



Ohio Weighs In

# Texting Prospective Clients

By Seth L. Laver

**M**arketing is now a must for all professionals, and as competition for clients intensifies, professional service providers increasingly use the marketing techniques and technologies that have already proved successful in the consumer goods market.

Lawyers do this, too, but they have faced exceptionally high ethical standards governing advertising to or solicitation of potential clients. Solicitation just became considerably easier, however, for attorneys in Ohio. They may now reach out to potential clients via text message provided, of course, that they abide by particular requirements. A novel decision could prove influential in other states and may mark an important turning point in the ongoing evolution of lawyer and law firm marketing.

Not so long ago every state bar in the country prohibited most forms of attorney advertising. Under the 1908 Canons of Professional Ethics “solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relation” was considered “unprofessional” and all forms of self-promotion viewed as “reprehensible ... to our profession.” Much later the U.S. Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which dealt with price advertising, held that the 1908 standard conflicted with the First Amendment, and a state could not prohibit attorneys from advertising for legal services outright while also upholding a state’s right to impose restrictions on commercial expression by attorneys to prevent “false, deceptive, or misleading” advertising. Accordingly, attorneys must observe a line in the sand.

Today, each state maintains its own set of ethics rules governing attorney advertising, solicitation, and marketing. *State Ethics Rules Governing Lawyer Advertising, Solicitation[,] and Marketing*, ABA Standing Comm. on Delivery of Legal Services, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/ad\\_rules.html](http://www.americanbar.org/groups/delivery_legal_services/resources/ad_rules.html) (last visited May13, 2013). Law firms with offices in multiple

states must know how varying states’ rules affect different marketing efforts. Some states prohibit attorneys from publishing testimonials and statements about past successes and service quality; some have reporting obligations or require precisely worded disclaimers. As communication technologies rapidly evolve, the situation has become ever-more challenging for both the lawyers wishing to expand their client bases and the state disciplinary boards seeking to apply ethical standards to the industry’s expanding use of blogs, e-mail communication, “chat rooms,” and other electronic solicitation forms.

The novel Ohio decision gained national attention by holding that attorneys could solicit via text. Ohio Sup. Ct. Bd. of Comm’n on Grievances & Discipline Op. 2013-2 (Apr. 5, 2013), [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2013/Op\\_13-002.pdf](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2013/Op_13-002.pdf). In the opinion, the Ohio board wrote that the traditional ethics rules did not bar advertising by text. The board concluded that as long as attorneys ensure that the text messages do not create real-time interactions similar to Internet chat room interactions and they follow applicable federal and state telemarketing laws, as well as ethics rules concerning electronic solicitation, they can solicit clients in text messages.

The board did impose certain limitations. “Text messaging may be a novel approach to client solicitation,” it wrote, “but our ethical review is actually a straightforward application of the Rules of Professional Conduct.” Of course, lawyers cannot make false, misleading, or non-verifiable statements, and they must refrain from predicting outcomes. Among other requirements, a text message solicitation must include the name and the address of the lawyer or the law firm responsible for the content; explain how the lawyer became aware of an individual’s legal need, such as from an accident or a police report; and warn in all caps that the material is advertising. Further, an “understanding your rights” statement must appear in all solicitation texts sent within 30 days of an accident or a disaster. A lawyer cannot link to it or include it as a graphic as had become a common practice.

The Ohio board acknowledged that despite the difficulty posed by text message technology, including a 160-character limit and the varying capabilities of recipients’ phones or their cell phone plans, the “under-



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standing your rights” statement was too important to avoid, even if it caused a message to split into several messages or fail to transmit in its entirety. The board also offered suggestions to help eliminate costs for recipients or receipt by minors.

The Ohio board imposed one specific obligation on a text that targets a defendant in a civil action: unless the prospective client is a potential or actual bankruptcy debtor, a lawyer must first verify through the court docket that the recipient has been served with notice of the action.

Undoubtedly other jurisdictions will keep an eye on how this decision plays out

as they consider the ethical ramifications of text message solicitation—a communication form that the profession will likely have great interest in because many people are tethered to it 24/7. People send about 6 billion texts daily, and they send considerably more texts than they make cell phone calls. *SMS Usage Remains Strong in the US: 6 Billion SMS Messages Are Sent Each Day*, Michael O’Grady Forrester Blog (June 19, 2012), [http://blogs.forrester.com/michael\\_ogrady/12-06-19-sms\\_usage\\_remains\\_strong\\_in\\_the\\_us\\_6\\_billion\\_sms\\_messages\\_are\\_sent\\_each\\_day](http://blogs.forrester.com/michael_ogrady/12-06-19-sms_usage_remains_strong_in_the_us_6_billion_sms_messages_are_sent_each_day). The *New York Times* has noted that “at a time when in-boxes fill with

hundreds of never-opened e-mail messages from direct marketers, 97 percent of SMS [text] marketing messages are opened (83 percent within one hour).” Mark Cohen, *Small Business Guide: Text-Message Marketing*, N.Y. Times, Sept. 23, 2009, available at <http://www.nytimes.com/2009/09/24/business/smallbusiness/24texting.html>.

Savvy lawyers are aware of these statistics and hope to use texts to develop their client bases. Before doing so, however, they must know how to conduct these marketing efforts within the bounds of ethics and professionalism. 