



Ohio Board of Professional Conduct

OPINION 2023-07

Issued August 4, 2023

Discharged Lawyer's Solicitation of Former Client

SYLLABUS: With rare exception, a discharged lawyer may not solicit a former client to continue a client-lawyer relationship after the client has retained a new lawyer in the matter.

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Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 1.16, 4.2, 7.3

QUESTION PRESENTED:

May a discharged lawyer solicit a former client to continue the client-lawyer relationship after the client has retained new counsel in the matter?

OPINION:

Background

A client is represented by Lawyer A regarding an automobile accident. The client terminated the client-lawyer relationship, in writing, and instructed Lawyer A to forward the client file to her new lawyer, Lawyer B. Lawyer A later contacted the former client on several occasions, including visiting the client at her home, to convince the client to continue the prior client-lawyer relationship. After the client reported the conduct to Lawyer B, the lawyer emailed Lawyer A and directed him to stop contacting the client as she is now represented by Lawyer B. Lawyer A responded that he was not communicating with the client about the subject of representation but engaging in an appropriate solicitation due to the prior professional relationship with the client.

Withdrawal after discharge

A client has an absolute right to discharge an attorney or law firm at any time, with or without cause. *Reid v. Lansberry*, 68 Ohio St.3d 570, 570, 629 N.E.2d 431 (1994); Prof.Cond.R. 1.16, cmt.[4]. A lawyer who has been discharged by a client must withdraw from the representation and take steps to protect the client's interests, give the client adequate notice, deliver all client papers and property, and allow the client time to employ new counsel. Prof.Cond.R. 1.16(a)(3); 1.16(d). In most instances after a client-lawyer relationship has ended due to the client's termination of the lawyer, there are few legitimate reasons for the lawyer to communicate with the former client.

Prohibited communication with a represented person

In general, a lawyer is prohibited from engaging in communications about the subject matter of the representation with any person the lawyer knows to be represented by another lawyer in the matter. Prof.Cond.R. 4.2.; Prof.Cond.R. 4.2, cmt.[2]. The purpose of the rule is to prevent lawyers from overreaching, interfering in other client-lawyer relationships, and eliciting protected client information. Prof.Cond.R. 4.2, cmt.[1].

A lawyer's solicitation of a former client about reemployment, while the underlying matter is still pending, is a communication with a person about the subject matter of the representation. N.Y.City Prof. Ethics 2011-1. Before a discharged lawyer contacts a former client about the subject of the representation, the lawyer should make a reasonable effort to ascertain if the former client is represented by new counsel in the matter such as by reviewing a court's docket. If the former client is not represented, the lawyer's contact with the former client is permissible under Prof.Cond.R. 4.2. If the discharged lawyer learns that the client is newly represented, as is the case in the facts presented, the lawyer is charged with the knowledge that the former client is "represented by another lawyer in the matter" and the communication may not occur unless the new counsel gives his or her consent. N.Y.City Prof. Ethics 2011-1.

"In representing a client . . . "

Prof.Cond.R 4.2(a) limits the scope of the rule to those situations in which the contacting lawyer is "[] representing a client." Yet, the rule has been applied in comparable situations to prohibit a lawyer from contacting a represented person, even

when the lawyer is acting *pro se* and thus not “representing a client” at the time of contact. *Disciplinary Counsel v. Bruce*, 158 Ohio St.3d 382, 2020-Ohio-85 (pro se lawyer sending offer letter directly to represented party); *Disciplinary Counsel v. Bennett*, 146 Ohio St.3d 237, 2016-Ohio-3045 (lawyer contacted prospective client who had obtained other counsel.) Here, the conduct of the discharged lawyer conflicts with one of the primary purposes of Prof.Cond.R. 4.2 — to prevent interference with established client-lawyer relationships. Consequently, it is the Board’s opinion that the rule applies in those situations where a discharged lawyer, who does not represent any person in the matter, solicits a former and represented client in an effort to continue the prior client-lawyer relationship in the same matter.

Impermissible solicitation

Prof.Cond.R. 7.3(a)(2) permits the solicitation of a person with whom the lawyer has had a prior professional relationship, and the discharged lawyer relies on this rule to assert that his contact with the client was an appropriate solicitation. While the discharged lawyer had a prior professional relationship with the former client, the lawyer’s solicitation of the client was improper once he learned of the new representation and was instructed to stop communicating with the former client. Because the discharged lawyer implicated Prof.Cond.R. 4.2 by contacting the newly represented client about the subject matter of the representation after she retained new counsel, the discharged lawyer cannot rely on Prof.Cond.R. 7.3(a)(2) as the basis for the communication with the former client.

Other communications with former client

A discharged lawyer is not prohibited from communicating with a former client in all circumstances. There may be valid reasons for a discharged lawyer to communicate with a client after the termination of representation that are not motivated by future or potential pecuniary gain. For example, the lawyer may need to inquire with the former client about an outstanding payment, a refund of fees or expenses, or return of client property not resolved contemporaneously at termination. In rare circumstances, a former client may wish to consult with the previous lawyer about the advice or counsel he or she received from the new lawyer. Prof.Cond.R. 4.2, cmt.[3] (rule does not preclude communication with a represented person who is seeking advice from a lawyer who is

not otherwise representing a client in the matter.) The Board does not believe that a blanket prohibition against all contact with a former client by a discharged lawyer is advisable and its conclusion in this opinion is limited to the facts presented.