

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 90-2

Issued February 23, 1990

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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 2-101, eff. Jan. 1, 1993 and Aug. 16, 1993; DR 2-103, eff. Jul. 1, 1996.]

SYLLABUS: The solicitation of clients for pecuniary gain is prohibited when the method used presents a significant danger of overreaching, undue influence or the invasion of privacy. Telemarketing involves telephone contacts directed to certain exchanges whereby all phone numbers in that area are called to determine whether the advertised services are needed. In our view, telemarketing legal services creates the potential for overreaching and is an invasion of privacy. In addition, telemarketing places undue pressure on the potential client for an immediate answer. Therefore, we advise lawyers not to engage in a telemarketing program to solicit new clients.

OPINION: We have before us your request, for an advisory opinion on whether it is ethical for a lawyer to participate in a telemarketing program. The program uses phone contacts to selected telephone exchange areas to determine whether the lawyer's services are needed. The initial phone call can be made by either a computer generated voice or, a person employed by the telemarketing firm; both would follow a pre-determined script.

If the recipient is interested in a free initial consultation, she gives her name, phone number and a brief description of the problem. The telemarketing firm recontacts the interested person for further screening using criteria supplied by the lawyer involved. The lawyer then contacts those persons who meet the criteria to schedule a free initial consultation. The fee for the telemarketing is a fixed monthly rate.

Your particular questions are as follows:

1. Is telemarketing as a form of advertising, under any format, permissible under the Code of Professional Responsibility?

2. At what point, if any, does the telemarketing firm's screening process constitute the unauthorized practice of law?
3. How should the telemarketing firm be paid for its services?

Disciplinary Rule 2-101 relates to lawyers advertising; it provides for radio, television, and print advertising but does not mention telephone advertising. A lawyer is not permitted to compensate a person or organization to recommend or secure his or her employment by a client. Code of Professional Responsibility DR 2-103(B) (exceptions not applicable). This rule does not prohibit a lawyer from accepting employment received in response to his or her own advertising, provided such advertising is in compliance with DR 2-101. Code of Professional Responsibility, DR 2-103 (E).

Although not adopted in Ohio, ABA Model Rule 7.3 states;

- (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
- (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a) if: (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment.

Autodialed recorded communications via the telephone are permitted under the ABA model rules. Model Rule 7.3 Comment.

Your first question asks whether telemarketing, as advertising, is permitted under the Code of Professional Responsibility. Telemarketing in our opinion is a form of solicitation undertaken for pecuniary gain.

There are varying degrees of solicitation by lawyers. In-person solicitation is prohibited because of the dangers of overreaching, fraud and undue pressure. Ohralik v. Ohio State Bar Assn, 436 U.S. 447 (1978). (uninvited lawyer visited accident victim in hospital armed with an employment contract). The Court in Ohralik was also concerned with the invasion of the prospective client's privacy and the difficulty of monitoring the lawyer's representations made in the face-to-face contact.

Solicitation of prospective clients not for pecuniary gain and based upon the lawyer's ideological concerns where the dangers of overreaching and coercion are not present has been held to be constitutionally protected. In re Primus, 436 U.S. 412 (1978) (ACLU lawyer solicited client through the mail to offer free legal services).

More recently, the U.S. Supreme Court held that a state may not prohibit a lawyer from sending out targeted direct mail solicitation to persons known to need legal services. Shapero v. Kentucky Bar Assn, 486 U.S. 466 (1988). The Shapero Court maintained the ban on in-person solicitation because of the potential for abuse and the difficulty in regulating in-person solicitation. Targeted direct mail solicitation provides a written record of the communication that can be checked for potential abuse. A face-to-face conversation between a lawyer and a potential client cannot be scrutinized by other lawyers or the general public.

Improper solicitation has been defined by a Michigan court as "a situation where the solicitor's position or relation to a prospective client is such that his request may force the recipient into acquiescing to the plea." Woll v. Kelley, 116 Mich.App. 791, 323 N.W.2d 560, 566 (1982). Under this definition a phone call could be construed as improper solicitation because "there may be pressure to accept the offer immediately, thus depriving an individual of an opportunity to reflect and make a reasoned decision." *Id.* at 566.

As with in-person solicitation, telephone solicitation cannot be effectively monitored in order to prevent any overreaching or misrepresentations. Although telephone solicitation may be less intrusive than in-person solicitation, we believe it creates a sense of urgency and is an invasion of privacy.

In an earlier opinion this Board found that a lawyer could permissibly advertise through an agency which ran commercials for an injury helpline. Board of Commissioners Op. 89-30 (1989). Potential clients who called the toll free number televised were put in touch with a lawyer who bought exclusive rights to receive all calls from that geographic area. Unlike the facts in this request, the client in opinion 89-30 makes the initial call in response to a television advertisement. Moreover, the necessity for an immediate answer is not required with a television advertisement.

In a 1988 opinion, the Board stated that lawyers are permitted to advertise in the Talking Yellow Pages (TYP). Again, after making the initial call, the potential client gets a lawyer's name by random selection from the TYP operator.

Because of the answer to your first question, it is unnecessary to answer questions two and three.

In conclusion, it is our opinion and you are so advised that telemarketing is an intrusive form of solicitation. Telemarketing by a lawyer, or someone on behalf of a lawyer, creates the potential for overreaching and is an invasion of privacy which places undue pressure on the potential client for an immediate answer. Therefore, we recommend that lawyers do not participate in telemarketing.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.