

# The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

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## OPINION 2013-2

Issued April 5, 2013

### Direct Contact with Prospective Clients: Text Messages

**SYLLABUS:** Prof.Cond.R. 7.2 allows lawyers to use text messages to solicit professional employment from prospective clients. However, text message solicitations must also comply with Prof.Cond.R. 7.1 and 7.3 and all applicable federal and state laws, rules, and regulations.

**QUESTION PRESENTED:** May Ohio lawyers use text messages to solicit professional employment from prospective clients?

**APPLICABLE RULES:** Rules 7.1, 7.2, and 7.3 of the Ohio Rules of Professional Conduct

### OPINION:

*Text Message Advertising is Generally Permissible under Prof.Cond.R. 7.2(a)*

The Board has been asked to determine whether the Rules of Professional Conduct permit Ohio lawyers to advertise their services directly to prospective clients via text message. The technical term for “text messaging” is Short Message Service (SMS). Masur & Maher, *Mobile Phone Text Message Spam: Building a Vibrant Market for Mobile Advertising While Keeping Customers Happy*, 7 Va. Sports & Ent. L.J. 41, 44 (2007). “SMS text messaging systems allow users to write and send messages using the keypads or keyboards on their cell phones. Users can also send SMS text messages to and from email addresses or instant messaging applications directly to the recipient’s mobile phone. However, the ability to send and receive SMS text messages is not always included in typical monthly cell phone plans. Many consumers pay additional monthly fees for text message allowances while other consumers are charged...for each SMS text

message that they send or receive.” *Id.* at 43-44. While SMS text messages are similar to e-mail messages in that both are electronic exchanges of text, SMS text messages are typically limited to 160 characters. *Id.* at 44. If a SMS text message is longer than 160 characters, some devices separate the message into multiple messages.

Text message technology is rapidly changing, and some companies provide “enhanced” messaging services that support messages more than 160 characters on certain devices. Also, Smartphone users can access internet text messaging applications (“apps”) that are free and have greater character and image capacity.<sup>1</sup>

In the usual scenario reported to the Board, lawyers obtain the cellular phone numbers of prospective clients from accident or police reports. The lawyer then sends SMS text messages (hereinafter “text messages”) directly to the cellular phone numbers indicated in the reports. The messages contain direct solicitations for professional employment. Given the limited number of characters usually available in a standard text message, the message contains very general information about the lawyer and his or her legal services. Often the message will contain an internet link to a website that contains additional advertising material.

Prof.Cond.R. 7.2(a) governs lawyer advertising and allows a broad range of marketing techniques within the constraints of the rules on general communication and direct contact with prospective clients. Prof.Cond.R. 7.2(a) states as follows:

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

“Electronic communication” is not defined in the Rules of Professional Conduct (Rules), but is generally understood to include text messages. *See, e.g.*, R.C. 4506.01(KK) and 4511.204(F). A text message could also be a “written

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<sup>1</sup> Brian X. Chen, *Apps Redirect Text Messages, and Profits, from Cellular Providers* (Dec. 4, 2012), <http://www.nytimes.com/2012/12/05/technology/free-messaging-apps-siphon-profits-from-cellular-providers.html> (accessed Jan. 29, 2013).

communication” for purposes of Prof.Cond.R. 7.2 as “ ‘written’ ” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail.” Prof.Cond.R. 1.0(p). The comments to Prof.Cond.R. 7.2 fail to reference text messages, but demonstrate that the Rules were drafted to take into account new or non-conventional advertising methods. For example, Comment [1] states that “[t]he interest in expanding public information about legal services ought to prevail over considerations of tradition.” Comment [3] further states that “electronic media, such as the internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by [Prof.Cond.R. 7.2].” Because text messages may be considered both an “electronic communication” and a “written communication” under the Rules of Professional Conduct, a plain reading of Prof.Cond.R. 7.2(a) indicates that lawyers may use text messages to advertise their services. This conclusion is consistent with the forward-thinking commentary to Prof.Cond.R. 7.2.

