

To the Forum:

I have been trying to develop an appellate practice and decided a few years ago to write a quarterly electronic newsletter discussing recent appellate decisions on issues that are of interest to my colleagues and potential clients. My thought was that the newsletter would give me an opportunity to demonstrate my writing and analytical abilities, and attract clients.

The newsletter (known as “The Able Law Firm Letter”) targets attorneys and members of the business community who might refer business to my firm, and it includes my biographical and contact information. When I write about a case, I give the citation. I discuss the decision, its implications to the particular practice area and whether the decision is in my opinion correct. I never mention the names of the attorneys who handled the case. My plan is working and I have gotten several clients who tell me they decided to hire me because of the newsletter. Recently, I had a case in the Court of Appeals, which resulted in a major victory for me. I have decided to write about the case in my newsletter and plan on identifying the name of my client and highlighting the fact that I was the attorney who successfully handled the case.

A number of colleagues have suggested that my newsletter is attorney advertising, and that it is unprofessional for me to tout my victory by writing about it. Frankly, I do not think my colleagues are correct, but I am wondering whether it is possible that I am doing something wrong. I have also been told that even though my Court of Appeals decision is a reported case, I need the permission of my client to write about the case and identify its name.

Sincerely,
I.A.M. Able, Esq.

Dear I.A.M. Able, Esq.:

Your questions concerning The Able Law Firm Letter raise significant issues. First, are prior editions of The

Able Law Firm Letter that merely discuss recent developments in the law “attorney advertising” pursuant to the Rules of Professional Conduct? Second, does the proposed forthcoming edition of The Able Law Firm Letter, in which you plan to tout your recent victory in the Court of Appeals, constitute attorney advertising? Finally, if that forthcoming edition is attorney advertising, are you required to obtain written consent from the client about whose case you intend to write?

Under Rule 1.0(a) of the Rules of Professional Conduct, a communication does not rise to the level of an “advertisement” unless it is “about that lawyer or law firm’s services.” As Professor Roy Simon, a leading commentator on New York ethics issues, wrote in his treatise (2013 ed.): If “a communication is not about either the lawyer making the communication or the services of the law firm making the communication, then it is not an advertisement” (at 22).

The principal advertising guidelines are in Rule 7.1. Comment 7 to Rule 7.1 states, in relevant part:

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.

Professor Simon seems to concur with this view (at 1350).

Merely adding a lawyer’s biographical information or contact information to a topical newsletter does not make the newsletter “about the lawyer or law firm’s services.” N.Y. State Bar Op. 848 (2010). Therefore, it appears that the prior editions of The Able Law Firm Letter are not “advertising” within the meaning of Rule 1.0(a).

However, the forthcoming edition of The Able Law Firm Letter (in which

you intend to discuss your recent victory in the Court of Appeals), likely qualifies as an “advertisement” under Rule 1.0(a) because it touts your victory, rather than merely discussing the result in the case.

Rule 7.1 therefore applies to this communication. Rule 7.1 is extensive, and you should pay close attention to it. In particular, you should note the following:

Rule 7.1(a)(1) states that a “lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that contains statements or claims that are false, deceptive or misleading.”

Rule 7.1(b) sets forth some categories of information that an advertisement may contain, including qualifications, names of “regularly represented” clients (provided they have given prior written consent), bank references, and range of fees.

Rule 7.1(c) states various matters that a lawyer may *not* include.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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Rule 7.1(d) sets forth information that a lawyer may include, but only if the communication complies with Rule 7.1(e).

Rule 7.1(f) requires advertising to be prominently labeled as "Attorney Advertising" on the first page of a hard copy communication, on the home page of a website, and on a self-mailing brochure or postcard. It also states that, for a communication that is sent by email, "the subject line shall contain the notation 'ATTORNEY ADVERTISING'" (capitalization in the original).

The third part of our answer to your question deals with whether you must obtain your client's consent to write about your victory on the client's behalf. The answer here is probably not.

There are two rules that require an attorney to obtain the client's prior written consent for a communication that constitutes "attorney advertising": Rule 7.1(b)(2), which allows an advertisement to mention the "names of clients regularly represented, provided the client has given prior written consent"; and Rules 7.1(d)(3) and (e)(4), which allow for "testimonials or endorsements of clients, and of former clients," provided that "the client gives informed consent confirmed in writing."

In our view, neither of these applies to your forthcoming newsletter. Both rules appear to apply to client *endorse-*

ments, whether implicit (Rule 7.1(b)(2)) or explicit (Rule 7.1(d)(3)). Many law firms list the names of representative clients to convey an implicit endorsement. That is, if XYZ Bank, or ABC Insurance Company, regularly engages the law firm, those clients are happy with the law firm's performance. Other lawyers like to use an explicit endorsement (e.g., Clarence Client says: "I.A.M. Able is the most able lawyer in town"). Both rules require that such endorsements be cleared with the client in advance, and that the client give prior written consent.

Because the forthcoming newsletter is not offering the client's name as a *testimonial*, but only as part of the truthful reporting about a decision by the Court of Appeals that is a matter of public record, the obligation to obtain the client's written consent is far from clear. The better reading of the Rules is that obtaining the consent is not required. The safer course under the Rules and (perhaps more important) for client relations is to obtain the consent anyway.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.,
Jamie B.W. Stecher, Esq., and
Matthew R. Maron, Esq.,
Tannenbaum Helpen Syracuse
& Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have always been curious about what conduct outside of legal practice could potentially affect my ability to practice law. Recently, for whatever reason, I have done a number of things that some people have told me are unbecoming. For example, last year my home suffered damage after Super Storm Sandy. My insurance claim listed not only items of direct loss, but also some items that needed repair even before the storm, but which "may" have been exacerbated by it. In addition, I currently own real estate for investment. Several of these properties display numerous building code violations and fines. Last, a month or so ago, I submitted an application for a bank loan, and I may have said on the application that I attended Yale Law School, rather than my true alma mater, "Yala" Law School.

My question for the Forum: Do any of these constitute violations of the Rules of Professional Conduct that could lead to disciplinary charges?

Sincerely,
Risk E. Behavior

Your Foundation

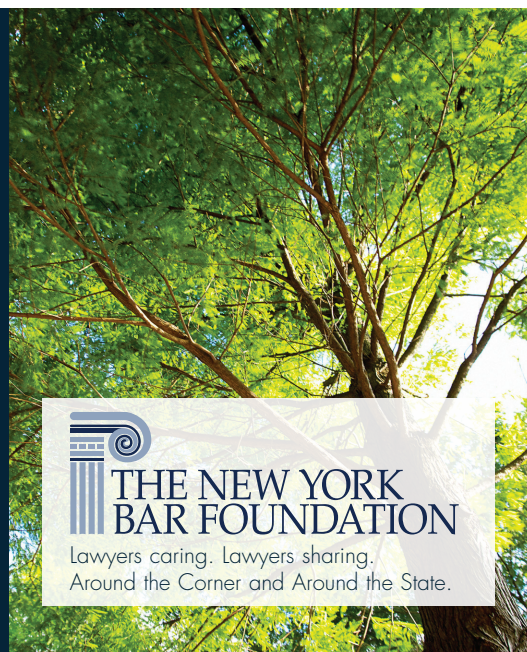
From pro bono work to volunteerism to financial generosity, the legal profession does so much to help so many. Contributing knowledge, time, funding and a passion for justice, together The New York Bar Foundation and sharing and caring attorneys and firms have done a lot. Together we can do much more. Supporting the New York Bar Foundation provides an opportunity to have a meaningful impact in our local communities and across the state.

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