



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

Opinion 1110 (11/23/16)

Topic: Advertising; solicitation; educating lay persons

Digest: Lawyer may (i) organize and participate in online webinars and live seminars for non-lawyers on topics within lawyer's fields of competence, (ii) publicize the same by individual invitation, social media or other lawful means, and, (iii) following a webinar/seminar, discuss representation with participants, all subject to compliance with applicable rules on advertising and solicitation.

Rules: 1.0(a); 7.1; 7.3

FACTS

1. The inquirer, an intellectual property lawyer practicing in New York, plans to conduct online webinars and live seminars on topics within his principal fields of practice for persons who may have a business interest in those topics and a need for legal services. Inquirer contemplates identifying persons fitting that description by use of commercially available business listings, including such listings on government agency web sites, such as business entity lists. Admission to the webinars and seminars may be free or may be for a fee.

QUESTIONS

2. The inquirer asks a number of questions:
- A. May the lawyer attract possible attendees to seminars and webinars by sending invitations to addresses found on commercially available business entity lists?
 - B. May the lawyer advertise the seminars on social media using social media-provided filters to target a specific audience?
 - C. Does it matter whether the lawyer charges a fee for the seminars and webinars?
 - D. May the lawyer solicit prospective clients to register for the seminars?
 - E. May the lawyer notify webinar/seminar participants of future webinars/seminars?
 - F. May the lawyer solicit webinar/seminar participants for legal representation after the program ends?

OPINION

Sponsoring Seminars for Non-lawyers

3. This Committee has explained that, under both the current Rules of Professional Conduct (the “Rules”) and the former Code of Professional Responsibility (the “Code”), lawyers may participate in legal seminars designed for non-lawyers. *See* N.Y. State 918 (2012), *citing* N.Y. State 830 (2009) (under the Rules) and N.Y. State 508 (1979) (under the Code). We noted in N.Y. State 918 that “participation in such programs is not only permitted but encouraged.” *Id.* *See* Rule 7.1, Cmt. [9]. Under the Rules, there is no difference in this regard between seminars conducted in person and those conducted over a website. Consequently, in this opinion, we will refer generically to “seminars” to include both live programs and web-based programs.

4. Before the Supreme Court’s holding in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which extended First Amendment protection to lawyer advertising, the Code prohibited lawyers and law firms from organizing legal seminars for nonlawyers. Rather, sponsorship was allowed only by a “bar association, school or other responsible public or private organization.” N.Y. State 508, *supra*. The post-*Bates* amendments to the Code removed restrictions on lawyer sponsorship of such seminars and programs. *Id.*

5. If such seminars were to be available and useful to significant numbers of people, lawyers needed to publicize them. Therefore, we held that a lawyer may ethically mail notices of such seminars. *See* N.Y. State 508 (1979) (absent a judicial holding that mailing of advertisements violates §479 of the Judiciary Law, law firm may organize and promote by mail a legal seminar designed for non-lawyers).

Publicizing the Seminars – Does the Seminar or the Publicity for the Seminar Constitute Advertising?

6. The inquirer’s questions regarding the means a lawyer may use to publicize proposed seminars involve more than just the mail. Under the Rules, the answers to the inquirer’s questions depend on whether the seminar itself (or the advertising for the seminar) would constitute “advertising” within the meaning of Rule 1.0(a) that is subject to Rule 7.1 or “solicitation” within the meaning of Rule 7.3(b) that is subject to Rule 7.3. If the seminar (or the publicity for the seminar) does not constitute advertising, then the provisions of Rule 7.1 will not apply (and, since solicitation is a subset of advertising, neither will the prohibitions of Rule 7.3). If the seminars (or the publicity for the seminars) do constitute advertising, the inquirer must adhere to Rule 7.1. If the seminar constitutes solicitation, then the provisions of Rule 7.3 will apply, and if it also involves in-person or telephone contact or interactive computer-accessed communication, then the seminar will be prohibited unless it is advertised only to current and former clients and close friends or relatives of the inquirer.

7. We begin with what constitutes advertising and what constitutes solicitation under the Rules. Rule 1.0(a) defines an “advertisement” 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. [Emphasis added.]

8. A solicitation is a particular kind of advertisement defined in Rule 7.3(b) as follows:

(b) 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. [Emphasis added.]

