

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2004-1

Issued February 13, 2004

Withdrawn by Adv. Op. 2017-3

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: Until ethical rules, specifically addressing unsolicited e-mail advertising of legal services, are set forth in the Ohio Code of Professional Responsibility, attorneys are discouraged from, but not barred from, advertising their legal services through unsolicited e-mails to potential clients. If an attorney proceeds with sending unsolicited e-mail advertising of legal services, the existing advertising rules in the Ohio Code of Professional Responsibility (DR 2-101 through DR 1-105) will apply, as will applicable federal and state laws. As to the Ohio Code of Professional Responsibility, the advertising of legal services through unsolicited e-mail constitutes targeted direct mail, subject to the restrictions set forth in DR 2-101(F)(2), DR 2-101(F)(4), DR 2-101(H)(1). The direct mail restrictions imposed under DR 2-101(F)(2) apply regardless of whether or not the e-mail recipient has a specific legal need known to the sender/attorney. Specific requirements of the DR 2-101(F)(2) must be applied with reason. For example, since there is no envelope on which to place the required DR 2-101(F)(2)(e) recital “ADVERTISEMENT ONLY” this language should be placed on the Subject Line of the e-mail as well as in the text of the e-mail. This language should appear in no smaller than the required 10 Point type and in red ink, but if not possible, customary black type will suffice on the e-mail subject line and in the e-mail text for the “ADVERTISEMENT ONLY” recitals. Under DR 2-101(F)(4), if an attorney knows that the prospective client is a defendant in a civil action, the lawyer must first satisfy the requirements of DR 2-101(F)(4) before sending the e-mail. Under DR 2-101(H)(1), if an attorney knows that e-mail is directed to a prospective client or a 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 attorney must satisfy the requirements of DR 2-101(H)(1) in the e-mail. Attorneys should provide a method for the recipient to opt out of receiving further e-mail. If recipients ask not to receive e-mail, attorneys should not send them any unsolicited e-mail advertising legal services. Unsolicited e-mail advertising of legal services should comply with applicable federal and state law with which attorneys should be knowledgeable.

Attorneys may participate in lawyer advertising services or lawyer referral services that send unsolicited commercial e-mails advertising legal services to potential clients, but are

discouraged from doing so until ethical rules specifically addressing unsolicited e-mail advertising of legal services are set forth in the Ohio Code of Professional Responsibility. In the meantime, if an attorney participates in a lawyer advertising service that sends unsolicited commercial e-mail, the attorney should review the e-mail advertising to determine compliance with existing advertising rules and applicable law. If a lawyer participates in a lawyer referral service, the lawyer should review whether the referral service conforms to DR 2-103(C) of the Ohio Code of Professional Responsibility and to the Regulations of the Lawyer Referral and Information Services Committee of the Supreme Court of Ohio. In the absence of a rule or regulation that exempts lawyer referral services from compliance with lawyer advertising rules, the Board suggests that e-mail advertisements of lawyer referral services should conform to the lawyer advertising rules set forth in the Ohio Code of Professional Responsibility.

OPINION: This opinion addresses the use of unsolicited e-mail to advertise legal services.

1. Is it proper for attorneys to advertise legal services by sending unsolicited e-mails to potential clients?
2. Is it proper for attorneys to participate in lawyer advertising services or lawyer referral services that send unsolicited e-mails to potential clients?

The issues presented—an attorney, an advertising entity, or a referral entity sending unsolicited e-mail advertising legal services to an individual or to hundreds or thousands of prospective clients at once—is ripe for guidance in Ohio.

Question One

Is it proper for attorneys to advertise legal services by sending unsolicited e-mails to potential clients?

Unsolicited commercial e-mail is controversial.

Anyone with an e-mail address is well familiar with unsolicited commercial e-mail. Internet users and others refer to unsolicited commercial e-mail as “spam.”

