



# Ohio Board of Professional Conduct

## **OPINION 2017-03**

Issued April 7, 2017

(Update and Withdrawal of Former Opinion 2004-1)

### **Solicitation of Professional Employment Via Email**

**SYLLABUS:** A lawyer may use email to solicit professional employment, subject to the restrictions contained in the Rules of Professional Conduct concerning lawyer communications and solicitation.

A lawyer may allow a lawyer referral service or a lawyer advertising service to transmit a solicitation email on the lawyer's behalf. However, the lawyer remains responsible for the content of the email and must ensure that the communication complies with the Rules of Professional Conduct.

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# Ohio Board of Professional Conduct

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**QUESTIONS PRESENTED:** 1) Whether it is proper for a lawyer to advertise legal services by sending unsolicited emails to persons. 2) Whether a lawyer can participate in a lawyer referral service or lawyer advertising service that sends unsolicited emails to persons.<sup>1</sup>

**APPLICABLE RULES:** Prof.Cond.R. 5.3, 7.1, 7.2, and 7.3

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<sup>1</sup> This opinion analyzes the substantially same question addressed by former Adv. Op. 2004-1, but does so under the Ohio Rules of Professional Conduct.

**OPINION:**Question One

Prof.Cond.R. 7.3 governs a lawyer's direct contact with persons when soliciting professional employment. A "solicitation" is a type of advertising communication initiated by a lawyer that is directed to a specific person and includes an offer to provide legal services. Prof.Cond.R. 7.3, cmt. [1]. Prof.Cond.R. 7.3 prohibits in-person, live telephone, or real-time electronic solicitation of clients unless the person contacted is a lawyer, family, close personal friend, or has a prior professional relationship with the lawyer. One rationale for the rule is to prevent undue influence, intimidation, and over-reaching by the soliciting lawyer. Prof.Cond.R. 7.3, cmt. [2].

Less direct forms of solicitation including written, recorded, or electronic communications are permissible under the Rules of Professional Conduct. An email is a form of a written communication for purposes of Prof.Cond.R. 7.2 as the term "written" is defined as "a tangible or electronic record of a communication or representation, including \* \* \* electronic communications." Prof.Cond.R. 1.0(p). Terminology. Solicitation by email is expressly permitted because it does not involve the type of real-time contact prohibited by Prof.Cond.R. 7.3(b) (a communication can be mailed or transmitted by email or other electronic means that do not involve real-time contact \* \* \*.) Prof.Cond.R. 7.3(b), cmt. [3].

While an email solicitation is permissible under the Rules of Professional Conduct, additional ethical and legal concerns must be addressed when a lawyer chooses to utilize the method to advertise the availability of legal services.

Most importantly, all communications concerning a lawyer or a lawyer's services, regardless of form, must comply with the requirements of Prof.Cond.R. 7.1:

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or

omits a fact necessary to make the statement considered as a whole not materially misleading.

Because email solicitation is treated similarly to other forms of written communication permitted by Prof.Cond.R. 7.1-7.3, the content of the email soliciting professional employment must not be false, misleading, or nonverifiable. Comments [3], [4], and [5] to Prof.Cond.R. 7.1 provide examples of the types of communications that may conflict with the rule.

In addition, Prof.Cond.R. 7.3(b) provides that solicitation in any form is not permitted if 1) the person being solicited has made it known they do not desire to be contacted; or 2) the solicitation involves coercion, duress, or harassment, or the lawyer knows or reasonably should know that the person is a minor, incompetent, or cannot exercise reasonable judgment in employing a lawyer. If after sending an email the lawyer receives no response, further email communication with the same recipient may implicate Prof.Cond.R. 7.3(b). Prof.Cond.R. 7.3(b), cmt. [6].

Lastly, Prof.Cond.R. 7.3(c) requires “[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter” to comply with three conditions: 1) disclose accurately and fully the manner in which the lawyer became aware of the identity and specific legal need of the addressee; 2) refrain from expressing any predetermined evaluation of the merits of the addressee’s case; and 3) conspicuously include the recital “ADVERTISING MATERIAL” or “ADVERTISEMENT ONLY” at the beginning and ending of any electronic communication. The inclusion of the “ADVERTISING MATERIAL” or “ADVERTISEMENT ONLY” recital in the subject line of the email satisfies the requirement to include the recital at the beginning of the communication. Additional restrictions concerning the verification that a defendant in a civil action has been served, and the inclusion of the “Understanding Your Rights” statement thirty days after an accident or disaster that gives rise to a claim must also be observed. Prof.Cond.R. 7.3(d), (e). The “Understanding Your Rights” statement must be included in the body of the email solicitation, and not referenced by an attachment or hyperlink. *See* Adv. Op. 2013-2.

*Additional legal considerations for e-mail solicitation*

Under Prof.Cond.R. 7.3, communications may be mailed or transmitted by email or other electronic means that do not violate other laws governing solicitations. Prof.Cond.R. 7.3, cmt. [3]. In 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”) was enacted by the United States Congress to regulate the commercial use of email. The law covers all commercial messages, which the law defines as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” Lawyers should be mindful that Ohio also regulates commercial email under R.C. 2307.64.

Question Two

A lawyer may permit a lawyer referral service or lawyer advertising service to transmit a solicitation e-mail on the lawyer’s behalf. However, Prof.Cond.R. 5.3 holds the lawyer responsible for the conduct of persons employed by, retained by, or associated with the lawyer that violates Rules of Professional Conduct when the lawyer has ordered or otherwise ratified the conduct. Consequently, the lawyer using a service is responsible for ensuring the service’s compliance with the Rules of Professional Conduct applicable to lawyer communications and solicitation. A lawyer participating in a service transmitting an email solicitation on the lawyer’s behalf should review the content of the email to ensure its compatibility with the lawyer’s professional obligations.

**CONCLUSION:** An email is a permissible form of advertisement for lawyers when used to solicit professional employment. However, when using email as a solicitation method, a lawyer must comply with restrictions concerning the communication of a lawyer’s services and solicitation contained in Prof.Cond.R. 7.1-7.3. Solicitation by email is permissible if the method otherwise complies with other laws concerning the use of email for commercial purposes. Lawyers participating in lawyer referral services or advertising services that use email as a solicitation method, must insure that the email communications conform to the Rules of Professional Conduct.