

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL ETHICS**

**Formal Opinion 2015-7: APPLICATION OF ATTORNEY ADVERTISING RULES TO LINKEDIN**

**TOPIC:** Attorney Advertising and LinkedIn

**DIGEST:** An attorney’s individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the *primary* purpose of attracting paying clients. For example, including a list of “Skills,” a description of one’s practice areas, or displaying “Endorsements” or “Recommendations,” without more, does not constitute attorney advertising.

If an attorney’s individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content “Attorney Advertising”; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

**RULES:** 1.0(a), 7.1, 7.4, 7.5, 8.4(c)

**QUESTIONS:**

1. Under what circumstances does an attorney’s LinkedIn profile or other content constitute an attorney advertising?
2. If an attorney’s LinkedIn profile or other content on LinkedIn constitutes an attorney advertisement, what obligations do the Rules of Professional Conduct impose on the lawyer?

## **OPINION:**

### **I. Introduction**

As social networking sites grow in popularity, lawyers have struggled to apply the regulations that govern attorney conduct to the realm of social media. Rules that were created in the analog age defy easy extension to the digital world and, in particular, to social media content. Ethics committees tasked with providing guidance on these issues find themselves straining to force fit the proverbial square peg of social media into the round hole of legal ethics – with varying degrees of success. In addition, due to the pace of technological change, bar regulators may be reluctant to amend ethics rules to incorporate social media use, out of a legitimate concern that any such rules may become obsolete as social media platforms develop and change.

These challenges are particularly acute when trying to apply the attorney advertising rules to social media use. Before the advent of the Internet, attorneys who advertised their legal services were limited to fairly traditional forms of advertising, such as newspaper or yellow pages ads, television commercials, and billboards. Some attorneys and law firms eschewed these forms of advertising, preferring to rely instead on professional networking, reputation building, and word-of-mouth to develop business. Today, however, the Internet has expanded the opportunities for lawyers to grow their professional networks and to promote themselves to a broader group of potential clients and referral sources. Even attorneys who never considered using traditional advertising platforms are exploring Internet-based marketing options. The most basic form of Internet-based marketing is, of course, the traditional law firm website – a relatively static form of online communication. But attorneys and law firms are also turning to more dynamic and interactive platforms, such as blogs, Twitter accounts, or Facebook pages. But, by far the most popular online networking and marketing tool for individual attorneys over the past few years has been LinkedIn. According to the ABA’s 2014 Legal Technology Survey Report, of the lawyers and law firms that responded, 99% of large firms, 97% of mid-sized firms, 94% of small firms and 93% of solos have a LinkedIn profile. LinkedIn was the most downloaded general business app among lawyers in 2014 and 2015, according to the ABA Legal Technology Survey Reports for both years.

The growing popularity of LinkedIn and other social media platforms has raised many questions about the ethical implications of using these platforms as networking, marketing and advertising tools. These questions can be divided into two general categories. First, what type of social media content constitutes attorney advertising? Second, if certain social media content constitutes attorney advertising, what must attorneys do to comply with the advertising regulations concerning such content? This Opinion attempts to answer these questions with respect to LinkedIn profiles and other LinkedIn content.<sup>1</sup>

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<sup>1</sup> Although this Opinion focuses on LinkedIn, many of the principles may be applicable to other social networking sites.

## II. The Rules Governing Attorney Advertising

### A. What Is – and Is Not – Attorney Advertising?

Rule 1.0(a) of the New York Rules of Professional Conduct (the “Rules” or the “New York Rules”) defines an “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.” The definition of advertisement contains an explicit exclusion: “It does not include communications to existing clients or other lawyers.”

The comments to Rule 7.1 (the main rule that governs attorney advertising) provide more specific guidance regarding the scope of the term “advertisement.” For example, Comment [6] makes clear that “[n]ot all communications made by lawyers about the lawyer or the law firm’s services are advertising.” For a communication to fall within the definition of “advertisement,” its “primary purpose” must be for “retention of the lawyer or law firm for pecuniary gain.” R. 7.1, Cmt. [6]. Thus, the fact that a communication contains certain information that might also appear in an advertisement does not necessarily make that communication an advertisement. *See also* Roy D. Simon, *Simon’s New York Rules of Professional Conduct Annotated*, 1734 (2015 ed.) (explaining that a law firm’s right under Rule 7.4(a) to “publicly identify” its “practice areas” applies not only to “advertisements” but to “statements that fall outside Rule 1.0(a)’s definition of ‘advertisement’”). In other words, the content of a communication, alone, does not necessarily make it an “advertisement.” One must also consider the attorney’s primary purpose in making the communication, as well as its intended recipients.

