



New York State Bar Association Committee on Professional Ethics

Opinion 937 (10/3/2012)

Topic: Promotional gifts branded with a law firm's logo

Digest: A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

Rules: 7.1,7.3(a)

FACTS

1. The inquirer wants to cooperate with a local hospital to provide a promotional gift (i.e., calendar, pen, etc.), branded with the law firm logo, in a welcoming informational package given to all hospital patients.

QUESTION

2. May a law firm provide a promotional gift with its logo in a welcoming informational package provided to all patients at a local hospital?

OPINION

3. In our view, nothing in the New York Rules of Professional Conduct prevents the proposed distribution of branded promotional gifts to hospital patients. Such items are not "advertising" within the meaning of the Rules, so that many of the restrictions on advertising and solicitation (a form of advertising) do not apply. An "advertisement" is defined 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 the retention of the lawyer or law firm," other than communications to existing clients or other lawyers.¹

4. As the State Bar's Comments to the Rules make clear, there are many communications that have the general aim of increasing a lawyer's business and yet are not deemed advertising. For example, topical newsletters intended to educate recipients about new developments in the

¹ Rule 1.0(a). "Solicitation" is defined to include "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," other than a proposal or other writing prepared and delivered in response to a specific request of a prospective client. Rule 7.3(b).

law are generally not considered advertising. Rule 7.1 Cmt. [7]. Of particular significance here, the same is true of certain communications intended to raise brand awareness:

“Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo and contact information printed on them do not constitute ‘advertisements’ within the definition of this Rule if their primary purpose is general brand awareness and branding, rather than the retention of the law firm for a particular matter.”

Rule 7.1, Cmt. [8]. In other words, when the intent of a communication is to educate recipients about legal developments or to raise general brand awareness, that intent will be considered its primary purpose. Thus, even if such communications are more fundamentally motivated by the aim of increasing a lawyer’s business, they are not advertising within the meaning of the Rules.

5. With that understanding, it seems clear that the primary purpose of giving incoming hospital patients a calendar or pen marked only with the inquirer’s name and contact information is to raise general awareness of the inquirer’s firm. As a consequence, numerous rules that apply to advertising, such as the requirement that all advertisements include the principal law office address and telephone number of the lawyer or law firm being advertised, Rule 7.1(h), do not apply to the distribution of the promotional gifts at issue here. We note, however, that if the pen or calendar were marked with more than the firm logo – if for example they included slogans or more information about the firm – then the conclusion we reach here might change.

6. We recognize that the distribution of law-firm-branded materials to hospital patients might seem in tension with the policy expressed in Rule 7.3(a)(2)(iv), which provides that solicitation is barred when “the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer.” But we think it unlikely that a mere branded pen or calendar would overwhelm the judgment of even a frail hospital patient or his or her family.

7. In any event, the proposed distribution of gifts would not violate the terms of Rule 7.3(a)(2)(iv). Indeed, this would be true even if the pen or calendar, by including more than the firm logo, were to constitute advertising. The fact that some recipients of the gifts might be expected to be in a frail physical, emotional or mental state does not mean that otherwise permissible distributions to the hospital-patient population as a whole would be barred. Distributions to any broad segment of the population would be expected to reach some persons who are covered by Rule 7.3(a)(2)(iv), but that does not mean that the entire distribution is prohibited. Of course under the actual inquiry, the items would be marked only with the firm logo. Because the proposed distribution of promotional gifts would therefore not constitute advertising, it also would not constitute solicitation and could not violate the rule against solicitation of frail recipients.

8. Nor would the proposed distribution violate Rule 7.3(a)(1), which bars in-person solicitation. Again supposing that the items were to include enough information so as to

constitute advertising, their distribution, without any accompanying oral communication about the firm, would not be the kind of in-person contact barred by the rule.² And again returning to the actual inquiry, because there would be no advertising, there could be no violation of the rule against in-person solicitation.

CONCLUSION

9. A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

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² In N.Y. State 659 (1994), this Committee opined that including a law firm advertisement in an "information package" that would be distributed by a car dealer to car buyers, without discussion, would not constitute in-person solicitation. We subsequently opined that even a lawyer's paid paralegal employee could deliver a solicitation to neighboring buildings provided the paralegal "simply [left] a name-change announcement at a residence...[and had] no personal contact with the recipients." N.Y. State 857 (2011).