



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

Opinion 1227 (08/26/2021)

Topic: Advertising, solicitation, targeted email to prospective clients

Digest: Email communication from out-of-state law firm to a list of specific individuals in New York, seeking clients for future false advertising and products liability class actions, is both an advertisement and a solicitation under Rules 7.1 and 7.3 of the New York Rules of Professional Conduct.

Rules: 1.0(a), 7.1, 7.3

FACTS:

1. The inquirer is a partner in a California law firm. Although the firm does not have a New York office, one of its partners is admitted to practice in New York. The inquirer proposes to send out an “email blast” to individuals in New York, seeking potential named plaintiffs for future class action cases that the firm would like to commence alleging false advertising and products liability. The inquirer acquired the names and email addresses of these individuals from various lists, but the inquirer has no information about the individuals listed, including whether or not they have been harmed by the advertisements or products that the firm is investigating.

QUESTION:

2. Is the proposed email communication to potential clients a “solicitation” under Rule 7.3 of the New York Rules of Professional Conduct (the “Rules”)?

OPINION:

3. This inquiry is governed principally by Rule 7.3, entitled “Solicitation and Recommendation of Professional Employment.” There is a threshold issue, however, as to whether this committee has jurisdiction to interpret Rule 7.3 as applied to the proposed conduct of an attorney who is not admitted to practice in New York and who practices in a firm that does not maintain an office in New York. We believe we do have such jurisdiction, because paragraph (i) of Rule 7.3 provides:

(i) The provisions of this Rule [7.3] shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

4. Accordingly, as New York specifically asserts disciplinary jurisdiction over out-of-state

lawyers like the inquirer who solicit retention by residents of New York State, we will proceed to answer the inquiry.

5. Rule 7.3(b) provides that “solicitation” is a form of “advertisement” that satisfies four specific criteria:

(b) For purposes of this Rule [7.3], “solicitation” includes 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. [Emphasis added.]

6. Comment [2] to Rule 7.3 elaborates on this definition by stating: “Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.”

7. Rule 1.0(a) defines “advertisement” as follows:

(a) “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.

8. Since the emails will be sent “by or on behalf of” the inquirer’s law firm, and since the “primary purpose” of the emails is to locate future clients willing to retain the inquirer’s firm and to serve as named plaintiffs in future class action false advertising or product liability cases which the inquirer’s firm will commence, the proposed email is an “advertisement” within the meaning of Rule 1.0(a).

9. The proposed email communication clearly satisfies three of the four additional criteria of Rule 7.3(b) for classification as a solicitation. First, the communication will be “initiated” by the lawyer or law firm (rather than responding to a “specific request” from a potential client). Second, the “primary purpose” of the email is to locate clients who will retain the firm for future class action matters involving false advertising and products liability claims. Third, a “significant motive” for the email is the firm’s expectation of “pecuniary gain” via future legal fees if it is retained.

10. The only remaining requirement is that the email communication be “directed to, or targeted at, a specific recipient or group of recipients.” Comment [3] to Rule 7.3 provides guidance on this question, explaining that an attorney advertisement is “directed to or targeted at” a specific recipient” if it is “addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages).” Such advertisements are deemed to be solicitations subject to more stringent rules, “because otherwise they would not be readily subject to disciplinary oversight and review.” Rule 7.3, Comment [3].

11. This policy of subjecting solicitations to more stringent rules is the crux of the Rule. Newspaper, magazine, and billboard advertisements, like radio and television advertisements, are published or broadcast on “public media,” which is accessible and reviewable for compliance purposes. For the most part, website and internet advertising share this characteristic of being accessible and reviewable. In contrast, private communications to individuals or groups of individuals, such as letters, emails, and direct-mail packages, are not as easily accessible to the public or the disciplinary authorities and cannot ordinarily be reviewed or monitored for compliance purposes.

12. The protection of the public from non-compliant lawyer advertising and solicitation is an important aspect of the work of attorney grievance committees. Without the ability to review targeted advertising, these committees could not confirm that such advertisements are not deceptive, false or misleading, and are otherwise in compliance with the Rules.

13. We have reached similar conclusions in prior opinions. In N.Y. State 1009 (2014), we concluded that email sent to a specific recipient is a mode of communication that is considered “targeted” at “specific recipients” within the meaning of Rule 7.3. In N.Y. State 1039 (2014), we concluded that email sent to subscribers to an attorney blog could be solicitations if the attorney obtained the email addresses through an opt-in box on the blog. In N.Y. State 1136 (2014), we found that written communications from a law firm inviting people to a law firm marketing event must comply with Rule 7.3 if the firm is seeking client retention. In contrast, in N.Y. State 1016 (2014), we found that an emailed advertisement sent to all members of internet message boards of which the attorney was a member was not a solicitation.

14. Here, in our view, the inquirer’s emails constitute an “advertisement” that is “targeted at” “specific recipients” whose names are on a list of names and email addresses acquired by the firm. It does not matter that the firm has no further information about the recipients, that the recipient group is large, or that members of the group have not been chosen based on particular shared characteristics. The mailing is to a list of specific individuals, and that suffices to define it as a “solicitation” as defined by Rule 7.3(b).

CONCLUSION:

15. The proposed email communication to a list of individuals in New York, seeking clients for future false advertising or products liability class actions, is a solicitation under the Rule 7.3 of the New York Rules of Professional Conduct.

(13-21)