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## Social Media and the New York Rules of Professional Conduct: Is LinkedIn Attorney Advertising?



By BARRY R. TEMKIN AND JAMES Q. WALKER

### Introduction

Lawyers who maintain active social media presences should be aware of recent opinions by ethics committees in New York discussing the extent to which lawyers' postings on the social media page LinkedIn constitute attorney advertising. These committees have addressed the extent to which lawyers' social media postings subject them to regulation for attorney advertising within the meaning of the New York Rules of Professional Conduct (RPC). N.Y. City Formal Op. 2015-7; N.Y. Cty. Formal Op. 748 (2013). For example, is the mere listing of biographical information on LinkedIn sufficient to constitute attorney advertising such that the copy must be preserved for a period of one year and designated as such? Or is it more appropriate to look to the primary purpose of the posting to determine whether the lawyer's subjective intent was to garner the retention of the lawyer or law firm? This article attempts to reconcile the views and perspectives of the

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two ethics committees in order to provide guidance to lawyers practicing in New York.

### New York Rules of Professional Conduct

Regulation of attorney advertising in New York begins with the RPC and, in particular, Rule 7.1, which generally proscribes advertising that is false, deceptive, or misleading. Rule 7.1(a). Rule 7.1 forbids specific types of advertisements, including paid endorsements or testimonials absent disclosure that the portrayal is by a paid actor, or the use of a fictitious law firm. However, Rule 7.1 permits certain types of advertising, including basic biographical information, bank references, legal fees charged and, with written consent, the names of clients regularly represented. The rules require advertising be labeled "Attorney Advertising" and be retained by the law firm for a period of not less than three years in the case of hard copies and one year for computer accessible communications.

The starting point is, of course, the definition of attorney advertisement. Rule 1.0(a) provides that advertising is "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 rule explicitly excludes from its definition communications with existing clients or other lawyers. New York State Bar Association (NYSBA) commentary to the RPC adds that advertising should be narrowly defined as limited to communications whose primary purpose is "retention of the lawyer or law firm . . . for . . . pecuniary gain." RPC 7.1 Comment [6]. The "pecuniary gain" factor is not found in the text of the rule itself.

### The "Primary Purpose" Test

So how do we ascertain the primary purpose of a lawyer's communication, and whether it is seeking the retention of the lawyer or something else? Some explanation is provided by the NYSBA commentary, which states that "communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or the law firm. RPC 7.1 at Comment [7]. Similarly, topical newsletters, client alerts, or blogs intended to educate

recipients about new developments in the law are generally not considered advertising.

On the other hand, client alerts or blogs that provide information or news primarily about the lawyer or law firm generally are considered advertising. Even if a lawyer does not prepare a communication herself, it could be considered attorney advertising to forward or disseminate a favorable article about the lawyer's services written by a third party. Simply describing the lawyer's charitable or educational works, however, would be considered mere branding, and not advertising.

Also generally excluded from the definition of advertising is a lawyer's participation in an educational program "because its primary purpose is to educate and inform rather than attract clients." However, an educational program might cross the line and constitute advertising if the participants are actively encouraged to retain the lawyer. The NYSBA commentary indicates that lawyers' participation in, and promotion of, cultural, sporting and charitable events are generally not considered advertising. Nor would a lawyer's dissemination of law firm giveaways, such as complimentary pencils or coffee cups, be generally considered advertising. Rather, such marketing swag would generally be considered enhancements of a firm's brand, and not directly seeking retention of the lawyer.

## Social Media and Advertising: Two Opinions

How do these rules apply to social media? In its 2015 Opinion, the New York County Lawyers Association Professional Ethics Committee observed that the definition of attorney advertising is restricted to communications about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer for pecuniary gain. *See generally* N.Y. Cty. Formal Op. 748 (2013). According to the NYCLA committee, a LinkedIn profile that contains only biographical information, such as education and work history, would not qualify as an attorney advertisement within the meaning of Rule 7.1. Moreover, the NYCLA committee did not find that completing the fields of skills, endorsements or recommendations on LinkedIn would constitute a violation of RPC Rule 7.4, which prohibits an attorney from identifying herself as a specialist without appropriate advanced certification from a recognized national accreditation authority.

