

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 90-11**

Issued June 15, 1990

***Withdrawn by Adv. Op. 2023-02***

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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:** A legal services attorney may make an in-person offer to represent an indigent defendant who has appeared in court without representation. Canon 2 of the Code of Professional Responsibility prohibits in-person solicitation which is overreaching and for the lawyer's own pecuniary self-interest.

**OPINION:** We have before us your request for an informal advisory opinion regarding the right of a legal services attorney to make an in-person offer to represent an indigent defendant who has appeared in court without representation. The offer to represent would not be for the legal aid lawyer's pecuniary gain.

The hypothetical situation you present has the legal services attorney sitting in court waiting for her client's case to be called. During the wait, an unrepresented welfare recipient attempts to defend himself in an eviction case. The court refuses to consider procedural irregularities in the filing of the action and grants the eviction. The legal aid attorney believes the court has ruled improperly. The legal aid attorney hands the unrepresented defendant her card indicating she would be willing to discuss the eviction case and that he should call the legal aid office if interested. The attorney then returns to the courtroom to represent her client.

Disciplinary Rule 2-103 (A) prohibits a lawyer from recommending herself as a private practitioner to a non-lawyer who has not sought her advice regarding employment of a lawyer. However, the Code of Professional Responsibility does not prohibit a lawyer from communicating with persons whose legal rights may be in jeopardy when the lawyer is not thereby intending to gain paying clients. Prohibited solicitation would occur if the lawyer recommends employment of herself as a private practitioner. Code of Professional Responsibility DR 2-103(A). The Code does not prohibit a lawyer from giving unsolicited legal advice, even when such advice is given in person, unless the lawyer accepts employment resulting from the advice. In our view, this "accepting employment" prohibition applies to private practitioners where pecuniary gain is involved.

The Code does encourage a lawyer to assist laymen in this regard:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. [T]he advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Code of Professional Responsibility, EC 2-1, 2-3.

The activity set forth in the hypothetical is permitted under DR 2-104(A) (3). In our view, the Code of Professional Responsibility places legal services lawyers on different ethical grounds. Legal services lawyers are encouraged to see that the poor are adequately represented. As early as 1935, the ABA held that the broadcast of an offer to represent indigent persons in asserting their constitutional rights was not improper. ABA Committee on Ethics and Professional Responsibility Formal Op. 148 (1935). In that opinion a legal aid lawyer was soliciting indigent clients known to need specific legal services through the use of direct mail advertising.

We agree with the ABA that it is important to avoid imposing any unreasonable or unjustified restraints on legal services offices for the benefit of the indigent, and that we should work to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services. ABA Committee on Ethics and Professional Responsibility Formal Op. 334 (1974).

The U.S. Supreme Court spelled out the purpose of the anti-solicitation rule in the case of Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978):

[The rule] serve[s] to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest. Id. at 461.

The Court, however, has created exceptions to the anti-solicitation rule. In the case of In re Primus, 436 U.S. 412 (1978), the Court cited prior case law holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right with the protection of the First Amendment." The Court reasoned that the broader First Amendment protection was warranted in Primus because the evils were less plausibly involved and because of the non-pecuniary and ideological nature of the lawyer's reason for soliciting. The motivation in Ohralik was pecuniary. In Primus, the attorney's motivation was not for pecuniary gain or to create litigation. The motivation was to assist indigents in locating and selecting a competent lawyer.

Similarly, the ABA stated, in referring to NAACP v. Button, 371 U.S. 415 (1963), "the old regulations against fomenting litigation, solicitation and intervention of intermediaries were directed toward the malicious intent of those seeking 'private gain, serving no public interest,' or seeking to use the legal machinery to oppress. These underlying policies must be kept in mind when interpreting and applying the Disciplinary Rules of Canon 2." ABA Committee on Ethics and Professional Responsibility, Informal Op. 1339 (1975).

The Code and ethical considerations mandate that legal services programs exist, that they be supported by the bench and bar, and that they provide legal services to those that cannot afford them. See, EC 8-3, EC 2-15, EC 2-24, EC 2-32. For example, EC 2-24 states in part:

The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

In an earlier opinion we stated that a legal aid lawyer may solicit indigent clients known to need specific legal services through the use of direct mail advertising. Board of Commissioners Op. 88-03 (1988). One state bar association has stated that a lawyer may make an in-person offer to represent a genuinely indigent defendant on a pro bono basis. Alaska Bar Association Op. 81-1 (1981).

In conclusion, it is the Board's opinion and you are so advised that a legal services lawyer may ethically make an in-person offer to represent an indigent defendant who has appeared in court without representation. This advisory opinion is an extension of our earlier Informal Op. 88-3 and is limited to the legal aid attorney who receives no fee or remuneration for the representation.

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