New York State Bar Association

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Committee on Professional Ethics

Opinion 848 (12/22/10)

Topic: Attorney newsletters; advertisements; disclaimers about prior results

Digest: Whether a publication by a lawyer or law firm is an "advertisement" depends on its content, its intended purpose, and the targeted audience. With certain exceptions, if a publication is an advertisement, it must be labeled "Attorney Advertising," and if it makes certain types of claims it must include the precise disclaimer set out in Rule 7.1(e)(3). If a law firm's website is an advertisement, it must say "Attorney Advertising" on the home page.

Rules: 1.0(a) and 7.1(d), (e) & (f)

FACTS

1. A law firm ("Law Firm") is contemplating publishing an educational newsletter, which is intended to be informative. Law Firm will publish the newsletter in both hard copy and electronic formats. Law Firm will send the newsletter to current clients, former clients, persons who are not clients, attorneys, and persons not in any of those categories who have affirmatively opted to receive the firm's newsletters, announcements, emails, or blog posts. Law Firm wants to direct the recipients of the newsletter to the firm's website and to the firm's attorneys, but does not want such references to render the newsletter an "advertisement" that will be governed by Rule 7.1.

2. Law Firm also publishes marketing brochures, blogs and announcement emails, and Law Firm currently maintains a website that includes its own disclaimer regarding prior case results. The disclaimer reads as follows: "Case results depend upon a variety of factors unique to each case and matter. Similar results are not guaranteed in any future case." Neither this disclaimer nor the statement "Attorney Advertising" appears on the home page of Law Firm's website.

QUESTIONS

3. Is a law firm's educational newsletter an "advertisement" under the New York Rules of Professional Conduct if it refers to the lawyers and law firm who send out the newsletter?

4. Must a law firm use the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or is substantially similar language acceptable?

5. Does language disclaiming similar results in future cases as those achieved in prior cases relieve a law firm of the need to state "Attorney Advertising" on the home page of its website?

OPINION

A. Is Law Firm's Educational Newsletter an "Advertisement"?

6. The first question is whether Law Firm's educational newsletter is an "advertisement" within the meaning of the New York Rules of Professional Conduct (the "Rules"). This question is important because if a communication is deemed to be an "advertisement" as defined in Rule 1.0(a), then the language and format of the communication are governed by Rule 7.1.[1] For example, Rule 7.1(f) requires that most lawyer advertising must be labeled "Attorney Advertising."

7. Rule 1.0(a) defines "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.

8. In determining whether Law Firm's contemplated educational newsletter is an attorney advertisement within the meaning of Rule 1.0(a) – and is therefore subject to the mandates set out in Rule 7.1 – we consider three factors: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication.

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[1] In *Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010), the Second Circuit affirmed almost all of a district court decision that certain provisions of Rule 7.1 are unconstitutional. Defendants filed a petition for certiorari in the United States Supreme Court on August 9, 2010, but that petition has been denied.

9. Regarding the first factor – the intent of the communication – Law Firm's newsletter is deemed to be advertising under Rule 1.0(a) only if its primary goal is "the retention of the lawyer or law firm." Contact or biographical information about the lawyers or the law firm contained in the newsletter does not, without more, transform an otherwise educational communication into advertising. As with general marketing materials (such as pencils, pads, and T-shirts), stating the firm's name, logo and contact information does not change attorney communications into advertising under the Rules "if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter." *See* Rule 7.1, Cmt. 8; *cf.* Rule 7.1, Cmt. 10 (if information disseminated in connection with not-for-profit sponsorship by a firm is limited to the name of the law firm, contact information, brief description of areas of practice and the fact of sponsorship of the event, the communication is not considered advertising.)

10. Regarding the second factor – the content of the newsletter – Comment 7 to Rule 7.1 provides the following guidance:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, *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*. [Emphasis added.]

Thus, whether the newsletter is considered advertising will depend in part on its content.

11. Regarding the third factor – the audience for the communication — the definition of "advertisement" expressly excludes existing clients or other lawyers. Accordingly, communications that otherwise meet the criteria for an advertisement are not required to conform to the strict requirements of Rule 7.1 if they are directed to existing clients or other lawyers. Moreover, we believe that certain communications to former and prospective clients are not advertisements. Specifically, according to Rule 7.1, Comment 7:

> Communications to former clients that are germane to the earlier representation are not considered to be advertising. …. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services" are not advertising. .

12. If Law Firm determines that its educational newsletter is an advertisement under the Rules – which will depend mainly on the intent (purpose) and content of the newsletter -- then Law Firm should consider the audience for the newsletter in order to determine whether it must be labeled "Attorney Advertising." If the newsletter is produced in hard copy and mailed to the general public, then Law Firm must include the "Attorney Advertising" label required by Rule 7.1(f). Likewise, if the newsletter will also be circulated and made available electronically via the firm's website, via email, and via

blogs, and posts, where the precise nature of the receiving audience is unknown, Law Firm must include the phrase “Attorney Advertising” on the electronic versions of the newsletter. However, Law Firm has the option of omitting that language in versions of the newsletter that are sent only to existing clients, other lawyers, or persons who meet the exceptions for former and prospective clients discussed above, because communications to those persons are not advertising even if their primary purpose is the retention of the lawyer or law firm.