Significantly, under this definition, what differentiates a solicitation from a garden variety advertisement is that a solicitation is “directed to, or targeted at, a specific recipient or group of recipients.” Furthermore, if a communication is not an advertisement, it is not a solicitation. Thus the first issue to resolve here is whether the inquirer’s proposed publicity constitutes advertising subject to Rule 7.1.

9. In order to answer the questions posed, we must address whether the proposed seminars constitute advertising. In N.Y. State 848 (2010), which considered whether an educational newsletter constituted advertising, we weighed three factors: (1) the intent of the communication, *i.e.*, whether it is primarily educational or whether instead a substantial or significant purpose is to secure the retention of the lawyer or law firm publishing the newsletter; (2) the content of the communication; and (3) the targeted audience of the communication.

10. Scholars have suggested that, in determining the primary purpose of publicity, courts are likely to interpret the “primary purpose” to mean “substantial” or “significant.” Roy Simon & Nicole Hyland, *SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* 23 (Thompson Reuters 2016 ed). The determination of the “primary purpose” of publicity is subjective and judged in light of all the circumstances. *See* N.Y. State 1009 (2014), *citing* N.Y. State 873 (2011); *see also* N.Y. City 2015-7 (2015) (“We conclude that the ‘primary purpose’ standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.”).

11. To determine whether retention of the lawyer is the primary purpose of a communication, we must consider what other purpose the lawyer might have. The comments to Rule 7.1 address the 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].

12. In N.Y. State 918 (2012), we discussed the primary purpose test in the context of educational programs as follows:

[I]f 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. N.Y. State 918, ¶5.

On the other hand, in N.Y. State 848 ¶9 we said, "Contact or biographical information about the lawyers or the law firm . . . does not, without more, transform an otherwise educational communication into advertising." *See* Rule 7.1, Cmt. [8]; *cf.*, Rule 7.1, Cmt. [10]. The same reasoning would apply to publicity about a legal seminar or webinar.

13. The second factor considered in N.Y. State 848 is the "content" of the communication. The Committee pointed to Comment [7] to Rule 7.1, to the effect that newsletters or blogs focused on current developments in the law generally are not considered advertising, but that one that discusses developments in the law primarily as a vector for delivering information about the lawyer or law firm's personnel, clients, skills and achievements "would be considered advertising."

14. The third factor considered in N.Y. State 848 is the "audience." Communications that might otherwise be considered advertising subject to Rule 7.1 are excluded from the ambit of that Rule if directed to a close friend, a relative, an existing or former client, or a lawyer.

15. Assuming that the seminar and the communications used to publicize the seminar do not go beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire the inquirer, we believe they would not constitute advertising, and, therefore, would not involve solicitation. In that case, the inquirer could use any of the methods proposed in questions to publicize the seminar.

16. The remainder of this Opinion, however, assumes that the seminar and the publicity for the seminar is not so limited, but that a substantial or significant purpose of the seminar or the publicity for the seminar is to encourage prospective participants to retain the inquirer. They therefore would constitute advertising.

Publicizing the Seminars for Non-Lawyers – Does the Seminar or the Publicity for the Seminar Constitute Solicitation?

17. If a communication constitutes an “advertisement” subject to the requirements set forth in Rule 7.1, the question then arises whether it also constitutes a “solicitation” subject to Rule 7.3.

18. As noted above, an advertisement constitutes “solicitation” under Rule 7.3(b) if it “is directed to, or targeted at, a specific recipient or group of recipients”. Two Comments to Rule 7.3 – Comments [3] and [4] – provide gloss on the interpretation of the phrase “directed to, or targeted at, a specific recipient or group of recipients.”

19. Comment [3] states that an advertisement may be considered to be “directed to, or targeted at, a specific recipient or group of recipients” in two different ways: (1) if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication, or (2) if it is addressed so that it will be delivered to the specific recipient or recipients, as in the case of letters, emails and express packages. The Comment points out that advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements not delivered by those means, but addressed so that they will be delivered to a specific recipient or recipients, may be sent to a broader group of recipients, but they are subject to additional rules, including a filing requirement, to make them more easily subject to disciplinary oversight and review.

20. Comment [4] makes clear that, unless an advertisement falls within Comment [3], if it appears 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 group of recipients, simply because it is intended to attract potential clients with needs in a specified area of the law. For example, the Comment notes that an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine where it is placed is geared toward inventors.

21. With this background, we now turn to the inquirer’s questions on the method of conducting and publicizing the seminars, assuming that the seminar and the materials used to publicize it are advertising.

