ETHICS OPINION 1009

New York State Bar Association
Committee on Professional Ethics

Opinion 1009 (5/21/2014)

Topic: Advertising; solicitation; press releases and tweets regarding shareholder litigation

Digest: Press releases and tweets directed to potential clients in shareholder suits constitute advertising and solicitation. They are thus subject to retention requirements, and, if directed to New York recipients, are also subject to filing requirements. The tweets must be labeled “attorney advertising” but are not prohibited by the rule against interactive solicitation.

Rules: 1.0(a) & (c); 7.1(f) & (k); 7.3; 8.5(b)

FACTS

1. Inquirer is a New York attorney who works for a firm based in a different state. The firm focuses its practice on shareholder litigation, and the companies and lawsuits in question are sited in various states.

2. The firm distributes press releases concerning new investigations or lawsuits, and potential clients sometimes contact the firm after seeing such releases. The inquiry states that the releases “are generally issued through an outlet such as Business Wire, PR Newswire or other electronic wire service.” The firm also sends out “tweets” to alert recipients to the press releases.

3. According to the inquiry, the general purposes of the press releases are “to inform shareholders of the case or investigation” and to enable potential clients to contact the firm “for a potential attorney-client engagement.” The inquiry attaches sample press releases, all of which are labeled “Attorney advertising,” and some of which indicate that shareholders may contact the firm concerning their legal rights and remedies with respect to the specific cases described.

QUESTIONS

4. If a law firm issues press releases to inform potential clients of new investigations or actions, and sends "tweets" to alert recipients to the press releases, then are the press releases and tweets "advertisements" governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled "attorney advertising"?

5. Are such press releases and tweets "solicitations" governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

OPINION

A. Advertising issues under Rule 7.1

6. Lawyer conduct in using and disseminating advertisements is subject to Rule 7.1 of the New York Rules of Professional Conduct (the "Rules").[1] Under Rule 1.0(a), the term "advertisement" means (subject to exceptions not relevant here) "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." The communication is to be assessed in light of the circumstances of its circulation, and if its primary purpose is to obtain clients, then it is an advertisement for purposes of the Rules. *See, e.g.*, N.Y. State 873 (2011).

7. It seems clear from the nature of the press releases and the tweets that their primary purpose is to secure clients. Such communications are therefore advertisements under the Rules. As such, they can serve potential clients by educating them as to their need for legal advice and helping them obtain an appropriate lawyer, and can serve lawyers by enabling them to attract clients. *See* Rule 7.1, Cmt. [3] (indicating "principal purposes" of advertising).

8. Because press releases and tweets constitute lawyer advertising, they are subject to pre-approval and retention requirements. Rule 7.1(k) provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication," and specifies another retention scheme for web sites. Rule 1.0(c) defines ''computer-accessed communication'' to mean any 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.

9. The releases will be disseminated through wire services. We understand that such wire services typically distribute the releases to a wide variety of media, usually in full-text and without alteration. Even if the lawyers and wire services distribute the press releases by electronic means in the first instance, it does not follow that the alternative one-year retention period applies. Distribution by the wire services is merely the beginning of a pipeline of information that is intended to find its way into all kinds of mass media, including not only web sites and social networks but also newspapers, magazines and trade journals. Accordingly, the press releases at issue do not appear to constitute "computer-accessed communication[s]" subject to the

alternative one-year retention period.

10. We reach a different conclusion as to the tweets. These are disseminated by computer and resemble the examples in Rule 1.0(c). It is conceivable that the tweets could ultimately be reproduced in a newspaper or some other non-electronic format, but that is not their intended route of distribution. The tweets are therefore computer-accessed communications, and their retention is required only for one year.

