

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

Opinion 1129 (7/11/17)

Topic: Attorney Newsletters

Digest: If the primary purpose of a law firm’s newsletter is educational, it does not constitute an advertisement and may be sent to a larger audience than current and former clients without having to comply with Rules 7.1 and 7.3. However, if the primary purpose of the newsletter is to provide information or news about the lawyer or law firm (*e.g.*, the firm’s cases, personnel, clients or achievements) it generally will be considered advertising to generate business, and must comply with Rules 7.1 and 7.3. The law firm may accept newsletter content from a real estate brokerage firm, may acknowledge the source of the content and may accept payments from the real estate brokerage firm to defray the cost of publishing the newsletter, as long as the law firm does not accept money for referring business to the brokerage firm.

Rules: 1.0(a), 1.7(a) & (b), 7.1(a), (f) & (k), 7.3

FACTS

1. A residential real estate law firm wishes to create and publish a newsletter to send to former and current clients. The newsletter would contain information about changes to local laws and also would contain relevant market data provided by a real estate brokerage firm (the “Brokerage Firm”).
2. The law firm has no contractual or referral relationship with the Brokerage Firm. Additionally, the law firm will not be paying the Brokerage Firm for any market information. However, the Brokerage Firm has offered to pay the law firm to offset the cost of publishing the newsletter.
3. The law firm also wants to send the newsletter to customers of certain lenders that the law firm has represented on purchase or refinance transactions. (The customers of the lenders have provided written consent for the lenders to release their contact information.)

QUESTIONS

4. The inquirer poses several questions:

A. May a law firm that primarily handles real estate transactions send a newsletter to the firm’s current and former clients?

B. May the law firm send the newsletter to the customers of lenders, where the firm has previously represented the lenders?

C. May the law firm’s newsletter include (i) market data provided by a real estate brokerage firm, (ii) contact information for that brokerage firm or individual brokers, and (iii) credit to the real estate brokerage firm and/or its individual brokers for providing the market data?

D. May the law firm accept payments from the brokerage firm to offset the cost of publishing the newsletter?

OPINION

Newsletters as Advertising

5. In N.Y. State 848 (2010), we considered whether an attorney newsletter is an “advertisement” that is subject to the requirements of Rule 7.1 of the New York Rules of Professional Conduct (the

“Rules”), including the requirement that the newsletter be labeled “attorney advertising” and the requirement to maintain copies of advertisements for a specified period. *See* Rule 7.1(f) & (k). In Opinion 848, we began our analysis with the definition of “advertisement” in Rule 1.0(a):

“Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm’s services, the *primary purpose of which* is for the retention of the lawyer or law firm. [Emphasis added.]

We noted that the determination of whether a newsletter constituted advertising depended on three factors: (i) the intent of the communication, (ii) the content of the communication, and (iii) the targeted audience for the communication.

6. Regarding the first factor – intent – we said that a newsletter constitutes advertising under Rule 1.0(a) only if its “primary purpose” is the retention of the lawyer or law firm. Including contact or biographical information about the lawyer or firm does not, without more, transform an otherwise educational communication into advertising. *See generally* Rule 7.1, Cmt. [8] (“Some communications by a law firm ... are not necessarily advertisements. For example, pencils, legal pads ... or the like with the law firm name, logo, and contact information printed on them do not constitute ‘advertisements’ within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter”).

7. Regarding the second factor – content – Opinion 848 cited the general rule in Comment [7] to Rule 7.1:

Topical newsletters . . . 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 supplied.]

See also Rule 7.1, Cmt. [8] (distributing a report about the lawyer is “advertising” if the lawyer’s primary purpose in distributing it is to obtain retentions).

8. Regarding the third factor – the audience -- N.Y. State 848 noted that a newsletter directed to existing clients or to other lawyers by definition did not constitute advertising. The same would apply to communications to former clients germane to the earlier representation, and to communications to prospective clients who have expressed interest in, and requested information about, a lawyer’s services.

Newsletters to Customers of Lenders for Whom the Law Office Has Performed Services

9. The facts as presented here do not provide sufficient information for us to determine whether the newsletter would be considered an advertisement if sent to persons other than the audience described above, but the questions raised by the inquiry are in many respects similar to those we discussed in N.Y. State 1110 (2016). In that opinion, we analyzed whether a lawyer could sponsor seminars and webinars in the inquirer’s field and send invitations to addresses found on commercially available business entity lists. We noted that the answer to the inquirer’s questions depended on whether the seminars, or the advertising for the seminars, would constitute “advertising” within the meaning of Rule 1.0(a), and “solicitation” within the meaning of Rule 7.3(b).