Spam is unsolicited mail sent to hundreds, if not thousands, of users at once. Spam messages are usually advertisements for things you don’t want, including “get rich quick” schemes, “lose weight fast” come-ons, invitations for adult services on the Internet, and programs to do spamming yourself. Often the messages carry subjects to make you think that the sender is someone you know (e.g., “See you tomorrow”), so you’ll be sure to open the message.

Spam is worse than post office junk mail for a couple of reasons. It costs you money, since you have to download these messages and pay for the connection time to the mail service. You don't know it's junk until you read it. Most spammers hide their identity by sending out their junk using someone else's domain name as the return address, or even by accessing that person's mail server, so the spam cannot be traced back to them. One day this unlucky person could be you!

Kenneth E. Johnson, American Bar Association Law Practice Management Section, *The Lawyer's Quick Guide to E-mail* 115 (1998).

Criticisms of unsolicited e-mail abound. Spamming is accused of causing slower e-mail service, crashed servers, time wasted downloading unwanted e-mail, increased cost to internet service providers who purchase more bandwidth to handle the volume of mail, and increased cost to users when internet service providers raise prices for services. Coalition Against Unsolicited Commercial Email at <http://www.cauce.org> (last visited Jun. 17, 2003). Another concern with unsolicited commercial e-mail is that the content may be objectionable to the receiver.

Spamming has occurred in the legal profession. By order of the Supreme Court of Tennessee, an attorney received a one-year suspension for placing an advertisement that appeared on computer screens unsolicited. The hearing panel found the posting violated DR 2-101 and violated DR 1-102(A)(1)(5)(6). The attorney also received a disbarment for other misconduct. See *In re Canter*, Docket Nos. 95-831-O-H, 96-868-O-H, 96-908-O-H, 96-910-O-H, June 5, 1997.

There are laws regulating unsolicited commercial electronic mail.

On December 16, 2003, the President of the United States signed into law the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" also known as the "Can-Spam Act of 2003," "15 U.S.C.A. § 7701-7713. (West 2004). Under the law, predatory and abusive commercial e-mail is prohibited. 15 U.S.C.A. § 7703 (West 2004). Transmission of information that is false or materially misleading is unlawful. 15 U.S.C.A. § 7704(a)(1) (West 2004). Deceptive subject headings are prohibited. 15 U.S.C.A. § 7704(a)(2) (West 2004). The law requires a functioning return electronic mail address that the recipient may use to submit, in a manner specified in the message, a request not to receive further future commercial electronic messages from the sender. 15 U.S.C.A. § 7704(a)(3) (West 2004). The law prohibits transmission of commercial electronic mail after objections. 15 U.S.C.A. § 7704(a)(4) (West 2004). The law requires the inclusion of an identifier as an advertisement or solicitation, an opportunity to opt-out, and a valid physical address in the commercial electronic mail. 15 U.S.C.A. § 7704(a)(5) (West 2004). The law requires warning labels on commercial electronic mail containing sexually oriented material. 15 U.S.C.A. § 7704(d) (West 2004). The law prohibits a person from promoting a trade or business by electronic mail with false or misleading transmission information. 15 U.S.C.A. § 7705 (West 2004).

Since November 1, 2002, Ohio has regulated unsolicited commercial e-mail under Section 2307.64 of the Ohio Revised Code. The Can-Spam Act “supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.” 15 U.S.C.A. §7707(b) (West 2004).

Advertising of legal services by attorneys, including e-mail advertising, is subject to regulation by the Supreme Court of Ohio.

Attorney advertising is commercial speech protected by the First Amendment, but is subject to regulation by the states. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-384 (1977), *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). “In holding that advertising by attorneys may not be subjected to blanket suppression . . . we of course, do not hold that advertising by attorneys may not be regulated in any way.” *Bates*, 433 U.S. at 383.

The Supreme Court of Ohio regulates attorney advertising through DR 2-101 to 2-105 of the Ohio Code of Professional Responsibility. Because the Supreme Court of Ohio adopted the rules prior to e-mail, there is no direct reference to e-mail.

