



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

Opinion 1039 (12/8/14)

Topic: Advertising; solicitation

Digest: An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a free written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney later uses the contact information obtained through the opt-in box to send advertisements to subscribers, those communications would be subject to the rule on advertising and might also be subject to the rule governing solicitation.

Rules: 1.0(a), 7.1(a), (f) & (h), 7.3(b)

FACTS

1. The inquirer is a member of the New York and California bars¹ and operates a blog (available on the internet) that provides legal and publishing information to authors. She wants to build a list of subscribers who are interested in her blog posts and to whom she might send alerts about changes in publishing matters and copyright law. She also wishes to periodically survey these same subscribers about what they regard as their legal and publishing needs in order to create products that suit those needs. Finally, she wishes to advertise those legal products to the subscribers and others in the future.

2. The entire blog is marked as an “attorney advertisement” and contains an opt-in box where the inquirer offers a free written report about copyrights in exchange for readers’ names and legal addresses. Those subscribers that check the opt-in box will be broken down based on the state in which they live so the inquirer can determine what she “might offer as an attorney licensed in those states vs. general publishing information.”

QUESTION

3. May an attorney operate a blog containing an opt-in box whereby a person who subscribes can receive a written report about copyrights in return for providing contact information, which the attorney may later use to offer subscribers her products and services?

4. Does the above activity constitute “solicitation” within the meaning of Rule 7.3(b) of the

¹Whenever a lawyer is licensed in more than one jurisdiction, there is a question of choice of law under Rule 8.5(b)(2). We have assumed for purposes of this opinion that the inquirer principally practices in New York and that her conduct will have its predominant effect here.

New York Rules of Professional Conduct (the “Rules”)?

OPINION

5. Our jurisdiction extends only to questions of legal ethics. We note that the use of email for commercial purposes is covered by the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the "CAN-SPAM Act"), and by rules promulgated by the Federal Trade Commission, *see* 16 C.F.R. 316. The inquirer should therefore determine whether the use of email addresses gathered for one purpose may be used for another purpose and what disclosures or disclaimers are legally required. Those are questions of law beyond our jurisdiction.

6. Rule 1.0(a) defines the term “advertisement” for purposes of the Rules as: “any public or private communication 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. It does not include communications to existing clients or other lawyers.”

7. If a communication constitutes an “advertisement,” it is subject to numerous requirements in Rule 7.1. *See* N.Y. State 848 (2010). Primary among those is the requirement that the advertisement not contain any “statements or claims that are false, deceptive or misleading.” Rule 7.1(a)(1). In addition Rule 7.1 requires that each advertisement (with certain listed exceptions) be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. An advertisement must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered. Rule 7.1(h). It must be pre-approved by the lawyer or law firm, and a copy must be retained for a period of not less than three years following its initial dissemination. (Advertisements contained in a computer-accessed communication must be retained for a period of not less than one year.) Rule 7.1(k).

8. Not all blogs operated by attorneys constitute advertisements under the Rules. *See* Rule 7.1, Comment [7] (“Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising.”); N.Y. State 967 (2013) (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). However, as Rule 7.1, Cmt. [7] points out, “a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm’s cases, personnel, clients or achievements) generally would be considered advertising.” *See also Hunter v. Virginia State Bar ex rel. Third Dist. Committee*, 285 Va. 485, 744 S.E.2d 611(Va. 2013) (attorney's blog posts, while containing some political commentary, were deemed commercial speech subject to attorney advertising rules).

9. The inquirer states that her blog is labeled an "attorney advertisement" because a primary purpose of the blog is to advertise her services. The definition of "advertisement" quoted in ¶6 above requires that *the* primary purpose must be the retention of the lawyer or law firm. We do not opine on whether the label is actually required here, but we recognize that many lawyers take a conservative approach to whether educational material prepared for clients is an advertisement and thus should bear the label "attorney advertisement" as required by Rule 7.1(f). Whether a

given communication is an “advertisement” is not always clear. *See* N.Y. State 848 (discussing factors to be considered in determining if attorney communication constitutes an “advertisement,” including: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication). The fact that the lawyer decides as a precautionary matter to use the “advertising” label is not dispositive.

10. In N.Y. State 873 (2011), we noted that the Rules do not prohibit an attorney from offering a prize to those who join the attorney’s social networking sites, so long as the offer does not constitute illegal conduct. Similarly, we see no ethical bar prohibiting the inquirer here from offering a written report about copyrights in exchange for readers’ names and email addresses.

11. The inquirer also asks whether her communications constitute a “solicitation,” thereby subjecting them to the special requirements of Rule 7.3. The blog and opt-in box do not, standing alone, constitute a solicitation. Rule 7.3(b) defines a “solicitation” as an “advertisement” that meets other criteria. Thus, if the blog is not an “advertisement” under Rule 1.0(a), by definition it cannot be a solicitation under Rule 7.3(b). However, if the blog is in fact an “advertisement,” the lawyer needs to consider whether it is also a solicitation.

12. Under 7.3(b), a “solicitation” is “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 . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.” Comment [3] to Rule 7.3 states that one way that an advertisement may be considered to be “directed to, or targeted at, a specific recipient or group of recipients” within the meaning of Rule 7.3(b) is if it is made by “in-person or telephone contact or by real time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents.” The blog and opt-in box here are not transmitted by real time or interactive computer-accessed communication and are not delivered to any specific recipients. *See* N.Y. State 1016 (2014) (“A non-interactive commercial post to members of [a] message group would not constitute an interactive computer-accessed communication.”).

13. Furthermore, the blog does not make “reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers.” Rule 7.3(b), Comment 3; *see also* Rule 7.3(b), Comment [4] (“an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at ‘a specific recipient or group of recipients’ simply because it is intended to attract potential clients with needs in a specified area of law.”) Thus, even if the blog were an “advertisement” under the Rules, it is not a solicitation.

14. If the attorney (or someone on the attorney’s behalf) later uses the email addresses obtained through the opt-in box to send the inquirer’s advertisements, these communications would qualify as “advertisements” and, in addition, may very well fall within the definition of “solicitation” in Rule 7.3(b) and would be subject to the rules governing solicitation in Rule 7.3.

CONCLUSION

15. An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney uses the contact information obtained through the opt-in box to forward advertisements to subscribers, those communications would be subject to the rule governing advertising and might also be subject to the rule governing solicitation.

(42-14)