*Text Message Advertising Must Otherwise Comply with Prof.Cond.R. 7.1-7.3*

Although the Board finds that Prof.Cond.R. 7.2 allows text message advertising, further ethical guidance is required. As stated in Prof.Cond.R. 7.2(a), all lawyer advertising must comply with Prof.Cond.R. 7.1 and 7.3. There are also additional restrictions contained in Prof.Cond.R. 7.2 that apply to lawyer advertising. We will now separately examine these rules in the context of text message advertising by lawyers. Text messaging may be a novel approach to client solicitation, but our ethical review is actually a straightforward application of the Rules of Professional Conduct.

*a. False, Misleading, or Nonverifiable Communications*

Prof.Cond.R. 7.1 contains the general standard governing communications about a lawyer’s services, and states as follows:

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.

Prof.Cond.R. 7.1, Comment [1], verifies that lawyer advertising is a “communication” under Prof.Cond.R. 7.1 and therefore subject to the prohibition against false, misleading, and nonverifiable statements. Examples of statements that may violate Prof.Cond.R. 7.1 are found in Comments [3], [4], and [5], and include certain descriptions of past case results, unsubstantiated comparisons with other lawyers, characterization of fees as “cut-rate,” “lowest,” “giveaway,” “below cost,” “discount,” or “special,” and statements concerning the ability to improperly influence a government entity or official. Because text message advertising of a lawyer’s services must comply with Prof.Cond.R. 7.1, and is a “communication” under that rule, such advertising cannot be false, misleading, or contain nonverifiable information.

*b. Real-Time Electronic Contact*

Prof.Cond.R. 7.2 also makes a lawyer’s text message advertising subject to Prof.Cond.R. 7.3, which restricts direct contact with prospective clients and contains more detailed requirements than the general “false / misleading / nonverifiable” standard contained in Prof.Cond.R. 7.1. Several of these restrictions must be addressed in the context of text message advertising. First, Prof.Cond.R. 7.3(a) prohibits live solicitation of prospective clients in most situations:

- (a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless either of the following applies:
- (1) the person contacted is a lawyer;
  - (2) the person contacted has a family, close personal, or other professional relationship with the lawyer.

The rationale for the prohibition against live solicitation is found in the comments to Prof.Cond.R. 7.3, which state there is a “potential for abuse” when a layperson is subject to the “private importuning of the trained advocate in a

direct interpersonal encounter.” Prof.Cond.R. 7.3, Comment [1]. Also, “the prospective client...may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately.” *Id.* 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 considered a “live telephone” conversation. As we already determined that text messages are “electronic” communications for purposes of Prof.Cond.R. 7.2, to comply with Prof.Cond.R. 7.3(a), a text message solicitation of a prospective client cannot take place in “real-time.”

Like Prof.Cond.R. 7.3(a), the American Bar Association’s (ABA) Model Rule 7.3(a) also prohibits the solicitation of prospective clients by “real-time” electronic contact. The ABA has interpreted real-time electronic contact to include internet chat room communications. Bennett, Cohen & Whittaker, *Annotated Model Rules of Professional Conduct*, 553-554 (7<sup>th</sup> Ed. 2011). Chat rooms facilitate “live” text or voice conversations among multiple persons connected to the internet. The Board agrees that Prof.Cond.R. 7.3(a) prohibits lawyers from soliciting prospective clients via internet chat rooms as these are real-time electronic contacts. However, as stated in Prof.Cond.R. 7.2, Comment [3], lawyers are permitted to advertise by email. 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. Lawyers may likewise solicit clients using text messages so long as the technology used to implement the text message does not generate a real-time or live conversation.<sup>2</sup>

*c. Coercion, Duress, or Harassment*

The next rule for lawyers to consider is Prof.Cond.R. 7.3(b), which states that lawyer solicitations are impermissible if the prospective client has requested that the lawyer not solicit them or the solicitation “involves coercion, duress, or harassment.” Lawyers must honor the requests of prospective clients not to be solicited by text message or otherwise, and should refrain from additional

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<sup>2</sup> “Voice texting” apps, for example, can be used to create real-time conversations that combine voice and text. See David Pogue, *Smartphone? Presto! 2-Way Radio* (Sept. 5, 2012), <http://www.nytimes.com/2012/09/06/technology/personaltech/zello-heytell-and-voxer-make-your-smartphone-a-walkie-talkie-david-pogue.html> (accessed Jan. 17, 2013).

solicitations if the prospective client does not respond. *See* Prof.Cond.R. 7.3, Comment [5]. 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.

