



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1016 (8/4/2014)

Topic: Advertising

Digest: An attorney may advertise using commercial posts sent via email to members of internet message boards provided the advertisement is not false, deceptive or misleading, does not otherwise violate the Rules and the label “Attorney Advertising” is in the subject line of the email.

Rules: Rule 1.0(a), 1.0(c), 7.1, 7.3, 7.4 & 8.4(c)

FACTS

1. A sole practitioner belongs to several internet message boards, including one for parents and one for residents of specific neighborhoods. The attorney primarily practices in the areas of wills, trusts & estates and guardianship matters and proposes to advertise on the internet message boards to which the attorney belongs through an email sent to all the members of a particular message board.

2. The proposed advertisement would include the attorney’s contact information, practice areas and a list of languages spoken, and would state that the attorney offers in-home consultations for the elderly and parents of young children.

QUESTION

3. May an attorney advertise via commercial post email sent to the members of a message board to which the attorney belongs?

4. If so, are there any relevant limitations?

OPINION

ATTORNEY ADVERTISING

5. Rule 1.0(a) of the New York Rules of Professional Conduct (the “Rules”) defines the term “advertisement” as follows:

“Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about the 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. Rule 7.1 of the Rules governs advertisements by lawyers and law firms and states in part as follows:

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

7. Rule 7.1(b) expressly provides that subject to the provisions of Rule 7.1(a), advertisements may include information as to “legal and nonlegal education, degrees and other scholastic distinctions...areas of law in which the lawyer or law firm practices, as authorized by these Rules...foreign language fluency...” In addition, Rule 7.1(h) requires that “[a]ll advertisements . . . include...the principal law office address...of the lawyer or law firm whose services are being offered.”

8. Clearly the information that the attorney proposes to include in the advertisement is permissible under Rule 7.1(b).

9. The Rules also contain certain requirements to be included in advertising. Rule 7.1(f) requires that most lawyer advertising be labeled “Attorney Advertising.” Specifically Rule 7.1(f) states in part that:

“every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any website related thereto) or made in person under Rule 7.3(a)(1) must be labeled “Attorney Advertising” on the first page or on the home page in the case of a website...in the case of electronic mail, the subject line shall contain the notation “**ATTORNEY ADVERTISING.**”

10. In N.Y. State 848 (2010), the Committee determined that if a proposed newsletter is determined to be an advertisement then the law firm “should consider the audience for the newsletter in order to determine whether it must be labeled “Attorney Advertising.” The Committee concluded that if the newsletter is also circulated and made available electronically via the firm’s website, via email, and via blogs, and posts where the precise nature of the receiving audience is unknown, [the] Law Firm must include the phrase “Attorney Advertising” on electronic versions of the newsletter.” In making this determination the Committee explained that “[t]he “Attorney Advertising” label serves to dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers and the recipients might not otherwise know whether these communications are advertisements or educational items.”¹

¹ In addition, if the advertisement contains “statements that are reasonably likely to create an

11. The advertisement must also comply with Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation,” and “with Rule 7.4 (“Identification of Practice and Specialty”), which prohibits a lawyer or law firm from stating that the lawyer or law firm is a specialist or specializes in a particular field of law except in special circumstances.” N.Y. State 841 (2010).

DOES THE ADVERTISEMENT CONSTITUTE A SOLICITATION?

12. The advertisement would be transmitted via an email commercial post to all the members of the various message boards of which the attorney is a member, including parenting groups, neighborhood specific groups and parents of children with special needs. Does such advertising constitute a solicitation?

Comment [1] of Rule 7.3 states that “Not all advertisements are solicitations within the meaning of this Rule.” Solicitation is defined in Rule 7.3(b) as follows:

“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.

13. Comments [3] and [4] to Rule 7.3 provide guidance as to whether an advertisement is considered to be directed to or targeted at a specific recipient or recipients.

14. Comment [3] states that one way that an advertisement may be considered to be directed to or targeted at a specific recipient or recipients is if it is made by “in-person or telephone contact or by real time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents.” A non-interactive commercial post to members of the message group would not constitute an interactive computer-accessed communication.

15. In addition, comment [4] of Rule 7.3 states that “[u]nless it falls within Comment [3] an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients.” The presumption would not be rebutted simply because the advertisement is “intended to attract potential clients with needs in a specified area of law” and that fact would not render the advertisement to be targeted at a specific recipient or recipients. *See* Rule 7.3, Cmt. [4]. Similarly, the reality that some of the recipients of the proposed advertisement might be in need of the legal services

expectation about results the lawyer can achieve,” and “statements that compare the lawyer’s services with services of other lawyers” the precise disclaimer language, “prior results do not guarantee a similar outcome” is required. *See*, Rule 7.1(e) (3).

offered by the attorney does not transform the advertisement into a solicitation. *Id.*

16. Because the proposed advertisement is not directed to, or targeted at, a specific recipient or group of recipients, it would not be a solicitation under Rule 7.3.

CONCLUSION

17. An attorney may advertise using commercial posts sent via email to members of internet message boards to which the attorney belongs provided the advertisement is not false, deceptive or misleading, does not otherwise violate the Rules and the label “Attorney Advertising” is in the subject line of the email.

(39-13)