



Committee on Professional Ethics

Opinion 1232 (11/09/2021)

Topic: Attorney advertising

Digest: A lawyer who contacts a medical fertility clinic to request to be included on the clinic's website as a lawyer who practices in the area of assisted reproduction is engaged in attorney advertising, but not solicitation.

Rules: 7.1, 7.2, 7.3

FACTS:

1. The inquiring lawyer would like to contact a medical clinic, which specializes in fertility procedures, to request that he be included on their website as a potential referral for legal representation and consultation in the area of assisted reproduction. The clinic's website mentions a number of attorneys in New York that the clinic suggests could be retained in that area of practice. The lawyer would not be seeking to be retained by the medical clinic.

QUESTION:

2. Does the proposed communication to the medical clinic constitute attorney advertising, and if so, is it also a solicitation?

OPINION:

3. New York Rule of Professional Conduct ("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.

4. The inquirer's proposed communication with the clinic is attorney advertising because the inquirer seeks to communicate his area of practice on the clinic's website in order to be considered for retention by those who view the website. The inquirer must therefore meet the requirements for attorney advertising set forth in Rule 7.1.

5. However, as we will now explain, the communication is not a "solicitation" under the Rules.

6. Rule 7.3(b) provides that "solicitation" is a form of "advertisement" that satisfies certain 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.

7. The inquirer is seeking the website posting for the “primary purpose” of “retention” for “pecuniary gain,” but that posting will not be “directed to” or “targeted at” a specific recipient or group of recipients or their family members or legal representatives. Thus, the website posting does not meet all of the elements of a solicitation. Comment [4] to Rule 7.3 explains:

Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, websites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. *** Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper to the general public that the lawyer practices in the area of personal injury or Workers’ Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

8. Comment [3] to Rule 7.3 provides that a website-posted advertisement will constitute a solicitation “if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers.” (Emphasis added.) But Comment [5] to Rule 7.3 makes clear that a “specific incident” within the meaning of Comment [3] involves “potential claims for personal injury or wrongful death” arising from a “particular identifiable event (or a sequence of events of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.”

9. Because the website posting requested by inquirer does not fall within the circumstances described within Comments [3] [4] and [5] of the Rule 7.3, it would not be a prohibited solicitation.

10. We caution, however, that the inquirer should not offer anything of value to the clinic in exchange for being included on its website as such an offer would constitute an improper payment of a referral fee. See Rule 7.2 (prohibiting, with limited exceptions, compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client”).

CONCLUSION:

11. A lawyer who contacts a medical fertility clinic to request to be included on the clinic’s website as a lawyer who practices in the area of assisted reproduction is engaged in attorney advertising, but not solicitation.

(26-21)