The definition of an “advertisement” has certain limitations and exclusions. As noted above, it excludes communications with other lawyers and existing clients. For the purposes of the advertising rules, the term “existing client” is “interpreted more broadly” than the term “current client” in the context of the conflict of interest rules. R. 7.1, Cmt. [6]. In addition, although not specified in the Rules, “[c]ommunications to former clients that are germane to the earlier representation are not considered to be advertising.” R. 7.1, Cmt. [7]. Further, communications with a potential client “who has expressed interest in, and requested information about, a lawyer’s services, are not advertising.” *Id.* Thus, the restrictions on advertising do “not apply to a lawyer’s response to a prospective client who has asked the lawyer to outline the lawyer’s qualifications to undertake a proposed retention or the terms of a potential retention.” *Id.*

In this era of content marketing, the application of the attorney advertising rules to public speaking, blogging and other educational or publishing endeavors is particularly relevant. Rule 7.1(r) provides that: “without 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.” Further, a “lawyer may 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.” Rule 7.1(q). Comment [7] explains that “[t]opical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising.” Further, 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.” R. 7.1, Cmt. [9].

On the other hand, an educational “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.” *Id.* Likewise, “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.” R. 7.1, Cmt. [7]. Moreover, the “circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising *if the lawyer’s primary purpose is to obtain retentions.*” R. 7.1, Cmt. [8] (emphasis added). The comments also make clear that communications to other lawyers in “bar association publications and other publications targeted primarily at lawyers” are not attorney advertising, “even if their purpose is the retention of the lawyer or law firm.” R. 7.1, Cmt. [7]. This is because, as noted above, communications with lawyers are expressly excluded from the definition of “advertisement.”

The line between attorney advertising and general marketing or branding is also discussed in the comments. Comment [8] explains that “[s]ome communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts 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.” *See also* Rule 7.1, Cmt. [10] (law firm sponsoring not-for-profit event may disseminate name of the law firm, contact information, brief description of areas of practice and the fact of sponsorship of the event); NYSBA Ethics Op. 848 (2010) (“As with general marketing materials (such as pencils, pads, and T-shirts), stating the firm’s name, logo and contact information does not change attorney communications into advertising under the Rules “if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter.”) (quoting Rule 7.1, Cmt. [8]).

## **B. Regulations That Apply to Attorney Advertising**

Assuming a communication falls within the definition of an “advertisement,” it is subject to numerous regulations. These regulations fall into three general categories: content-based regulations, legibility requirements, and procedural requirements. Although it would be impossible to discuss all of these categories in detail in one opinion, we have attempted to provide a helpful summary.

### ***1. Content-Based Regulations:***

The content-based regulations can be divided into four subcategories: (1) prohibited content (information that *must not* be included in the advertisement); (2) permitted content (information that *may* be included); (3) conditional content (information that *may* be included, provided it meets certain conditions and/or is accompanied by certain disclaimers); and (4) mandatory content (information that *must* be included in some or all advertisements). Below are some examples from each of these categories. These examples are not exhaustive, and attorneys

should review Rules 7.1, 7.4 and 7.5 to familiarize themselves with the different types of content-based regulations.

**a. Prohibited Content:**

The cornerstone of New York’s attorney advertising rules is the prohibition against statements that are “false, deceptive or misleading.” R. 7.1(a)(1). In fact, some have argued that it is the only advertising rule we need. *See* APRL, *2015 Report of the Regulation of Lawyer Advertising Committee* (June 22, 2015), available at [https://aprl.net/publications/downloads/APRL\\_2015\\_Lawyer-Advertising-Report\\_06-22-15.pdf](https://aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf) (proposing to replace all existing advertising rules with a single rule prohibiting lawyers from making “false or misleading communications about the lawyer or the lawyer’s services”). All of the other advertising rules are ostensibly in service of this paramount policy goal of ensuring that attorney advertisements are free from misrepresentations.<sup>2</sup> Other prohibited content includes:

- Content that would violate any New York Rule of Professional Conduct (R. 7.1(a)(2));<sup>3</sup>
- Portrayals of fictitious law firms, the use of fictitious names to refer to lawyers not associated in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case (R. 7.1(c)(2));
- Advertisements that “resemble legal documents” (R. 7.1(c)(4));
- Use of “meta-tags or other hidden computer codes that, if displayed, would violate [the] Rules” (R. 7.1(g)); and
- The use of a law firm name that is either a “trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm,” except for “deceased or retired members of the firm or of a predecessor firm” (R. 7.5(b)).<sup>4</sup>

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<sup>2</sup> For example, the requirement to include “Attorney Advertising” on certain types of advertisements is intended to ensure the public is not misled, particularly when it is not clear from the format of the communication that it is an advertisement. *See* R. 7.1, Cmt. [5] (“The ‘Attorney Advertising’ label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers.”).

<sup>3</sup> This includes content that would be considered a prohibited solicitation in violation of Rule 7.3. While this Opinion addresses LinkedIn content in the context of attorney advertising, we are not opining on whether any LinkedIn content also constitutes solicitation under Rule 7.3. Attorneys should review Rule 7.3 and its Comments to ensure that their communications on LinkedIn also comply with the solicitation rules.

