



New York State Bar Association
Committee on Professional Ethics

Opinion 967 (6/5/13)

Topic: Lawyer advertising

Digest: A blog written by an attorney, the primary purpose of which is not retention of the attorney, is not an advertisement.

Rules: 1.0(a) & (c), 7.1(k)

FACTS

1. The inquirer is a columnist who is also an attorney licensed in New York. The inquirer has become an employee of a corporation that promotes work-life balance. In that capacity the inquirer will write a blog that will be titled “The [Inquirer’s Name] Esq. Blog.” The blog will not address legal topics but will include posts about work-life balance.¹

QUESTION

2. Is the inquirer’s blog an advertisement and thus subject to the retention and preservation requirements of the attorney advertising rules?

OPINION

3. Rule 7.1 of the New York Rules of Professional Conduct contains extensive requirements relating to advertising by attorneys. Rule 7.1(k) provides: “Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved” at specified times.

4. Rule 1.0(c) defines “computer-accessed communication” as “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.” A blog disseminated over the internet is clearly a “computer-accessed communication” as defined in Rule 1.0(c).

¹ For purposes of this opinion we have slightly changed the facts of the inquiry.

5. However, the restrictions in Rule 7.1 apply only to “advertisements” as defined in the Rules, and in particular, Rule 7.1(k) applies only to those computer-accessed communications that constitute or contain such advertisements. Rule 1.0(a) broadly defines “advertisement” 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.” In this instance there is no question that the blog is a public communication made by a lawyer. Another element of the definition is that the communication be “about that lawyer.”² It seems reasonable to assume that some of the posts will be about the blog’s author, so we assume for purposes of this inquiry that this test is also met. The remaining question is whether the primary purpose of the blog “is for the retention of the lawyer.”

6. The Comments to Rule 7.1 indicate that not all communications by and relating to a lawyer constitute an advertisement. For example, marketing and branding items such as pencils or legal pads with a firm name do not constitute advertisements if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter. Cmt. [8]. Sponsorship of cultural or sporting events, with dissemination of information about the lawyer limited to specified narrow categories, is also not considered advertising. Cmt. [10]. In an opinion on whether a lawyer could offer a prize to join the lawyer’s social network, this Committee noted:

“To fall within the definition of ‘advertisement,’ the communication offering the prize must be for the ‘primary purpose’ of the inquirer’s retention. The fact that business development might be the inquirer’s ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer’s personal social circle, with the aim of meeting potential new clients.”

N.Y. State 873 (2011). Even when communications from lawyers contain information about the law, they are not necessarily advertising.³

7. Since the inquirer’s blog will not discuss legal matters and it appears that the inquirer does not intend to solicit clients for a law practice, the blog will not be considered an advertisement even though its name indicates that the author is an attorney.

² Alternatively, if the correct reading of Rule 1.0(a) is that communications otherwise within the definition are advertisements if they are made by a lawyer or law firm “about that lawyer[’s] or law firm’s services,” then there would be an additional reason, beyond those in the body of this opinion, to conclude that the blog is not an advertisement.

³ For example, “[t]opical newsletters ... or blogs intended to educate recipients about new developments in the law are generally not considered advertising.” Rule 7.1, Cmt. [7]; *see also*, e.g., N.Y. State 918 (2012) (educational legal video that does not encourage viewers to retain the law firm is not an advertisement because the primary purpose is not retention of the law firm); N.Y. State 899 (2011) (providing general answers to questions in a legal chat room, without more, does not constitute advertising).

8. We note, however, that “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].

CONCLUSION

9. A blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement, and would thus not be subject to the retention and preservation rules for lawyer advertising, even though the title of the blog makes clear that the author is an attorney.

(24-13)