



Committee on Professional Ethics

Opinion 873 (6/9/11)

Topic: Offering a prize to join attorney's social networking sites

Digest: The Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal, but if the primary purpose of the prize offer is the retention of the attorney, then it will constitute an "advertisement" and will be subject to the rules governing lawyer advertising. If the prize offer is an advertisement, and if it is targeted to specific recipients, and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and will be subject to additional requirements and restrictions.

Rules: 1.0(a) & (c), 7.1, 7.2, 7.3, and 8.4(c).

QUESTION

1. May a lawyer offer a prize as an incentive to connect to the inquirer on social networking sites?

OPINION

2. The inquirer currently uses various social networking sites, including Facebook, LinkedIn and MySpace. The inquirer is considering offering the chance to win a prize (to be determined) for connecting to the inquirer on one of those sites. By building the inquirer's social network this way, the inquirer hopes to market the inquirer's legal services more effectively.

3. The Committee assumes that the proposed "prize" will be awarded randomly to someone simply for agreeing to connect to the inquirer on one of the inquirer's social networking sites (*e.g.*, for agreeing to become a new "friend" or "contact"). The Committee also assumes that a person will not be required or expressly invited to retain the inquirer as an attorney in order to be eligible for the prize.

4. Preliminarily, we note that there may be laws or regulations governing sweepstakes and games of chance that could apply to the inquirer's proposal. The Committee does not address these issues because the Committee does not opine on questions of law. The Committee has considered solely whether, assuming that the proposal is legal, it is also permissible under the New York Rules of Professional Conduct (the "Rules"). The Committee likewise has not considered whether a prize offer would violate the Terms of Use of any particular social network. The Terms of Use are a matter of contract between the inquirer and the social networking sites and are not within the Committee's jurisdiction.

A. New York Rules of Professional Conduct Relevant to a Prize Offer

5. We begin by setting forth various provisions in the New York Rules of Professional Conduct that are relevant to the question posed.

6. New York Rule 7.1 ("Advertising") governs advertisements by lawyers and law firms. Rule 1.0(a) defines the term "advertisement":

"Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

7. Rule 7.2 ("Payment for Referrals") governs various types of compensation for marketing. Rule 7.2(a) provides as follows:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client

8. Rule 7.3 ("Solicitation and Recommendation of Professional Employment") governs advertisements directed at particular potential clients. Rule 7.3(a) provides:

A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client

9. Rule 7.3(a)(1) uses the term "computer-accessed communication," which is defined in Rule 1.0(c) as follows:

"Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated

through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

10. Rule 7.3(b) defines “solicitation”:

For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

11. Finally, Rule 8.4 (“Misconduct”) contains the general prohibition, in Rule 8.4(c), that a lawyer or law firm shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

B. Applying the Rules of Professional Conduct to the Prize Offer

12. A “solicitation” in Rule 7.3(b) is by definition an “advertisement” that meets additional criteria, so something cannot be a “solicitation” unless it is first found to be an “advertisement.” See Rule 7.3, cmt. [1] (“Not all advertisements are solicitations All solicitations, however, are advertisements with certain additional characteristics.”). If the proposed prize offer is not an advertisement as defined by the Rules, it will not fall under the strictures that apply to advertising or solicitation. Therefore, we must first determine whether the offer is an advertisement. If so, we must then determine if it is also a “solicitation” under Rule 7.3(b).

Is the prize offer an “advertisement”?

13. To fall within the definition of “advertisement,” the communication offering the prize must be for the “primary purpose” of the inquirer’s retention. The fact that business development might be the inquirer’s ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer’s personal social circle, with the aim of meeting potential new clients. As stated in Comment [6] to Rule 7.1:

Not all communications made by lawyers about the lawyer or the law firm’s services are advertising. Advertising by lawyers consists of communications made in any forum about the lawyer or the law firm’s services, the primary purpose of which is retention of the

lawyer or law firm for pecuniary gain as a result of the communication. ...

See also Rule 7.1, cmts. [7] - [9] (regarding various communications that may or may not be advertisements, depending on the circumstances).

