

NYSBA Issues Opinion On Lawyer Solicitation

The Committee on Professional Ethics released Opinion 830 on July 14, 2009.

The question addressed by the Committee was:

May a lawyer contact an organization of laymen and inform them of his or her availability as a public speaker on legal topics?

The Committee considered the following Rules of Professional Conduct: 1.0(a); 7.1(a), 7.3(a), (q), (r); and Comment 9 to Rule 7.1. A summary of the Opinion follows.

Effective April 1, 2009, Rules 7.1 and 7.3 control attorney advertisements and solicitations. Rule 7.1 regulates advertising by lawyers and Rule 7.3 regulates solicitation by lawyers.

Rule 1.0(a) (Terminology) defines "Advertisement" as:

...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.

Rule 7.3(a) defines "solicitation" as:

...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 of a prospective client.

Rule 7.3(a) prohibits a lawyer from engaging in "solicitation" by the following means (among others):

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if: (i) the communication or contact violates Rule 4.5 ("Communication after Incidents Involving Personal Injury or Wrongful Death"), Rule 7.1(a), or paragraph (e) of this Rule.

Rule 7.1(a) prohibits any lawyer advertising that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

[Note: The Comments to the new Rules are the Comments of the State Bar and have not been adopted by the Courts.] Comment 9 to Rule 7.1 expressly recognizes that “lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise.” The Comment further notes that “[a] lawyer’s participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.” However, “a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm.” In that case, Rules 7.1 and 7.3 would regulate any communications about the program. We also note that Rule 7.1(q) expressly permits a lawyer to “accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.” Further, Rule 7.1(r) provides that “[w]ithout affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.”

Applying these rules and definitions as well as Comment 9, a lawyer may contact a lay organization to participate in a program to educate the public in order to alert the organization that the lawyer is available to participate in a program as a public speaker on legal topics. However, if the communication is made expressly to encourage participants in the program to retain the lawyer or law firm, then the communication falls within the definitions of advertisements and solicitations, and any communications concerning the program must comply with Rules 7.1 and 7.3.

The Committee noted that it lacks jurisdiction to determine whether the communications it discussed are permitted under §479 of the Judiciary Law, which prohibits solicitation by attorneys, or whether §479 remains constitutional in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and its progeny.

The Committee concluded that subject to the qualifications it described, a lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics.