also, Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) (labor unions right to advise members to obtain legal assistance and to recommend specific lawyers guaranteed by First and Fourteenth Amendments).

Other states, in case law and advisory opinion, have addressed the specific question raised in this opinion. The Supreme Court of Michigan held that the conduct of an attorney whose solicitation was directed to a union business agent who represented the interests of union members did not rise to the level of "fraud, undue influence, intimidation, overreaching and other forms of 'vexatious conduct'" which the disciplinary rules may properly seek to prevent. State Bar Grievance Adm'r v. Jaques, 281 N.W.2d 469, 470 (1979) [quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978)]. The court explained that the union agent possessed expertise to make a

detached and informed evaluation of the attorney's qualifications before recommending the attorney to the union members. Jaques, 281 N.W.2d at 470. The court further stated "the union agent served as a buffer between the attorney and prospective clients thus alleviating the potential for overreaching and undue influence." Id. A similar conclusion was reached by an ethics committee in Maryland which advised that a lawyer may personally contact representatives of organizations to solicit business because the communication occurs with a fiduciary of the organization and not to a specific person in need of legal services. Maryland State Bar Ass'n, Op. 88-48 (1988). However, the committee did advise that the attorney may not seek employment from the representative as an individual. Id.

In this request, the proposed written contact by an attorney to a union representative asking that the attorney's law firm be considered for recommendation for employment to the union's membership does not carry with it the concerns related to in-person solicitation such as overreaching, duress, and undue influence of clients. The union representative serves as a buffer between the lawyer and the potential clients and the union representative can evaluate whether or not to recommend the firm's services to the members. Therefore, the opinion of this Board is that under DR 2-103 (C) (2) an attorney may write a union representative requesting that the attorney's firm be considered for recommendation of employment to the union membership provided that the union is a bona fide organization in compliance with the provisions of DR 2-103 (D) (4) (a) through (g). However, the attorney must comply with the DR 2-103 (B) restriction that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D)." Further, DR 2-103 (C) (2) (a) and (b) requires that the recommendation must be made to a member or beneficiary of the organization; and if the attorney accepts employment which results from recommendation by the union to its members, the attorney must remain free to exercise his/her professional judgment on behalf of the client.

**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.**