



## Committee on Professional Ethics

Opinion 918 (4/13/12)

**Topic:** Solicitation; advertising; public education for laypersons.

**Digest:** A lawyer may ethically produce and post an internet video designed to educate lay individuals about a legal subject, and may distribute flyers to members of the public inviting them to view the video. However, the lawyer must adhere to advertising and solicitation requirements under the Rules if the video or the flyers encourage participants to retain the lawyer.

**Rules:** 1.0(a), 7.1, 7.3

### FACTS

1. The inquirer is a private practitioner who wishes to produce and post on the internet a video designed to educate lay individuals about what to do if they are sued in a collection matter. The video would be general in nature and not specific to any case. The inquirer plans to include her name and firm contact information at the end of the video, but the video will not urge viewers to contact her. Additionally, the inquirer would like to distribute flyers to members of the public, inviting them to view the video.

### QUESTION

2. May a lawyer ethically distribute flyers to members of the public inviting them to view the lawyer's internet video designed to educate lay individuals about a legal subject?

### OPINION

3. This Committee has explained that, under both the current Rules of Professional Conduct and the prior Code of Professional Responsibility,<sup>1</sup> lawyers may participate in legal seminars designed for non-lawyers. See N.Y. State 830 (2009) (opining under current Rules that a lawyer may contact a lay organization to inform it of the lawyer's availability as a public speaker on legal topics); N.Y. State 508 (1979) (opining under prior Code that law firm may organize a legal seminar designed for non-lawyers). Indeed, participation in such programs is not only permitted but encouraged: "The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore,

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<sup>1</sup> The Code was substantially revised in 1978 in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which held that categorical prohibitions against attorney advertising violate the First Amendment.

lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise.” Rule 7.1, Cmt. [9]. This Committee has also concluded that lawyers may promote these educational opportunities by mail. N.Y. State 508.

4. Advertisements and solicitations are subject to certain restrictions in the Rules. An “advertisement” is defined by Rule 1.0(a) as follows:

“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.”

5. The comments address application of the primary-purpose test to educational programs:

“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. Such a 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.”

Rule 7.1, Cmt. [9]. Accordingly, if a program goes beyond education to discuss the lawyer’s skills or reputation, or give other reasons to hire that lawyer, then the lawyer may need to comply with the rules on advertising. But absent the inclusion of some such hiring pitch, a legal seminar will generally not be considered advertising as long as it is a *bona fide* educational program.

6. Rule 7.3(a)(1) prohibits a lawyer from engaging in solicitation by certain specified means including “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.” Under the definition in Rule 7.3(b), some but not all advertisements constitute solicitations:

“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. Applying the above opinions and Rules, as elucidated by the comments, to the present inquiry, we conclude that the inquirer’s proposed course of action does not violate the Rules. The inquirer proposes a legal education program governed by the general principle that such programs are not only permitted but encouraged. The format of the presentation – a video published on the internet – does not change the analysis. *See* Rule 7.1, Cmt. [7] (recognizing dissemination of non-advertising legal information by another form of internet content – the

blog); *see also* ABA 10-457 (noting that lawyer websites “can assist the public in understanding the law and in identifying when and how to obtain legal services”) (footnote omitted).

8. The proposed video is a form of legal education for lay individuals that would not usually be categorized as advertising. The primary purpose of such communications is deemed to be one of educating the public rather than attracting clients. *See* Rule 7.1 Cmt. [9]. The inquirer’s planned inclusion of her firm contact information at the end of the video is a reasonable and appropriate way of identifying the source of the educational program, and it does not, in and of itself, transform the video into an advertisement. *Cf.* Rule 7.1 Cmt. [7] (explaining that items such as legal pads containing law firm name and contact information do not constitute advertisements if their primary purpose is “general awareness and branding” rather than retention of law firm for a particular matter).

9. As long as the video does not go beyond a *bona fide* educational presentation, an inquiry into the existence of additional motivations for preparing that presentation is not required. But if the video contains statements or suggestions that the viewers should retain the preparer of the video to represent them, then it may appear that the primary purpose of the video is one of attracting clients. In that case, the video will be subject to Rule 7.1 and the other provisions in the Rules that govern advertising.

10. A similar analysis applies to the flyers (and to other forms of publicity such as mass mailings or emails). If the flyers serve merely to publicize a video which itself does not constitute advertising, then they too would be deemed to have a primarily educational purpose. If the flyers go beyond that to include reasons to hire the inquiring lawyer, then their primary purpose may be deemed one of attracting clients, in which case they would be subject to the advertising rules. If the video and the flyers do not constitute advertising, then they would also not implicate the rules governing solicitation.

11. If, on the other hand, the video includes reasons to hire the inquiring lawyer and constitutes advertising (or if the flyers themselves encourage the public to retain the preparer of the video), then use of the flyers would have to comply with the rules governing solicitation. For example, the flyers generally could not be distributed in person to members of the public. *See* Rule 7.3(a)(1).<sup>2</sup>

12. Additionally, “all 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.” Rule 7.1, Cmt [6].

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<sup>2</sup> As the Committee lacks jurisdiction to determine matters of law, we do not opine on whether the inquirer’s planned communications are permitted under the anti-solicitation provisions of Judiciary Law §479.

## **CONCLUSION**

13. A lawyer, having produced and posted an internet video designed to educate lay individuals about a legal subject, may ethically distribute flyers to members of the public inviting them to view that video. However, the lawyer may be subject to the advertising and solicitation requirements under the Rules if the video or the flyers include statements or suggestions that the viewers should hire the creator of the video.

(8-12)