



New York State Bar Association Committee on Professional Ethics

Opinion 899 (12/21/11)

Topic: Solicitation; answering legal questions on the Internet

Digest: A lawyer may provide general answers to legal questions from laymen on real-time or interactive Internet sites such as chat rooms, but the lawyer may not engage in “solicitation” in violation of Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that those who did not request it cannot see it.

Rules: 1.0(a) & (c), 7.1(a), (q) & (r), 7.3(a) & (b)

QUESTIONS

1. May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet?
2. If so, may the lawyer also offer his or her legal services in the course of answering questions?

OPINION

3. A lawyer asks whether he may visit real-time interactive internet or social media sites on which individuals post legal questions and, if so, whether he may answer questions and advise individuals of his availability as a lawyer. For example, if a layperson in an Internet chat room asks how long a person can wait to sue a lawyer for legal malpractice, may the lawyer respond by saying, “The statute of limitations in New York is three years”? May the lawyer also say, “Please call me at the following number as soon as possible for a free evaluation of your case”?

General principles of advertising and solicitation by lawyers

4. Rule 7.1 of the New York Rules of Professional Conduct (the “Rules”) governs attorney advertisements, and Rule 7.3 governs a special form of advertising called

“solicitation.” We begin our analysis with the definitions of “advertisement” and “solicitation.”

5. An “advertisement” is defined under Rule 1.0(a) as “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.”

6. “Solicitation” is defined in Rule 7.3(b) as follows:

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. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

7. Thus, Rule 7.3(a) excludes from solicitation a response in writing to a specific request of a potential client.

8. In general, Rule 7.1(a)(1) regulates the content of an advertisement by prohibiting any lawyer advertisement that “contains statements or claims that are false, deceptive or misleading.” Rule 7.3(a)(1) regulates the manner of advertising by expressly prohibiting a lawyer from engaging in solicitation “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 . . .” (Emphasis added.)

9. The term “computer-accessed communication,” which is used in Rule 7.3(a)(1), 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. Comment [9] to Rule 7.3 sets forth the rationale for prohibiting solicitation by in-person or telephone contact or by real-time or interactive computer-accessed communication:

[I]n-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. . . .

11. Comment [9] also explains that “[o]rdinary email and web sites are not considered to be real-time and interactive communications,” but “[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.” Thus, the lawyer must not engage in solicitation in those forums. With that background in place, we turn to the specific questions before us.

Question 1: May the lawyer answer legal questions in chat rooms?

12. The first question is whether the lawyer may answer legal questions posted by laymen in chat rooms or on other social media sites on the Internet. Answering questions on the Internet is analogous to writing for publication on legal topics. As set forth in Rule 7.1(r), a lawyer may write for publication on legal topics without affecting the right to accept employment, as long as the lawyer does not undertake to give individual advice.¹ Comment [9] to Rule 7.1 echoes Rule 7.1(r) by cautioning that, in the course of educating members of the public to recognize their legal problems a lawyer “should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised.” Comment [9] adds that talks and writings by a lawyer aimed at the public “should caution them not to attempt to solve individual problems” on the basis of the information conveyed by the lawyer. A lawyer who adheres to those guidelines may answer legal questions posted by laymen on the Internet.

13. Comment [9] to Rule 7.1 also says that lawyers “should encourage and participate in educational and public relations programs concerning the legal system, with particular reference to legal problems that frequently arise.” A lawyer’s participation in an educational program “is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.” If a communication is not advertising, then it also cannot be solicitation – see Rule 7.3, cmt. [1]. But Comment [9] to Rule 7.1 also notes that an educational program “might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm.” In that case, the communications would have to comply with Rules 7.1 and 7.3. See, e.g., N.Y. State 830 (2009) (a lawyer may ethically contact lay organizations to inform them that he or she is available to speak on legal topics, but “must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm”). We therefore turn to Question 2.

¹ We add that a lawyer who gives individual advice in a chat room or on a public social media site might also be establishing an attorney-client relationship without undertaking the conflict check required by Rule 1.10(e) and would be revealing privileged legal advice in a public place in violation of Rule 1.6(a).

Question 2: May the lawyer offer his or her legal services in chat rooms?

14. The second question is whether the lawyer may offer his or her legal services in the course of answering legal questions on the Internet. As already noted, Rule 7.3(a) prohibits solicitation in chat rooms and other similar types of conversational computer-accessed sites because they are considered to be “real-time” or “interactive” communications. However, the definition of “solicitation” in Rule 7.3(b) expressly excludes “a proposal or other writing prepared and delivered in response to a **specific request** of a prospective client.” (Emphasis added.)

15. Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a “specific request” to retain the lawyer. Thus, encouraging a layperson to retain the lawyer in response to such a question is prohibited by Rule 7.3(a)(1). On the other hand, if a lawyer’s primary purpose in answering a question is not to encourage his own retention but rather is to educate the public by providing general answers to legal questions, then Rule 7.3(a)(1) does not prohibit the lawyer’s responses.

16. Moreover, Rule 7.1(q) generally allows a lawyer to accept employment resulting from educational activities. Rule 7.1(q) provides as follows:

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

17. Thus, if a potential client initiates a specific request to retain the lawyer during the course of permissible real-time cyberspace communications, then the lawyer’s response to that person does not constitute impermissible solicitation. Yet because the lawyer’s response in a chat room or interactive social media site would constitute a solicitation to everyone on the site who did not specifically request the lawyer’s services, the lawyer may not post a response that encourages everyone on the site to retain the lawyer. Therefore, if the person making the request includes contact information, the lawyer may respond only to that person.

18. If the person making the request does not include contact information, however, then the lawyer’s response must be in two stages. The first stage is to ask the layperson to communicate directly with the lawyer off the site, by email, phone, or otherwise. For example, if the person whose question the lawyer answered in a chat room says, “Can you represent me in my case?” the lawyer may post a response such as, “My communications on this site are for the purpose of educating the general public about legal issues. If you are seeking an individual consultation, please visit my website at *www.jones.com*.” Alternatively, the lawyer may provide an office phone number, email address, and/or mailing address, without giving any information about the lawyer’s services. If the person who requested the lawyer’s services then uses one of these methods to contact the lawyer directly outside the real-time or interactive site, then the lawyer will not violate the restrictions on solicitation by preparing and delivering

a proposal or other writing that responds to the specific request made by that prospective client. (Because advertising includes both public and private communications for the purpose of seeking retention, these communications must comply with Rule 7.1.)

19. However, the lawyer may not post a proposal offering his or her legal services on the real-time interactive Internet or social media site, because posting that information would be a real-time and interactive computer-accessed solicitation to people who did not request it, in violation of Rule 7.3(a)(1).

20. This Committee cannot answer questions of law. Accordingly, we cannot determine whether private responses to a layperson's specific request on a real-time or interactive computer-accessed site would violate § 479 of the New York Judiciary Law, which prohibits solicitation by attorneys. Nor can we determine whether § 479 or the Rules regulating advertising and solicitation are constitutional in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

CONCLUSION

21. A lawyer may provide general answers (not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in "solicitation" absent compliance with Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal cannot see it.

(20-11)