14. If the prize offer is merely posted on the inquirer's own social networking sites and people gain a chance to win the prize simply by connecting with the inquirer – not for retaining the inquirer – it is not likely to be an “advertisement” even if the site elsewhere identifies the inquirer as an attorney. If, however, the prize offer itself describes the inquirer as an attorney or describes the inquirer's legal services or law firm (or both), the prize offer would be an “advertisement” subject to all of the strictures of Rule 7.1, such as the mandatory use of the label “Attorney Advertising.”

15. Whether or not the prize offer is an advertisement, the inquirer must be honest. As observed in Comment [6] to Rule 7.1:

[A]ll communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. ...

Is the prize offer a “solicitation”?

16. If posting the prize offer is considered an “advertisement,” we must also ask whether it will also be considered a “solicitation” within the meaning of the Rules. Under Rule 7.3(b), the advertisement for a prize offer will be a solicitation if is “directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives” and a “significant motive” is “pecuniary gain.” If the prize offer is a solicitation, it will be subject to the special requirements of Rule 7.3.

17. Of particular relevance in the social networking context is Rule 7.3(a), which prohibits solicitation by (*inter alia*) “real-time or interactive computer accessed communication” unless the recipient is “a close friend, relative, former client or existing client.” (The inquirer has not suggested that those exceptions would apply to most recipients of the prize offer.) A “computer-accessed communication” is defined in Rule 1.0(c) as “any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device” Communications by targeted electronic messages – *e.g.*, posting the offer on a social networking site or sending it via email – would fall within the rubric of a “computer-accessed communication.” However, the closing sentence of Comment [9] to Rule 7.3 states: “Ordinary email and websites are not considered to be real-time or interactive communication.” Thus, if the inquirer merely posts the prize offer on his Facebook or other social networking site, or sends the offer to recipients by email, then the offer will

not be considered a prohibited “real-time or interactive computer-accessed communication” under Rule 7.3(a)

18. The policy reasons underlying the general prohibition against in-person solicitation, telephone contact, and real-time or interactive computer-accessed communications are set out in Comment [9] to Rule 7.3, which provides:

Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. ...

19. In sum, the prize offer will be an “advertisement” and must comply with Rule 7.1 only if the inquirer’s “primary purpose” is the “retention” of the inquirer or his law firm.” Furthermore, the prize offer will be a “solicitation” only if it is an “advertisement” *and* is “directed to, or targeted at, a specific recipient or group of recipients” (whether the recipients are already part of the offeror’s own social network contacts or are outside the offeror’s social network contacts). If the prize offer is a “solicitation,” it will be subject to the strictures of both Rules 7.1 and 7.3. No matter how the communication of the prize offer is labeled, it must be truthful per Rule 8.4(c).

20. Finally, the proposed prize offer does not violate Rule 7.2(a)’s ban against compensating or giving “anything of value” to a person “to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client” The inquirer is offering the chance to win a prize merely for connecting to the inquirer on a social networking site, not for recommending or employing the inquirer as a lawyer.

CONCLUSION

21. Offering a prize offer to join an attorney’s social network is not prohibited by the Rules of Professional Conduct as long as the offer does not constitute illegal conduct. If the primary purpose of the prize offer is to promote retention of the attorney’s legal services (which is a factual question), then it is an “advertisement” and is subject to Rule 7.1 and other Rules governing lawyer advertising. If it is an advertisement that also meets the definition of a “solicitation,” then it is subject to Rule 7.3 as well. If the attorney communicates the prize offer by posting it on a social networking site or sending it by mail, and if the attorney does not communicate the offer in person, by telephone, or by a real-time or interactive computer-assisted communication (other than to recipients who are close friends, relatives, former clients, or existing clients), then the communications about the prize offer are not prohibited by Rule 7.3(a).

22. If the prize offer is not an advertisement, it also cannot be a solicitation and will therefore be subject neither to Rule 7.1 nor to Rule 7.3. However, like every communication by a lawyer – advertisement, solicitation, or neither – it will be subject to the general prohibition in Rule 8.4(c) against conduct involving dishonesty, fraud, deceit or misrepresentation.

(70-09)