



ETHICS OPINION 1049

New York State Bar Association
Committee on Professional Ethics

Opinion 1049 (3/2/15)

Topic: Solicitation

Digest: A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

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

FACTS

1. An attorney frequents internet websites, such as Reddit and Twitter, which allow members to post questions about a variety of issues. A non-lawyer has posted a message on such a website describing a legal problem, and asking to be contacted by a lawyer who can help with the problem.
2. Our understanding of such social networking sites is that they are forums where registered community members can submit content, such as text posts. For example, in the case of Reddit, content is divided into categories, including a subcategory called "discussion based" that enables members to submit questions to other community members. Members can post comments about the submission, and respond back and forth in a thread or conversation-tree of written comments. Similarly, in the case of Twitter, users may post and read short messages posted by users, but members receive messages directly only from those they are "following," that is, from those with whom they have signed up to receive such messages.

QUESTIONS

3. A. May an attorney respond by email or through a social media website to an individual who posts about a specific problem on an internet forum or other similar website and who asks to be contacted by a lawyer about that problem to discuss undertaking a representation?

B. May an attorney who wishes to find plaintiffs for a potential case post an invitation on a third-party website, such as Reddit or Twitter, for individuals to contact him if they experienced a particular problem? If so, what requirements must be followed?

OPINION

Responding to a Request from a Potential Client Seeking Counsel

4. The first question asks whether an attorney may contact an individual by email or through a social media website, such as on Twitter or Reddit, to discuss undertaking a representation, based on the individual's posting on the internet site, which includes a request to be contacted by a lawyer about the individual's problem.

5. The threshold issue is whether such a contact would constitute "solicitation" of, or "advertising" directed to, the potential client by the lawyer. If the contact constitutes an "advertisement" as defined in Rule 1.0(a), then the contents must comply with Rule 7.1 of the New York Rules of Professional Conduct (the "Rules"), including the requirements for labeling as "advertising," retention of copies for specified periods and inclusion of the address and telephone number of the lawyer's "principal law office." See Rule 7.1(f), (h), (k). If the advertisement has additional characteristics that transform it into a "solicitation" as defined in Rule 7.3(b), then (1) the lawyer may not solicit the potential client by in-person or telephone contact, or by "real-time or interactive computer-accessed communication,"¹ unless the recipient is a close friend, relative, former client or existing client, see Rule 7.3(a)(1), and (2) the solicitation must comply with Rule 7.3(c), including the restrictions on communications relating to a specific incident involving potential claims for personal injury or wrongful death. Moreover, the lawyer must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee of the judicial district or department where the lawyer or law firm maintains its principal office, see Rule 7.3(c)(1).

6. Rule 7.3(b) defines "solicitation" for purposes of Rule 7.3 as:

[A]ny 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. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

Thus, in order to constitute a solicitation, the communication must first be an advertisement.

7. The term "advertisement" is defined in Rule 1.0(a) as:

[A]ny 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.

A communication to discuss the lawyer or law firm's services (as opposed to merely discussing the client's legal problem, as set forth below in paragraphs 12 and 13) is advertising, as long as the primary purpose of the communication is to secure retention of the lawyer or law firm and the potential client is not an existing client of the lawyer or law firm. Since we have been told that the purpose of contacting the potential client would be to secure retention, any discussion of the lawyer or law firm's services would constitute an "advertisement." But would it also constitute "solicitation" as defined in Rule 7.3(b), quoted above?²

8. The definition of "solicitation" in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client. That is, solicitation is an advertisement directed at a specific recipient that is initiated by or on behalf of a lawyer or law firm. Where a potential client contacts the lawyer to discuss a possible engagement, any response the lawyer makes to the contact does not constitute "solicitation." This distinction is made clear in Comment [2] to Rule 7.3, which says: "A 'solicitation' means any advertisement . . . that is initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)". This distinction also existed in the former Code of Professional Responsibility between 1970 and 1999. See DR 2-103 (prohibiting a lawyer from seeking professional employment from a person who has not sought advice regarding employment of the lawyer).