*d. Persons in Need of Legal Services in a Particular Matter*

If a lawyer has a reasonable belief that a person is in need of legal services in a particular matter, Prof.Cond.R. 7.3(c) requires all written, recorded, or electronic solicitations to state how the lawyer became aware of the person and their legal needs, refrain from predetermined evaluations of the matter, and "conspicuously" include the words "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY" in the text, on the outside envelope, if any, and at the beginning and end of any "recorded or electronic communication." Unless a text message solicitation is sent to another lawyer, family member, or person with a close personal or prior professional relationship with the lawyer, the text message must comply with Prof.Cond.R. 7.3(c). Tracking the rule language, the text message must notify the recipient of the means by which the lawyer learned of the potential need for legal services, for example, from accident reports or a court docket, and include "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY" at both the beginning and ending of the message. These descriptors must be conspicuous and in capital letters as designated in the rule. The text message also cannot include an evaluation of the case or a prediction of the outcome.

The lawyer has an additional obligation if the prospective client to be solicited by text message is a defendant in a civil action. If so, Prof.Cond.R. 7.3(d) requires the lawyer to "verify that the [person] has been served with notice of the action...by consulting the court docket" before sending a text message solicitation. This requirement does not apply if the prospective client is a potential or actual bankruptcy debtor.

*e. Solicitation Within Thirty Days of Accident or Disaster*

The final content-based requirement of Prof.Cond.R. 7.3 is stated in division (e), which applies to lawyer solicitations sent to prospective clients or relatives of prospective clients within "thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death." Prof.Cond.R. 7.3(e) mandates that the text of the "Understanding Your Rights"

statement contained in the rule be “included with the communication.” The “Understanding Your Rights” statement incorporates the following language: **“THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.”** (Emphasis in Prof.Cond.R. 7.3(e).)

Due to the limited number of characters available in a standard text message, including the entire “Understanding Your Rights” statement may cause the message to be split into multiple messages or fail to transmit in its entirety. Likely for this reason, some Ohio lawyers have included an internet link in their text message solicitations that allows the prospective client to view the “Understanding Your Rights” statement on the lawyer’s website. In the Board’s view, simply providing an internet link to the “Understanding Your Rights” statement does not comply with Prof.Cond.R. 7.3(e). Similarly, the Board believes that attachments or photographs containing the statement fail to satisfy Prof.Cond.R. 7.3(e). The rule requires that the statement be “included with the communication” and the Supreme Court’s announcement at the end of the statement similarly indicates that the solicitation “must include” the statement. Comment [7A] also addresses the “Understanding Your Rights” statement, which “must be communicated to the prospective client or a relative of a prospective client.” Given the language “included with the communication,” “must include,” and “must be communicated to,” that the Supreme Court employed in Prof.Cond.R. 7.3(e) and Comment [7A], the Board concludes that the “Understanding Your Rights” statement must appear in the body of the lawyer’s communication, and not as an internet link, attachment, photograph, or other item requiring additional action to access the statement. Although this may create multiple messages, it ensures that all recipients, regardless of the features on their cellular phones or service plans, have immediate access to the information. As with any solicitation sent to prospective clients within thirty days of an accident or disaster, the lawyer has the duty to ensure that the “Understanding Your Rights” statement is communicated to the text message recipient. Prof.Cond.R. 7.3, Comment [7A].

*f. Identity of Lawyer or Law Firm Responsible for Content*

Prof.Cond.R. 7.2, the general rule on lawyer advertising, contains two additional requirements that apply to text message solicitation of prospective clients. Prof.Cond.R. 7.2(c) states that “any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.” Because text message advertising is a written or electronic communication made pursuant to Prof.Cond.R. 7.2, the text message must include the name and office address of the lawyer or law firm responsible for the message.

