



# Ohio Board of Professional Conduct

## OPINION 2023-02

Issued February 3, 2023

Withdraws Adv. Ops. 1990-11 and 1988-3

### **Solicitation of Clients by Nonprofit Legal Aid Lawyers**

**SYLLABUS:** A nonprofit legal aid lawyer may engage in direct in-person solicitation of an individual who may benefit from representation when the lawyer will receive no fee or remuneration in connection with the representation. A nonprofit legal aid lawyer may send a direct mail solicitation to individuals facing legal action, so long as the lawyer verifies that the individual has been served prior to sending the letter and the lawyer will receive no fee or remuneration in connection with the representation.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**APPLICABLE RULES:** Prof.Cond.R. 7.1, 7.3

#### QUESTIONS PRESENTED:

- 1). May a nonprofit legal aid lawyer make a direct in-person solicitation to represent an indigent defendant who has appeared in court without representation?
- 2). May a nonprofit legal aid lawyer send defendants facing an eviction action a letter soliciting representation?

#### OPINION:

This opinion assumes that the salary of the nonprofit legal aid lawyer discussed below is paid by the employing organization. Further, the opinion also assumes that:

- 1) the lawyer's salary is not tied in any way to his or her retention of new clients for the organization;

- 2) the lawyer does not receive any fee or remuneration based on any specific client or the number of clients he or she represents; and
- 3) the lawyer does not share in any monetary recovery gained by the client.

*In-Person Solicitation of Clients by Nonprofit Legal Aid Lawyers*

The first question addresses the situation of a nonprofit legal aid lawyer who attends court on behalf of one client and observes another individual who is appearing in court without representation. The unrepresented individual appears to be a public-assistance recipient who is attempting 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 nonprofit legal aid lawyer desires to offer his or her services to the indigent individual.

The solicitation of clients is governed by Prof.Cond.R. 7.3. The rule prohibits direct in-person solicitation when a significant motive for doing so is pecuniary gain. Prof.Cond.R. 7.3(a). In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S. Ct. 1912 (1978), the Supreme Court recognized that the purpose of the rule against solicitation is 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. See also *Columbus Bar Assn. v. Bahan*, 159 Ohio St.3d 479, 2020-Ohio-434, ¶10. However, the Supreme Court in *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978) recognized that not every instance of in-person solicitation should be prohibited. *Primus* held it unconstitutional and a violation of the First and Fourth Amendment for a state to discipline an ACLU lawyer for her in-person and direct mail solicitation of women who had been sterilized as a condition of continuation of Medicaid benefits. *Id.* The Supreme Court relied on *NAACP v. Button*, 371 U.S. 415 (1963), for the proposition that “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” *Id.* at 426 (other citation omitted). The Supreme Court concluded that a broader protection was warranted for the lawyer’s conduct in *Primus*.

Comment [5] to Prof.Cond.R. 7.3 recognizes the Supreme Court’s rationale and explains that when a lawyer is motivated by considerations other than the lawyer’s

pecuniary gain, there is far less likelihood that a lawyer would engage in abusive practices. Further, the comment also indicates that “division (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations \* \* \* whose purposes include providing or recommending legal services to members or beneficiaries.” *Id.* Thus, a lawyer employed<sup>1</sup> by a nonprofit legal aid organization that provides or recommends legal services to individuals who qualify for its services may ethically make a direct in-person solicitation to represent an individual who has appeared in court without representation.<sup>2</sup> The solicitation is permissible so long as the nonprofit legal aid lawyer will receive no fee or remuneration for the representation.

*Direct Mail Solicitation of Clients by Nonprofit Legal Aid Lawyers*

The second question addresses the situation of a nonprofit legal aid lawyer soliciting defendants for representation in eviction actions after an eviction has been filed. Because direct mail solicitation is clearly permitted pursuant to Prof.Cond.R. 7.3, the question becomes whether a nonprofit legal aid lawyer is subject to the requirements found in Prof.Cond.R. 7.3(c). Generally, when a letter soliciting professional employment is directed to someone the lawyer reasonably believes to be in need of legal services the lawyer must: 1) disclose how 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 case; and 3) include in the text of the letter and on the outside envelope the recital – “ADVERTISING MATERIAL” or “ADVERTISEMENT ONLY.” Further, when soliciting employment via written communication directed to a party who has been named as a defendant, the lawyer must verify that the party has been served with notice of the action. Prof.Cond.R. 7.3(d).

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<sup>1</sup> A lawyer who volunteers for a nonprofit legal aid organization and solicits a client in person on behalf of the organization must do so for nonpecuniary reasons. The lawyer should refer the potential client to the legal aid office, not his or her own office. Such a solicitation may violate Prof.Cond.R. 7.3(a) if a significant motive of the volunteer lawyer is to gain exposure in the community or to gain experience necessary to further the lawyer’s practice with the goal of eventual pecuniary benefit. *See Bahan, supra* and R.I. Ethics Op. 98-03.

<sup>2</sup> This opinion does not confine a nonprofit legal aid lawyer’s in-person solicitation of clients to the courthouse only. Proper in-person solicitation based on the facts and circumstances may occur at other locations.

The text of the rule provides exceptions to the requirements of division (c) when the recipient of the letter: 1) is a lawyer; 2) is a family member; 3) has a close personal relationship with the lawyer; or 4) has a prior professional relationship with the lawyer. However, Comment [5] to Prof.Cond.R. 7.3 specifically states that the requirements of division (c) are not applicable to “situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain.” The direct mail solicitation contemplated by the nonprofit legal aid lawyer appears designed to assist defendants in recognizing their legal problems, making legal services available, and facilitating the process of selection of a lawyer, not for the lawyer’s own pecuniary gain. Thus, a nonprofit legal aid lawyer may send a direct mail solicitation to a defendant in need of legal services without complying with the requirements of Prof.Cond.R. 7.3(c). However, the nonprofit legal aid lawyer should comply with Prof.Cond.R. 7.3(d), if applicable, as the rule and comments are silent as to any relevant exceptions regarding verification that a defendant has been served with notice of an action before sending a written solicitation.

*Other ethical considerations*

A nonprofit legal aid lawyer contacting a potential client in person or by direct mail must comply with Prof.Cond.R. 7.1. The rule governs all communications about a lawyer’s services. A lawyer may not make or use a false, misleading or nonverifiable communication about the lawyer or the lawyer’s services. Prof.Cond.R. 7.1. Whatever means are used to make a lawyer’s services known, statements about them must be truthful. *Id.* at cmt. [1].