9. We note that the final sentence of Rule 7.3(b) states that a lawyer's proposal or other writing in response to a specific request of a prospective client does not constitute "solicitation." We believe the reference to written responses to "requests for proposals" provides a safe harbor, and is not the exclusive means of responding to a request for communication initiated by the client.

10. When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b).³ Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute "solicitation."

11. In N.Y. State 1014, the inquirer was contacted by a current client (a detainee in a detention center), was given the name and telephone number of a potential client (another detainee), and was told that the potential client would like the lawyer to contact him to discuss his defense. We opined that the prohibition of Rule 7.3 against in-person or telephone solicitation was not applicable, since the contact had been initiated by the potential client. We said:

The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is advertising initiated by or on behalf of a lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client.)" If upon the initial contact with the potential client it is apparent that the potential client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

12. Here, since the potential client initiated the communication through a posting on the internet, any response by the inquirer in the manner invited by the potential client would not constitute "solicitation." We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute "advertising." In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as "advertising" on the "first page" of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. See Rule 7.1(f), (h), (k).

13. The definition of "advertising" must be applied with some measure of common sense. In a strict sense, every communication between a lawyer and a potential client prior to actual retention is for the "primary purpose" of being retained. But not every email in the back-and-forth between the potential client and the lawyer, such as a discussion of the steps the lawyer would take in a particular case, a response to a particular question from the potential client about the lawyer's experience or the negotiation of the fees that the lawyer would charge in that case, needs to be labeled "Attorney Advertising" and contain the lawyer's law office address. For example, Comment [7] to Rule 7.1 states:

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. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

In this case, however, we believe that the initial communication between lawyer and client in which the lawyer describes his or her capabilities and experience in response to a broadly disseminated request by the potential client meets both the express terms and the purpose of the definition.

14. Since the inquiry here asks whether the lawyer may reply using the internet website or email, the reply would be in writing and thus compliance with the labeling, retention and address requirements described above in paragraph 12 would be straight-forward. We do not address how those requirements might be applied to a permitted non-written reply in response to the client's request.

Soliciting Clients on Twitter or Reddit

15. The second question asks whether the inquirer may post an invitation on a third-party website, such as Twitter or Reddit, for individuals to contact the lawyer if they have experienced a particular problem. In N.Y. State 1009 we held that a post on a third-party website, such as Twitter or Reddit, is not a real-time or interactive computer-accessed communication. Since that type of invitation does not generally constitute solicitation, the issue is whether the content of the attorney's post could transform it into a solicitation under Rule 7.3(b), thus subjecting the post to the requirements of Rule 7.3.

16. As noted above, Rule 7.3(b) defines "solicitation" as an "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." Comment [4] to Rule 7.3 explains that an advertisement in a public medium, seeking retention and pecuniary gain, does not become a solicitation simply because it is intended to attract potential clients with needs in a specified area of law. But it does become 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."

17. Here, the inquiring attorney has "become aware of a potential case, and wants to find plaintiffs," and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, see Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to "a specific incident involving potential claims for personal injury or wrongful death," see Rule 7.3(e).

CONCLUSION

18. A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

(31-14)

The term "computer-accessed communication" is defined in Rule 1.0(c) as:

[A]ny communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

The terms "real time" and "interactive" are explained in Rule 7.3, Comment [9], which states that "[o]rdinary email and web sites are not considered to be real-time and interactive communication," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

The rules of lawyer ethics have long disfavored certain types of solicitation, because they pose serious dangers to potential clients. As Comment [9] to Rule 7.3 explains:

[I]n person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

See N.Y. City 2000-1, which involved an internet-based system in which law firms could respond to requests for proposals of representation, and which concluded that, since the request had been initiated by the potential client, not the lawyer, the lawyer's response would constitute neither advertising nor solicitation. That opinion predates the issuance of the current rules on advertising and solicitation that were promulgated in 2007 and that are discussed in this opinion.