11. Rule 7.1(f) provides that advertisements must be labeled as "Attorney Advertising" unless they appear in certain specified media such as newspapers, radio, television, or billboards, or are "made in person pursuant to Rule 7.3(a)(1)." We next consider the applicability of Rule 7.1(f) to the tweets described in the inquiry.[2]

12. The tweets do not appear in any of the media that are explicitly exempted from the labeling requirement in Rule 7.1(f). They would be exempt only if they constituted advertisements "made in person pursuant to Rule 7.3(a)(1)." That provision generally prohibits certain forms of interactive solicitation – those made in person, by telephone, or by "real-time or interactive computer-accessed communication" – but allows those otherwise prohibited forms when "the recipient is a close friend, relative, former client or existing client." For present purposes, we need not determine the precise scope of this exemption from the labeling requirement.[3] Even if the exemption can apply to real-time or interactive computer-accessed communication, the tweets in question do not appear to come within that category. See *infra* ¶22. And even if they did, the exemption would still not apply. The inquirer has not suggested that access to the tweets would be limited to existing or former clients, or friends and relatives, nor does such a limitation seem plausible given the goal of directing potential new clients to the press releases. Because the tweets would not be in any of the categories exempted from Rule 7.1(f), they would need to include the "Attorney Advertising" label.

B. Solicitation issues under Rule 7.3

13. The threshold question is whether the press releases and tweets are "solicitations," a term defined in relevant part as

> any advertisement [1] initiated by or on behalf of a lawyer or law firm [2] that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, [3] the primary purpose of which is the retention of the lawyer or law firm, and [4] a significant motive for which is pecuniary gain.

Rule 7.3(b) (numbering added); *see* Rule 7.3, Cmt. [2] (elaborating on the four elements).

14. We have already noted (*supra* ¶7) that the press releases and tweets are advertisements, the primary purpose of which is to obtain retention of the lawyer or firm. It is also clear from the inquiry and the context that the press releases and tweets are initiated by or on behalf of the lawyer or law firm, and are motivated by desire for pecuniary gain. Whether they are solicitations thus depends on whether they are "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives."

15. The Comments to Rule 7.3 point out a few ways in which communications can be directed to, or targeted at, specific recipients. First, they can be directed to specific recipients by their mode of transmission (such as through telephone calls, mail, email, or in-person contact), which is not the case here. *See* Rule 7.3, Cmt. [3].

16. "Second, an advertisement in public media such as newspapers, television, billboards, web sites or the

like is 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." Rule 7.3, Cmt. [3]. This is an exception to the general rule that "an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients." Rule 7.3, Cmt. [4]. This exception is triggered by reference to people with legal needs arising from a "specific incident," which is "a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people." Rule 7.3, Cmt. [5]. The harm caused by a "specific incident" to which a solicitation relates will often be physical but may also be economic.[4]

17. Third, an advertisement in a public medium that is aimed at a specific group of people, such as those injured by a defective medical device or medication, is a solicitation even if the potential claimants were injured "over a period of years." In such cases the claims arise "at disparate times and places" and do not relate to one specific incident so as to trigger the "blackout" provisions of Rule 7.3(e). Nonetheless, the advertisements are solicitations because they make reference to, and are "intended to be of interest only to," the potential claimants. Rule 7.3, Cmt. [6].

18. 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" such as shareholder litigation. *See* Rule 7.3, Cmt. [4]. But the advertisement *does* become a solicitation if it is directed to or targeted at the specific group of recipients who held shares in a particular company on particular dates. From the sample press releases submitted with the inquiry, it appears that at least some refer to a "specific incident" in the management of the companies in question, and to groups of shareholders whose legal needs, the advertisements suggest, arise out of that specific incident. But even if a shareholder suit alleges misconduct too extended in time and place as to constitute a single incident, it can nevertheless be described in a press release that makes reference to, and is "intended to be of interest only to," the potential claimants. Accordingly, the press releases and tweets at issue here are "solicitations" subject to the requirements of Rule 7.3.

19. A filing requirement applies to solicitations that are "directed to a recipient in this State." Rule 7.3(c); *see* Rule 7.3(c), Cmt. [8] ("Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c)."). If a press release or tweet is targeted at the shareholders of a particular company, the lawyer may or may not know those shareholders' identities and residences. A lawyer's solicitation is not "directed" to a New York recipient if the lawyer has no reason to be aware that New York residents are in fact among the target audience. But Rule 7.3(c) would apply if the lawyer knows that the intended audience includes any New York residents, or if the existence of such persons would be apparent from the size or nature of the company. *Cf.* Rule 1.0(k) ("A person's knowledge may be inferred from circumstances.").

