

Soliciting Potential Clients By T

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The evolution of technology has changed the way attorneys do business, yet the waters have been muddied by debates over proper and ethical uses of that technology in carrying out their responsibilities. A recent opinion from the Ohio Supreme Court Board of Grievances and Discipline has offered some clarity on the use of technology, specifically as it relates to the solicitation of clients. In August 2012, an attorney's teenage daughter was a passenger in a car that hit another from behind. Less than 24 hours later, the teenager received a text message solicitation from a local attorney suggesting she may need his services. Incensed by what was perceived as an improper communication, her parent sought guidance from the Board. Recognizing that perhaps the Ohio Professional Conduct Rules lagged behind technology, the Board asked for a formal request for an advisory opinion on the issue: May Ohio lawyers use text messages to solicit professional employment from prospective clients? On April 5, 2013, the Board issued Advisory Opinion 2013-2 entitled, "Direct Contact with Prospective Clients: Text Messages."

The short answer is, yes. Lawyers may advertise their services through SMS text messages, that are written and/or electronic communication for purposes of Prof.Cond. R. 7.2(a). The message must comply with Prof.Cond.R. 7.1 and 7.3. The text must not contain a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. Prof.Cond.R. 7.3 imposes five additional requirements that apply to text message advertising by lawyers:

The text message cannot create a "real-time" interaction similar to an internet chat room;

The text message may not involve coercion, duress, or harassment, and the lawyer must abide by a person's request not to receive solicitations;

If the lawyer has a reasonable belief that the prospective client is in need of legal services in a

participate matter, the text message must state how the lawyer learned of the need for legal services, include the language "ADVERTISING MATERIAL" OR "ADVERTISEMENT ONLY" at both the beginning and ending of the message, and cannot offer a case evaluation or prediction of the outcome;

If the prospective client is a defendant in a civil case, the lawyer shall verify that the person has been served; and

Text message solicitations sent within 30 days of an accident or disaster must include, in the body of the text message, the entire "Understanding Your Rights" statement contained in Prof.Cond.R. 7.3(e).

Text Messages are Not "Real-Time" Typically

The Board found that a text message solicitation of a prospective client is not an in-person communication, and although it may be initiated with a cellular phone, would not ordinarily be consider a "live telephone" conversation. The Board's view is that a standard text message is more akin to an email than a chat room communication. Accordingly, a typical text message is not a "real-time" electronic contact. However, lawyers must ensure that the technology used to solicit clients using text messages does not generate a real-time or live conversation. In addition, because most text messages are received on cellular phones, which are often carried on one's person, lawyers should be sensitive to the fact that a text message may be perceived as more invasive than an email.

"Understanding Your Rights" Statement

The Board expressed concern that due to the limited number of characters available in a standard text message (typically 160 characters), including the entire "Understanding Your Rights" statement may cause the message to be split into multiple messages; or worse, fail to transmit in its entirety. The Board found that including an internet link in the message

Text Message Is Not A “LOL” Matter

to the statement was not sufficient. Likewise, including a photographic attachment of the statement fails to satisfy Rule 7.3(e). As with any solicitation sent within thirty days of an accident or disaster, it is the lawyer’s duty to ensure communication of the full statement – not just hit “send” and hope for the best.

Three Things to Consider Before Soliciting a Potential Client By Text Message

The Board identified three practical considerations for a lawyer who chooses to directly solicit prospective clients using text message. First, the text message should not create a cost to the prospective client. Because not every service plan includes free or unlimited text messaging, and significant cost may be incurred if the recipient is traveling internationally when the text is received, unless the lawyer can verify that a text message solicitation will not result in a cost to the prospective client, the lawyer should use “Free to End User” or similar technology by which the initiator of the message is responsible for the cost of both delivery and receipt. In other words, one should not pay for the privilege of receiving the solicitation.

Second, the lawyer should consider the age of the recipient of the text message. Lawyers who obtain phone numbers from police or accident reports should attempt to verify that the numbers do not belong to minors before sending a text message solicitation. Although Prof.Cond.R. 7.3 does not explicitly prohibit the direct solicitation of minors, the Board discourages it. The Rules Committee has been asked to consider proposing an amendment to the Rules of Professional Conduct that would address direct contact with prospective clients who are minors.

Third, before a lawyer solicits a prospective client using text message, the lawyer should carefully scrutinize the message and delivery mechanism to ensure compliance with all applicable federal and state laws, rules, and regulations pertaining to telemarketing laws. This may include consumer protection rules prohibiting the number of text messages sent by an autodialer to a cellular phone, the federal CAN-SPAM Act, and the requirements to abide by the federal “Do Not Call” provisions.

Back to the Future

Based on Advisory Opinion 2013-2, the lawyer who solicited the teenager failed miserably in his ethical obligations. While the message contained a statement that it was a solicitation, and identified the lawyer sending the

message, the entire “Statement of Your Rights” was not transmitted. And, remember – the text message was sent within 24 hours of the accident. Despite the fact that teen’s age was listed in the box right next to the telephone number, the solicitation was sent to a minor without even seeking the opportunity to communicate with a parent or guardian. The lawyer did not know whether or not the text would result in a cost to the recipient. But, in all fairness, he may have used “Free to End User” or similar technology. The number where the solicitation text was sent is listed on the federal “Do Not Call List.”

The Board opined that while text messaging may be a novel approach to client solicitation, their ethical review was actually a straightforward application of the Rules of Professional Conduct. Here’s hoping that most lawyers are making better application of the Rules than the one encountered by the attorney’s teenage daughter.



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