In the absence of a rule specifically listing e-mail do’s and don’ts, attorneys have sought guidance from the Board regarding the application of the rules. The Board’s view is that the advertising rules apply to all forms of public communication by attorneys, including e-mail. From the Board’s opinions, several guidelines are established.

- A lawyer may communicate with established clients through e-mail. See Ohio SupCt, Bd Comm’rs on Grievances & Discipline, Op. 99-2 (1999).
- A lawyer may receive and respond to e-mail legal questions from visitors to the law firm’s Web site. See Ohio SupCt, Bd Comm’rs on Grievances & Discipline, Op. 99-9 (1999).
- A lawyer may communicate by e-mail with other attorneys to express an interest in serving as counsel in a matter. See Ohio SupCt, Bd Comm’rs on Grievances & Discipline, Op. 2002-6 (2002).
- E-mail solicitation of prospective clients known to have a legal need is subject to regulation as direct mail solicitation under DR 2-101(F)(2), DR 2-101(F)(4), and DR 2-101(H)(1). (A lawyer may e-mail an out-of-state corporate party to inquire whether the corporation is represented by counsel, but must comply with direct mail solicitation restrictions as completely as possible within the limits of the e-mail technology.) See

Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 2002-6 (2002).

ABA has adopted a model rule regulating e-mail communications by attorneys.

American Bar Association Model Rule 7.3(c) requires “[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) [a lawyer] or (a)(2) [a person with whom the lawyer has a family, close personal, or prior professional relationship].

Some states have adopted specific rules regulating e-mail advertising of legal services. For example, under Florida rules, an attorney may not send an unsolicited electronic mail communication directly or indirectly to a prospective client unless certain conditions are met, including a requirement that the subject line of the communication states “legal advertisement.” See Florida Bar Rule 4-7.6(c). As another example, under Tennessee rules, e-mail communication to a specifically identified recipient who has not initiated the contact with the lawyer and who has no family or other prior professional relationship must comply with restrictions that include marking “This is an Advertisement” at the beginning and end of the written material. Tennessee SupCt Rule 7.3(c)(1).

Some states have provided guidance through advisory opinions treating unsolicited e-mail from attorneys to prospective clients in a manner similar to direct mail communication. See e.g., Arizona State Bar, Op. 97-04 (1997); Pa Bar Assn, Op. 97-130 (1997); Utah State Bar, Op. 97-10 (1997).

E-mail is a unique form of communication, but like other forms of publicity must comply with the lawyer advertising rules set forth in the Ohio Code of Professional Responsibility.

An e-mail travels to an electronic mail address. Each electronic mail address is unique. When a person receives an e-mail addressed to his or her electronic mail address, the person is a direct target of the sender.

Like other forms of lawyer publicity, a lawyer’s e-mail advertising legal services must conform to the existing advertising rules, DR 2-101 through DR 2-105 of the Ohio Code of Professional Responsibility. It is the Board’s view that the advertising of legal services through unsolicited e-mail constitutes targeted direct mail advertising, subject to the restrictions set forth in DR 2-101(F)(2), DR 2-101(F)(4), and DR 2-101(H)(1). DR 2-101(F)(2) requires that certain conditions must be fulfilled, such as including “Advertisement Only” in the text and on the envelope. DR 2-101(F)(4), requires that prior to sending a solicitation to a defendant in a civil action the attorney verify service

on the defendant. DR 2-101(H)(1) imposes a thirty day waiting period before sending a solicitation to a prospective client or relative of a client involved in an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

It will require effort by attorneys to apply the direct mail restrictions to e-mail communication advertising legal services to prospective clients. As to DR 2-101(F)(2), the Board has already advised: "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." Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 2002-6 (2002). As to DR 2-101(F)(4), a lawyer using a broad database of e-mail addresses may have little way of knowing whether an e-mail address will go to a defendant who has not been served in a civil action. Similarly, as to DR 2-101(H)(1), a lawyer using a broad database of e-mail addresses may have little way of knowing whether an e-mail address will go to a prospective client or relative of a client within a thirty-day period following an accident or disaster that gives rise to a potential claim for personal injury or wrongful death. Nevertheless, an attorney should use due diligence to avoid sending e-mail not in compliance with these rules, as well as all the other rules governing advertising.