20. The remaining issue is whether the tweets violate the rule that prohibits solicitation through certain interactive forms of contact. A lawyer may not engage in solicitation "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." Rule 7.3(a)(1). The policy is one of protecting potential clients:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-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.

Rule 7.3, Cmt. [9].

21. As noted in ¶12 *supra*, it does not appear that the tweets would go only to close friends, relatives, former clients or existing clients. Accordingly, the tweets would be impermissible if they were to constitute "real-time or interactive computer-accessed communication." The tweets do constitute computer-accessed communications, see ¶10 *supra*, but that leaves open the question whether those communications are also "real-time or interactive." This concept is addressed in Comment [9] to Rule 7.3:

> Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

22. Our understanding is that the broadly distributed tweets contemplated here, as currently used and in contrast to instant messaging or chat rooms, generally do not involve live responses. In that sense the tweets are more like ordinary email or web site postings. Because the tweets should not be considered real-time or interactive communication, Rule 7.3 does not prohibit them.

CONCLUSION

23. The subject press releases and tweets constitute "advertisements" and are thus subject to retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled "attorney advertising" and copies must be retained for one year. The press releases and tweets also are "solicitations" and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

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[1] The inquiry notes that the proposed conduct has connections to jurisdictions other than New York: the inquirer's firm is based in another state, and the companies involved in the derivative suits, and the lawsuits themselves, may be in any state. Although the inquirer is admitted to practice only in New York, in some circumstances ethics rules from other jurisdictions could apply. If the advertising and solicitations in question are "in connection with" a proceeding that has already been filed in court in a jurisdiction other than New York, and the inquirer has been admitted to practice before that court for purposes of that proceeding, then that jurisdiction's ethical rules would govern unless the rules of the court provide otherwise. *See* Rule 8.5(b)(1). But when there is not yet any particular forum for a lawsuit, the New York rules will generally apply to the inquirer's conduct (no matter where the firm is based), because the inquirer is licensed to practice only in New York. *See* Rule 8.5(b)(2)(i). And of course New York rules will also apply to the inquirer's conduct as to any lawsuit that has been filed in New York. In this opinion we limit our analysis to the latter two situations

and apply the New York rules of ethics. We also note that beyond the general provisions of Rule 8.5, one of the Rules at issue here includes more specific provisions as to its own applicability. *See* Rule 7.3(c) (discussed *infra* ¶19) and Rule 7.3(i).

[2] Whether *press releases* must be labeled as attorney advertising may depend on the circumstances. *See* Rule 7.1, Cmt. [5] (explaining that the label is not necessary for advertising in newspapers or on television or for "similar communications that are self-evidently advertisements," such as "press releases transmitted to news outlets" as to which there is no risk of confusion). The inquirer has already chosen to apply the label to the press releases in question, and has not asked us whether such labeling is required, so we do not opine on that issue.

[3] Read literally, the exemption could apply only to those solicitations that are permissible under Rule 7.3(a)(1) even though they are made "in person." However, the exemption has also been read more broadly to apply to *all* solicitations permitted under Rule 7.3(a)(1), including those by real-time or interactive computer-accessed communication. *See Simon's New York Rules of Professional Conduct Annotated* 1377 (2013 ed.).

[4] "Specific incidents *include* such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like." Rule 7.3, Cmt. [5] (emphasis added). But as quoted above, this comment also includes more general language explaining that – for purposes of the definition of solicitation – a specific incident occurs when events closely connected in time and place cause "harm." Comment [5] also refers to "a specific incident involving potential claims for personal injury or wrongful death," but that reference is for the different purpose of describing the scope of the 30- and 15-day "blackout" provisions of Rule 7.3(e), which are explicitly limited to such claims.

One Elk Street, Albany , NY 12207

Phone: 518-463-3200 Secure Fax: 518.463.5993