Seminars and Webinars

22. A seminar is conducted in person. A webinar is usually conducted via real-time or interactive computer-accessed media. In each case, if the inquirer included a pitch for his own services, it would constitute solicitation that is in-person or using real-time or interactive computer-accessed media. *See* Rule 7.3(a); Comment [3] to Rule 7.3. For guidance on what constitutes real-time or interactive computer-accessed communication, see Rule 1.0(c); Simon and Hyland, *supra* at 1769-1770. Thus, Rule 7.3(a) would limit participants to close friends, relatives and former or existing clients of the inquirer.

23. If the webinar were not real-time or interactive, then the inquirer would not be limited in the invitees, but the seminar would be considered solicitation and subject to the filing and other requirements of Rule 7.3(c).

Invitations Addressed to Particular Persons

24. The inquirer proposes to send seminar invitations to prospective attendees whose contact information appears on government lists.¹ Simon and Hyland state:

As a quick rule of thumb, letters and emails are always “directed to, or targeted at” specific recipients — they have an address on them Likewise, every advertisement delivered in-person to an individual known in advance, and every telephone call (live or recorded), is to a “specific recipient.”

Simon and Hyland, *supra* at 1791. Thus, if the communications contain a “hiring pitch” or other advertising, they constitute solicitation and must comply with Rule 7.3.

Soliciting Prospective Participants by Other Means

25. The inquirer asks about “soliciting” prospective clients to register for the seminars, without defining “soliciting.” As in the case of sending communications to prospective attendees on commercially available mailing lists, if the communication constitutes an advertisement, any form of solicitation must comply with Rule 7.3.

Communications to Former Seminar Participants

26. The answer does not differ where the recipients are former seminar participants, whether the inquirer wishes (i) to send notices of future seminars that constitute advertising or (ii) to offer former participants legal representation on IP matters. Thus, the inquirer may not solicit in person or by real-time or interactive computer-accessed communications unless the recipient is a close friend, relative, former client or existing client – and the fact that a person participated in a webinar does not turn the participant into a client or close friend. And any solicitation not involving personal or real-time or interactive computer-access communications would have to comply with Rule 7.3.

¹ Questions of law are outside our jurisdiction, so we do not opine on whether using government agency or commercial business lists to develop a list of invitees may violate any federal or state law, e.g., with respect to privacy. Cf., Driver’s Privacy Protection Act 18 U.S.C.A. §§2721-2725; *Maracich v. Spears*, 133 Sup. Ct. 2191 (2013).

Charging for Seminars

27. The inquirer asks if it makes a difference if the lawyer charges those who attend the seminars. There is nothing inherently unethical about charging for educational seminars. However, when a lawyer charges for seminars targeted at lay people, the lawyer should make clear that the seminar cannot give individualized legal advice. As expressed in Rule 7.1, Cmt. [9]:

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

Otherwise, the attendees may believe that their payments entitle them to receive legal advice.

Communications Using Social Media with Target Filters

28. The inquirer asks whether it is ethically permissible “to advertise the webinars/seminars on social media, using social media provided filters to target a specific audience.” In N.Y. State 1016 (2014), we discussed a lawyer’s sending advertisements through internet message boards for specific groups, such as parenting groups, neighborhood specific groups and parents of children with special needs and concluded that advertisements sent through such message boards would not constitute solicitation. We assumed that such messages would not be individually addressed, but rather would be posted on the message board. We therefore concluded that the advertisements were akin to public media and would not be deemed to be directed to or targeted at a specific recipient. We also concluded that the internet message boards did not involve real time or interactive computer-accessed communications. Because the proposed advertisement was not directed to, or targeted at, a specific recipient or group of recipients, and was not sent using real time or interactive computer communications, we concluded it would not be a solicitation.

29. Here, the inquirer has not provided information on the nature of the social media that the inquirer would use in the proposed communications. Consequently, we cannot determine whether the advertisements would be individually addressed or sent using real time or interactive computer-accessed media.

CONCLUSION

30. A lawyer may organize and participate in online webinars and live seminars for non-lawyers on topics within the lawyer’s fields of competence, publicize the same by individual

invitation, social media or other lawful means, and following a webinar or seminar discuss representation with webinar/seminar participants, all subject to compliance with applicable rules on advertising and solicitation as discussed in the body of this opinion.

(22-16)