



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 841 (4/12/10)

Topic: Lawyer sending e-mails to other lawyers seeking referrals of people injured by a particular pharmaceutical product.

Digest: E-mails to other lawyers requesting referrals of clients are not “solicitations” regulated by Rule 7.3. However, the e-mails must comply with Rules 7.4 and 8.4(c).

Rules: 1.0(a); 1.5(g); 7.1; 7.3; 7.3(b); 7.4; 8.4(c).

Comments: Rule 7.1, cmt. 7; Rule 7.3, cmt. 1.

QUESTION

1. May a lawyer send e-mails to other lawyers asking them to refer cases to the sending lawyer involving people injured by a particular pharmaceutical product?

FACTS

2. A lawyer who handles cases involving people injured by a particular pharmaceutical product proposes sending e-mails to other lawyers advising them that he is handling such cases and inviting the recipients of the e-mails to refer such cases to the lawyer.

OPINION

3. Rule 7.3 of the New York Rules of Professional Conduct (the “Rules”) establishes restrictions on solicitation by lawyers and sets forth the filing requirements for any permitted solicitation. Rule 7.3(b) defines the term “solicitation.” It states that, for purposes of Rule 7.3:

“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. [Emphasis added.]

4. The communication in question here contains many elements of Rule 7.3(b) – it is “by a lawyer ... targeted at ... a group of recipients”; the “primary purpose” of the communication is “the retention of the lawyer”; and a “significant motive” for the communication is “pecuniary gain.” But the communication lacks one crucial element of a solicitation: the communication is not an “advertisement” because it will be sent to other lawyers. Rule 1.0(a) (which defines “advertisement”) expressly excludes communications to other lawyers from the definition of “advertisement.” Specifically, Rule 1.0(a) provides:

“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.* [Emphasis added.]

5. Since the communication in question will be sent only to other lawyers, it is not an “advertisement.” Therefore, it is also not a “solicitation” within the meaning of Rule 7.3(b). See Rule 7.3, cmt. 1 (“By definition, a communication that is not an ‘advertisement’ is not a solicitation.”) A communication that is not a “solicitation” is not subject to the filing requirements (or any other requirements) of Rule 7.3. Moreover, since the communication is not an advertisement, it is also not subject to the provisions of Rule 7.1 (“Advertising”). Comment 7 to Rule 7.1 provides that communications to other lawyers are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm sending them.

6. Of course, the communications must nonetheless comply with Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation,” and they must comply 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.

7. Finally, if the attorney sending the communications intends to share a portion of the fee with a referring attorney, the sending attorney must comply with Rule 1.5(g), which regulates a division of legal fees with another lawyer not associated with the same law firm.

CONCLUSION

8. A lawyer may ethically send e-mails to other lawyers asking for referrals of clients who have been injured by a particular pharmaceutical product. Since a communication to other lawyers is expressly excluded from the definition of "advertisement," the communication is not an advertisement, and is therefore also not a "solicitation." Consequently, it is not subject to the provisions of either Rule 7.1 or Rule 7.3. However, it is subject to the provisions of Rule 7.4 and Rule 8.4(c).

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