Also, Prof.Cond.R. 7.2(d) states that “[a] lawyer shall not seek employment in connection with a matter in which the lawyer or law firm does not intend to participate actively in the representation, but that the lawyer or law firm intends to refer to other counsel.” As is the case with traditional prospective client solicitations, a lawyer may not seek employment via text message if the lawyer does not plan to participate in the representation.

*Additional Considerations for Lawyers Employing Text Message Advertising*

The Board has identified three practical considerations for a lawyer who chooses to directly solicit prospective clients using text messages. First, the text message should not create a cost to the prospective client. Not every cellular phone service plan includes free or unlimited text messaging, and significant costs may be incurred if the recipient is traveling internationally when the text is received. If the lawyer is unable to verify that a text message solicitation will not result in a cost to the prospective client, he or she should employ “Free to End User” or similar technology, by which the initiator of the text message is responsible for the cost of both delivery and receipt.

Second, the lawyer should be mindful of the age of the recipient of the text message. Minors are in possession of cellular phones in increasing numbers, and accident and police reports may contain cellular phone numbers that belong to minors. Such reports usually include dates of birth, and lawyers who obtain cellular phone numbers from such 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 as in some states, the Board discourages the solicitation of minors via text message.<sup>3</sup>

Finally, lawyers must use due diligence to ensure that any text message advertisement or solicitation complies with the applicable federal and state telemarketing laws. The Telephone Consumer Protection Act (TCPA) and the accompanying rules adopted by the Federal Communications Commission (FCC) prohibit a number of types of text messages sent by an autodialer to a cellular phone. *See* 47 U.S.C. 227; 47 C.F.R. 64.1200. Under new FCC regulations effective in 2012 and 2013, “prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers” is required and “all prerecorded telemarketing calls [must] allow consumers to opt out of future prerecorded telemarketing calls using an interactive, automated opt-out mechanism.” 77 Fed. Reg. 112. Text messages are considered “calls” for purposes of the FCC rules. *See* 68 Fed. Reg. 143, ¶ 116; *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9<sup>th</sup> Cir. 2009). A lawyer’s text message solicitation must also comply with the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) and the accompanying rules adopted by the Federal Trade Commission (FTC). *See* 15 U.S.C. 7701-7713; 16 C.F.R. 316.1-316.6. The CAN-SPAM Act addresses unwanted email messages sent to cellular phones, which may appear as text messages. Further, lawyers are required to abide by federal “Do Not Call” provisions. *See* Prof.Cond.R. 7.3, Comment [2]; 15 U.S.C. 6151; 16 C.F.R. 310.4. Applicable state laws include R.C. 109.87, which authorizes the Ohio Attorney General to enforce the TCPA, and R.C. 2307.64, which regulates email advertisements. Before a lawyer engages in direct client solicitation by text message, the Board advises that the lawyer carefully scrutinize the message and delivery mechanism for compliance with all applicable federal and state laws, rules, and regulations.

**CONCLUSION:** Lawyers may advertise their services through SMS text messages, which are written and/or electronic communications for purposes of Prof.Cond.R. 7.2(a). All lawyer advertising, including text message advertising, must comply with Prof.Cond.R. 7.1 and 7.3. Under Prof.Cond.R. 7.1, the text message may 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:

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<sup>3</sup> For references to state rules that regulate lawyers’ direct solicitations of professional employment to minors, *see* Smolla, 1 Law of Lawyer Advertising 7:9 (Oct. 2012).

- 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 particular 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 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).

In addition, under Prof.Cond.R. 7.2(c) and (d), the text message must include the name and address of the responsible lawyer or law firm and the lawyer may not solicit prospective clients if the lawyer does not intend to actively participate in the representation. The Board further recommends that lawyers employ “Free to End User” or other technology to avoid creating a cost to the text message recipient and attempt to verify that the text message recipient is not a minor. Finally, the Board advises lawyers to confirm that their text message advertising complies with all applicable federal and state laws, rules, and regulations, including the TCPA, CAN-SPAM Act, and Do Not Call Registry.

**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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.**