10. If the seminar (or the publicity for it) did not constitute advertising, we opined in N.Y. State 1110 that the provisions of Rule 7.1 would not apply. And if Rule 7.1 did not apply, then the

prohibitions of Rule 7.3 would not apply either, because a communication cannot be a solicitation unless it first meets the definition of an “advertisement.” However, we also opined that if the seminars (or the publicity for them) did constitute advertising, then the inquirer must adhere to Rule 7.1. Moreover, if the seminar (or the publicity) was targeted at specific recipients and a significant motive was the inquirer’s pecuniary gain, then the seminars (or the publicity) constituted “solicitation” and the provisions of Rule 7.3 would also apply. If the seminar (or the publicity) also involved interactive computer-accessed communication, then they would be prohibited as in-person solicitation unless the seminar was advertised only to current and former clients and close friends or relatives of the inquirer.

11. Here, if the primary purpose of the newsletter is educational (*i.e.*, to educate recipients about new developments in the law as opposed to attracting clients), then it may be sent to a larger audience than just current and former clients. However, if the content of the newsletter is primarily about the lawyer or law firm (*e.g.*, the firm’s cases, personnel, clients or achievements), then the primary purpose would be deemed to be the “retention of clients,” and the newsletter generally would be considered to be advertising, so the law firm would have to comply with Rule 7.1. *See* N.Y. State 1001 (2014) (giving an example of a newsletter that we considered to be an “advertisement”). Moreover, because the newsletter would then be an “advertisement” targeted to a particular audience, it would constitute a “solicitation” within the meaning of Rule 7.3, and the law firm would also have to comply with all of the requirements and prohibitions in Rule 7.3.

Utilizing Information from a Third-Party Brokerage Firm and Providing Attribution

12. No Rule prohibits the law firm from including information in the newsletter provided by the Brokerage Firm. If the newsletter is advertising, however, the law firm must ensure that none of the content “contains statements or claims that are false, deceptive or misleading.” Rule 7.1(a).

13. Similarly, the Rules do not prohibit the lawyer from truthfully identifying the source of the market data by attributing the data to the Brokerage Firm.

May the Law Firm Accept Payment from the Brokerage Firm to Offset Publication Costs?

14. In N.Y. State 1001 (2014), we determined that a law firm was permitted to sell third-party advertising in the law firm newsletter, as long as the law firm did not charge rates for the advertising suggestive of an improper referral fee and there was no other explicit or implicit understanding between the law firm and the advertiser suggestive of a referral arrangement. Here, the Brokerage Firm is not paying for advertising *per se* in the newsletter, but it is paying to help the law firm offset the costs of publishing the newsletter. We therefore think that the basic principles stated in Opinion 1001 apply here. The law firm may accept payment to defray the costs of publishing the newsletter, but the law firm may not accept payments in exchange for referring clients to the Brokerage Firm. Similarly, the law firm should ensure that the newsletter does not contain an express or implied recommendation of the Brokerage Firm’s services.

15. If the Brokerage Firm is paying the law firm to include its data, then the law firm should disclose this fact to the readers of the newsletter.

16. The law firm must also consider whether accepting money from the Brokerage Firm will affect its ability to undertake representations of clients in transactions in which the Brokerage Firm provides real estate brokerage services. Rule 1.7 prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial or personal interests. If the payment from the Brokerage Firm to offset the publication costs of the newsletter are significant, then a reasonable lawyer would conclude there is a significant risk that the lawyer’s professional judgment on behalf of a client will be affected in a real estate transaction where the

Brokerage Firm will receive a commission only if the transaction closes.

17. The question would then be whether the lawyer's personal conflict of interest is subject to client consent under Rule 1.7(b) with full disclosure of the lawyer's conflict. Under Rule 1.7(b) the lawyer may undertake the representation with the informed consent of the client, confirmed in writing, as long as the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation and the other conditions of Rule 1.7(b) are met. We have issued a number of opinions concluding that client consent may be obtained where the lawyer receives compensation from a third party. *See* N.Y. State 958 (2013) (lawyer receives referral fee for introducing clients to prospective investors); N.Y. State 667 (1994) (lawyer receives referral fee from a mortgage broker); N.Y. State 461 (1977) (lawyer receives referral fee from fire adjuster). The inquirer will have to determine whether he reasonably believes he can provide competent and diligent representation to clients in matters where the Brokerage Firm's interests are also implicated.

CONCLUSION

18. If the primary purpose of a law firm's newsletter is educational, it does not constitute an advertisement and may be sent to a larger audience than current and former clients without having to comply with Rules 7.1 and 7.3. However, if the primary purpose of the newsletter is to provide information or news primarily about the lawyer or law firm (*e.g.*, the firm's cases, personnel, clients or achievements) it generally will be considered advertising to generate business, and must comply with Rules 7.1. Moreover, because copies of the newsletter sent to customers of the law firm's bank client would then be an "advertisement" targeted to a particular audience, it would constitute a "solicitation" within the meaning of Rule 7.3, and the law firm would also have to comply with all of the requirements and prohibitions in Rule 7.3. The law firm may accept newsletter content from a real estate brokerage firm, may acknowledge the source of the content and may accept payments from the real estate brokerage firm to defray the cost of publishing the newsletter, as long as the law firm does not accept money for referring business to the brokerage firm.

(18-17)