While profiles containing lawyers' background information would not be considered advertising, the NYCLA committee reasoned that a profile including "subjective statements regarding an attorney's skills, area of practice, endorsements and testimonials from clients or colleagues is likely to be considered advertising." Opinion 748 cautions lawyers that if an advertisement is reasonably likely to create an expectation of results, or where it compares the lawyer's services with those of other lawyers, the attorney should label the page as "Attorney Advertising" and include the disclaimer "Prior results do not guarantee a similar outcome."

The NYCLA committee cautioned that New York lawyers must periodically monitor and review the endorsements on their social media pages. In the case of third-party external endorsements on lawyers' LinkedIn profiles—for example, an endorsement by a colleague

or client—lawyers have an ongoing obligation periodically to review social networking sites at reasonable intervals to confirm their accuracy and ensure that the LinkedIn profiles do not contain skills and endorsements to which they cannot honestly lay claim. For example, a matrimonial lawyer who is the recipient of an unrequested endorsement for her skills in patent law should delete any undeserved praise for legal experience she patently lacks.

In its Opinion 2015-7, the New York City Bar Committee on Professional Ethics rejected a bright line test for determining what qualifies as attorney advertising on social media, and instead (like the NYCLA opinion) reminded New York lawyers that the definition of advertising in RPC 1.0 depends on whether "the primary purpose . . . is for the retention of the lawyer or law firm." N.Y. City Formal Op. 2015-7. After a detailed analysis of prior ethics opinions on the definition of advertising, the City Bar committee determined that a LinkedIn profile would constitute attorney advertising only if the profile's primary purpose is the retention of the lawyer for pecuniary gain, which the committee determined was based on the "subjective intent of the lawyer who makes the communication." The City Bar committee added, however, that "this intent may be inferred . . . from other factors, including the content of the communication and the audience for the communication. . . ."

The City Bar committee also cautioned that not all LinkedIn communications are made for the primary purpose of retention for pecuniary gain, and listed several other potential motivations, including networking with college and law school classmates, publishing and sharing articles, looking for jobs, maintaining a digital resume, and enhancing the lawyer's brand. For instance, the attorney advertising rule would not apply to a lawyer in government service or academia, working for a non-profit, or trolling for pro-bono assignments.

The City Bar committee articulated a five-step analysis to determine whether a LinkedIn profile would constitute attorney advertising. A communication is not advertising unless: (a) it is made by or on behalf of the lawyer; (b) its primary purpose is to attract new clients for pecuniary gain; (c) the contents relate to the lawyers' legal services; (d) the contents are intended to be viewed by potential new clients; and (e) there is no recognized exception under the Rules of Professional Conduct, e.g., for communications to other lawyers or existing clients. Thus, the City Bar committee appears to require a case-by-case assessment of the content of the LinkedIn profile.

Both bar associations agree that the advertising rule would not apply to communications directed to other lawyers, communications not intended to result primarily in the retention of the lawyer nor to law firm or communications to existing clients. N.Y. Cty. Formal Op. 748 (2013); N.Y. City Formal Op. 2015-7.

## Conclusion

The City Bar committee and NYCLA committee agree on the most significant considerations relating to attorney advertising on social media. Both committees are unequivocal in stating that not all communications on LinkedIn are considered advertising. For example, routine biographical and education information, along with basic marketing and branding of the law firm, generally

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would not be considered attorney advertising, and therefore it is not subject to labeling as such or the one-year retention requirements set forth in Rule 7.1. On the other hand, a detailed description of a lawyer's legal skills with intent to garner retention for pecuniary gain would be likely to constitute attorney advertising, and would require the lawyer to comply with all of the Attorney Advertising rules, including but not limited to la-

being the content as "Attorney Advertising" and retaining a copy for the relevant period. Both committees also cautioned that attorneys must monitor social media content posted by third parties on the attorney's online profile to ensure that the statements are truthful and not misleading.

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