

ADVISORY ETHICS OPINION 1998-03

SYNOPSIS:

An attorney may not ethically approach pro se defendants in pending criminal matters in District Court and offer either a business card or advertising circular as an offer of representation in the matter pending before the court.

FACTS:

An attorney with an active criminal law practice seeks advice as to whether he may ethically approach prospective clients who are appearing before the District Court in criminal matters without legal representation, and offer either a business card or advertising circular to such individuals in order to see if they might be interested in his representing their interests. The attorney is mindful of the prohibition in DR 2-101 of false or misleading communications, and questions whether, assuming that no violation of 2-101 exists, DR 2-104 would prevent him from initiating communication in this manner. The requesting attorney indicates that because he is in attendance at District Court on a regular basis, and is a sole practitioner, he is able to offer his services at less than the prevailing fee levels in his geographic practice area.

DISCUSSION:

In pertinent part, DR 2-104 provides as follows:

A lawyer may not initiate communication with a prospective client with the purpose of obtaining professional employment, except that communications may be made: . . . (3) by means of letters or advertising circulars.

We note that prior to 1989, this provision of DR 2-104 specifically limited the addressing or distribution of such materials “generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.” This revision necessarily gives rise to the question of whether it was implicitly intended to broaden the scope of the Rule to allow in-person solicitation by the use of letters or circulars.

The answer to this question appears to lie in the two revisions to the Ethical Considerations which were made in conjunction with the 1989 revisions to DR 2-104. Prior to the revisions, “targeted mailings” directed at recipients involved in specific legal matters or incidents were viewed as being prohibited by the Disciplinary Rules. (See EC 2-10A, which was repealed as part of the 1989 revisions). The 1989 revisions to EC 2-10 were apparently intended to expand the scope of solicitation by mailing to allow “targeted mailings,” but expressly carried forward the prohibition on in-person and telephone solicitation, due to the “greater danger of overreaching” posed by such methods of solicitation.

The requesting attorney’s proposal to hand out circulars or business cards to pro se defendants in or at the court house would appear to constitute precisely the type of in-person solicitation which continues to be prohibited by the Disciplinary Rules. (While the Committee is cognizant that there are Constitutional issues relating to attorney advertising in general, we express no view in this regard.)

CONCLUSION:

In the context of the question posed by the requesting attorney, we are of the view that the Disciplinary Rules prohibit the attorney from handing out business cards or circulars to potential clients in the District Court for the purpose of initiating in-person contact concerning legal representation.