B. Must Law Firm Use the Precise Disclaimer Set Out in Rule 7.1(e)(3)?

13. The second question is whether Law Firm must use in its newsletter the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or instead whether substantially similar language would be acceptable.

14. We do not know the content of the proposed newsletter, but we will assume it will contain some of the categories of information governed by Rule 7.1(d), which allows a law firm to include certain types of information in an advertisement (*e.g.,* “statements that are reasonably likely to create an expectation about results the lawyer can achieve,” and “statements that compare the lawyer’s services with the services of other lawyers”), *provided* the advertisement complies with Rule 7.1(e). In turn, Rule 7.1(e)(3) states, in relevant part, as follows:

> (e) It is permissible to provide the information set forth in paragraph (d) provided …
>
> > (3) it is accompanied by the following disclaimer: *“Prior results do not guarantee a similar outcome.”* [Emphasis added.]

15. We believe the precise disclaimer language specified in Rule 7.1(e)(3) is required, and that paraphrasing or similar language does not comply with the Rules. Rule 7.1 is written with great specificity regarding both content and format. For example, the disclaimer just quoted from Rule 7.1(e)(3) is placed inside quotation marks, and the last line of Rule 7.1(f) (quoted below) provides that in the case of email advertising, “the subject line shall contain the notation ‘ATTORNEY ADVERTISING.” (Quotation marks and capital letters in the original.) We think this high degree of specificity as to language and formatting dictates strict compliance with the requirements of Rule 7.1(e)(3). Language that is substantially similar to the specific disclaimer language prescribed in Rule 7.1(e)(3) is not sufficient and does not negate the need to include the precise disclaimer set out in Rule 7.1(e)(3). Omitting that exact language violates the plain language of the rule.

16. We also believe, however, that a law firm may include additional language alongside the Rule 7.1(e)(3) disclaimer as long as the additional language does not undermine or contradict the Rule 7.1(e)(3) “prior results” disclaimer. Nothing in Rule 7.1 prohibits additional language unless it is false, deceptive, or misleading – *see* Rule 7.1(a)(1). But when an advertisement contains information falling within the ambit of

Rule 7.1(d), a law firm does not satisfy Rule 7.1(d) and 7.1(e)(3) by substituting other language for the mandated language. It must include the exact wording set out in the rule.

C. Must Law Firm's Home Page Say "Attorney Advertising"?

17. The third question is whether language disclaiming similar results in future cases as those achieved in prior cases relieves Law Firm of the need to state "Attorney Advertising" on the home page of its website. This question is controlled by Rule 7.1(f), which provides as follows:

> *Every advertisement* other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), *shall be labeled 'Attorney Advertising'* on the first page, or *on the home page in the case of a web site*. If the communication is in the form of a self-mailing brochure or postcard, the words 'Attorney Advertising' shall appear therein. In the case of electronic mail, the subject line shall contain the notation 'ATTORNEY ADVERTISING.' [Emphasis added.]

18. Under Rule 7.1(f), all of Law Firm's communications that fall within the definition of "advertisement," including the home page of the firm's website, must include the phrase "Attorney Advertising." Thus, if Law Firm's newsletter, website, marketing brochures, blogs, announcement emails, or other communications constitute advertising under the Rules, then the communication must be labeled as "Attorney Advertising" unless specifically exempted by the Rules. The "Attorney Advertising" label "serves to dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers" and the recipients otherwise might not otherwise know whether these communications are advertisements or educational items. *See* Rule 7.1, Cmt. 5. Conversely, because advertisements in newspapers and on television and radio are "self evidently advertisements" and there is "no risk of such confusion or concern," the Rules do not require those forms of advertising to include the label "Attorney Advertising."

CONCLUSION

19. Whether a newsletter or other law firm communication is an "advertisement" under the New York Rules of Professional Conduct depends on three factors -- the content of the communication, the intent (purpose) of the communication, and the targeted audience of the communication. If a particular communication is an "advertisement" within the meaning of Rule 1.0(a), then it is governed by Rule 7.1. However, limited references to the law firm, its lawyers, and their contact information do not transform an otherwise educational newsletter into an advertisement.

20. Advertisements that include information of the types set out in Rule 7.1(d), such as statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of

other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, must include the specific disclaimer language set out in Rule 7.1(e)(3), which states: "Prior results do not guarantee a similar outcome." The Rules permit additional language that does not contradict or undermine that disclaimer, but the Rules do not permit substitute language.

21. Finally, every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto) must be labeled "Attorney Advertising" as prescribed by Rule 7.1(f), and the statement "Attorney Advertising" must also appear on the home page of the firm's website if the website is an "advertisement." The presence of the "prior results" disclaimer required by Rule 7.1(e)(3) does not relieve a law firm of the obligation to include the words "Attorney Advertising" on its home page.

(10-10)