



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

Opinion 1001 (3/28/14)

Topic: Sale of Third-Party Advertising in Law Firm Brochures and Rules Governing Advertising Brochures with Educational Content

Digest: Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether the brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

Rules: 1.0(a); 1.5(g), 7.1(d), (e), (f), (k), (l), (m) , 7.2(a)

QUESTION

1. The inquiring law firm asks whether the law firm may accept a fee for allowing third parties to advertise in the firm’s monthly brochure, which is distributed free of charge through a variety of outlets and contains both articles of legal interest in the areas in which the law firm practices and advertisements, identified as such, for the law firm’s services. We see no obstacle in the Rules of Professional Conduct to such a practice subject to the caveats below.

BACKGROUND

2. The inquirer is a New York law firm that offers professional services in several practice areas. On a monthly basis, the law firm publishes a newsletter containing information about a variety of legal subjects on which the firm concentrates, which is distributed free of charge through several means to clients and non-clients. The content of this newsletter provides analysis of legal issues of importance in the practice areas the law firm offers, but the articles typically conclude with an invitation to call the law firm for additional information. Some articles prominently feature a successful representation by the law firm. The newsletter also prominently features advertisements for the law firm, offering, among other things, free legal consultations, “reasonable” fees, and payment plans for the firm’s services. The back cover of the newsletter consists entirely of an advertisement for the firm.

ANALYSIS

3. The law firm's sole question is whether the law firm may accept advertising for the newsletter from other professionals, including law firms, medical professionals, and others. The law firm states that it will charge a straight fee for this advertising, without any arrangement indicative of referrals, fee-sharing, or other illicit agreements between service providers. The inquiry, then, is essentially whether a lawyer who engages in advertising on the lawyer's own behalf through a regular publication of interest to the public may also sell advertising in the same publication, without any kind of agreement between the publishing law firm and the advertiser. In our view, if the publication complies with New York Rule of Professional Conduct 7.1, then the law firm may provide space in its newsletter to others provided no impermissible conditions accompany the transaction.

4. In so opining, we rely on the law firm's representation that improper factors do not influence the value the law firm receives, if any, for the advertising. For instance, solely for the purpose of promoting good relationships, a law firm may decide to offer at no cost an advertisement for a former colleague who is starting a new law practice, or for a non-lawyer service provider whom the law firm sincerely considers worthy of consideration by persons who receive the brochure. Our concern is not with the price of the advertising but with any explicit or implicit understanding between the publisher and the advertiser suggestive of a fee-splitting or referral arrangement that would violate other Rules of Professional Conduct, including, for example, Rule 1.5(g) and Rule 7.2(a).

5. Although not the subject of the firm's inquiry, we would be remiss if we failed to note that, in our view, the firm's entire newsletter, as presented to us, constitutes "advertising" within the meaning of the Rules of Professional Conduct. Rule 1.0(a) defines "advertisement" to mean "any public or private communications 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." Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm. That portions of the newsletter are primarily educational in nature is not dispositive, especially when nine of the twelve pages contain advertisements for the law firm, including the entire back cover; almost all the articles end with an invitation to call the law firm for advice; and several articles begin with questions targeting persons with potential issues and identifying the firm as a firm that may assist with those issues.

6. This means that the provisions of Rule 7.1 apply to the entire newsletter. Among other things, the words "Attorney Advertising" should appear in some form on the first page of the brochure. Rule 7.1(f). These words must be "clearly legible and capable of being read by the average person." Rule 7.1(l). Statements "characterizing the quality of the lawyer's or firm's services" or that are "reasonably likely to create an expectation about the results the lawyer can achieve" – which at least some of the articles in the newsletter can be read to do – must be "accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Rules 7.1(d) & (e). Rule 7.1(k) requires the law firm to maintain a copy of the advertisement for at least three years. Rule 7.1(m) says that any fee arrangement offered in an advertisement published at least monthly must be held open until the next issue. This is not intended as an

exhaustive list of the issues the inquirer should examine in light of Rule 7.1, which we urge the inquirer to review carefully in publishing future issues.

7. Otherwise, we see no problem with a law firm selling or otherwise offering advertising space in its newsletter to other professionals provided that no other arrangement, such as a referral or other fee, attends the transaction. In our recent Opinion 981, we opined that a law firm may place advertisements for a non-legal service provider in the lawyer's office (in this instance, a home security firm), and that the non-legal service provider may pay the lawyer a fee if someone, whether or not a client of the lawyer, happens to retain the third party as a result of the advertisement being placed in the lawyer's office. We have otherwise concluded that a variety of cross-selling techniques are permissible provided that the lawyer complies with Rule 7.1 and does not transgress rules of fee-splitting, referrals and similar improper practices. See, e.g., N.Y. State 947 (2012) (acquisition of mailing lists); N.Y. State 937 (2012) (cooperative arrangement with a hospital for promotional gifts); N.Y. State 915 (2012) (linking of non-legal websites to a lawyer's website).

CONCLUSION

8. Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the publishing law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

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