In conclusion, the Board advises as follows. Until ethical rules, specifically addressing unsolicited e-mail advertising of legal services, are set forth in the Ohio Code of Professional Responsibility, attorneys are discouraged from, but not barred from, advertising their legal services through unsolicited e-mails to potential clients. If an attorney proceeds with sending unsolicited e-mail advertising of legal services, the existing advertising rules in the Ohio Code of Professional Responsibility (DR 2-101 through DR 1-105) will apply, as will applicable federal and state laws. As to the Ohio Code of Professional Responsibility, the advertising of legal services through unsolicited e-mail constitutes targeted direct mail, subject to the restrictions set forth in DR 2-101(F)(2), DR 2-101(F)(4), DR 2-101(H)(1). The direct mail restrictions imposed under DR 2-101(F)(2) apply regardless of whether or not the e-mail recipient has a specific legal need known to the sender/attorney. Specific requirements of the DR 2-101(F)(2) must be applied with reason. For example, since there is no envelope on which to place the required DR 2-101(F)(2)(e) recital "ADVERTISEMENT ONLY" this language should be placed on the Subject Line of the e-mail as well as in the text of the e-mail. This language should appear in no smaller than the required 10 Point type and in red ink, but if not possible, customary black type will suffice on the e-mail subject line and in the e-mail text for the "ADVERTISEMENT ONLY" recitals. Under DR 2-101(F)(4), if an attorney knows that the prospective client is a defendant in a civil action, the lawyer must first satisfy the requirements of DR 2-101(F)(4) before sending the e-mail. Under DR 2-101(H)(1), if an attorney knows that e-mail is directed to a prospective client or a 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 attorney must satisfy the

requirements of DR 2-101(H)(1) in the e-mail. Attorneys should provide a method for the recipient to opt out of receiving further e-mail. If recipients ask not to receive e-mail, attorneys should not send them any unsolicited e-mail advertising legal services. Unsolicited e-mail advertising of legal services should comply with applicable federal and state law with which attorneys should be knowledgeable.

Question Two

Is it proper for attorneys to participate in lawyer advertising services or lawyer referral services that send unsolicited commercial e-mails to potential clients?

As already stated, attorneys are not prohibited by the Ohio Code of Professional Responsibility from advertising legal services by sending unsolicited e-mails to potential clients. Further, there is no ban in the Ohio Code of Professional Responsibility on attorneys participating in lawyer advertising services or lawyer referral services that send unsolicited commercial e-mail to potential clients.

Thus, the Board advises as follows. Attorneys may participate in lawyer advertising services or lawyer referral services that send unsolicited commercial e-mails advertising legal services to potential clients, but are discouraged from doing so until ethical rules specifically addressing unsolicited e-mail advertising of legal services are set forth in the Ohio Code of Professional Responsibility. In the meantime, if an attorney participates in a lawyer advertising service that sends unsolicited commercial e-mail, the attorney should review the e-mail advertising to determine compliance with existing advertising rules and applicable law. If a lawyer participates in a lawyer referral service, the lawyer should review whether the referral service conforms to DR 2-103(C) of the Ohio Code of Professional Responsibility and to the Regulations of the Lawyer Referral and Information Services Committee of the Supreme Court of Ohio. In the absence of a rule or regulation that exempts lawyer referral services from compliance with lawyer advertising rules, the Board suggests that e-mail advertisements of lawyer referral services should conform to the lawyer advertising rules set forth in the Ohio Code of Professional Responsibility.

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.