<sup>4</sup> It should be noted that Rule 7.5 (which governs “professional notices, letterheads, and signs”) is not exclusively an advertising rule. It applies to all such forms of communication by lawyers, whether or not they fall within Rule 1.0(a)’s definition of an “advertisement.”

## **b. Permitted Content:**

The advertising rules identify certain content that lawyers are permitted to include in their advertisements. The list of permitted content is extensive, but by no means exhaustive. Lawyers may include other information in their advertisements that is *not* expressly identified as permitted content, provided of course that the information is neither misleading nor otherwise violates a Rule. Perhaps the most important category of permitted content is the listing of practice areas, which is permitted by Rules 7.1(b)(1) and 7.4(a). Rule 7.1(b)(1) (which governs the listing of practice areas in “advertisements,”) provides, *inter alia*, that “an advertisement may include information as to . . . areas of law in which the lawyer or law firm practices, as authorized by these Rules.” Rule 7.4(a) (which governs the listing of practice areas in *any* public communication – not just advertisements) states that:

A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).<sup>5</sup>

Other information expressly permitted, but not required, by the advertising rules includes, but is not limited to:

- Legal and nonlegal education, degrees and scholastic distinctions (R. 7.1(b)(1));
- Dates of admission to any bar (*id.*);
- Public offices or teaching positions (*id.*);
- Lists of law-related publications authored by the lawyer (*id.*);
- Memberships in bar associations or other professional associations, including committees (*id.*);
- Foreign language fluency (*id.*);
- Bona fide professional ratings (*id.*);
- Names of clients regularly represented, provided the client gives prior written consent (R. 7.1(b)(2));

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<sup>5</sup> This opinion will not discuss in detail the limitations on the use of the term “specialist” or “specializes” except for the following observations. First, those limitations apply regardless of whether the communication constitutes an “advertisement.” Thus, New York attorneys should avoid using those terms in their LinkedIn profiles or elsewhere except as permitted by Rule 7.4(c). Second, we agree with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading “Skills” or “Experience” does not “constitute a claim to be a specialist under Rule 7.4.” We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that “a lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included.” NYSBA 2015 Social Media Guidelines, at 7-8.

- Financial and credit information, such as bank references, credit arrangements accepted, prepaid or group legal services programs in which the lawyer participates (R. 7.1(b)(3));
- Nonlegal services provided (*id.*);
- The existence of contractual relationships between the lawyer and any nonlegal service providers (*id.*).

### c. Conditional Content:

There are a number of statements that attorneys may include in their advertisements, provided they comply with certain conditions. The conditions vary, depending on the type of statement or information at issue. Several of these conditional statements are expressly identified in Rules 7.1(d) and (e). Rule 7.1(d) permits lawyers to make certain types of comparative and qualitative statements in their advertisements, provided they comply with the conditions set forth in Rule 7.1(e). These permitted statements include:

- Statements that are reasonably likely to create an expectation about the results the lawyer can achieve;
- Statements that compare the lawyer’s services to other lawyers’ services;
- Testimonials or endorsements of current or former clients; and
- Statements describing or characterizing the quality of the lawyer’s or law firm’s services.

Under Rule 7.1(e), the following conditions must be met before the statements listed above may be included in an advertisement:

- The statements are neither misleading nor violate any other Rule;
- The statements can be factually supported on the date the advertisement is disseminated;
- The statements are accompanied by the disclaimer: “Prior results do not guarantee a similar outcome” in a manner that is “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” R. 7.1(i); and
- The client gives written informed consent to any testimonial or endorsement.

Other permissible conditional statements are not expressly identified in the Rules and require the lawyer to cross-reference different Rules or subsections. For example, Rule 7.1(b)(4) permits lawyers to advertise various types of fee arrangements. However, several other subsections of Rule 7.1 place numerous conditions on such advertisements. *See, e.g.*, Rules 7.1(j) (conditions on advertising fixed fee arrangements); 7.1(l) (conditions on advertising a range of fees, hourly rates for services, or fixed fees); 7.1(m) & (n) (requirement to be bound by advertised fee for period of time); 7.1(p) (requirement to comply with N.Y. Jud. Law 488(3)).

#### **d. Mandatory Content:**

Certain information must be included in some or all attorney advertisements. All advertisements, for example, must “include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.”<sup>6</sup> R. 7.1(h). Some, but not all, advertisements must “be labeled ‘Attorney Advertising’ on the first page, or on the home page in the case of a website” [R. 7.1(f)], in a manner that is “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” R. 7.1(i).

#### **2. Legibility Requirements:**

Several rules are designed to ensure that required disclaimers and labels are intelligible to the public. For example, Rule 7.1(i) states that “[a]ny words or statements required by [Rule 7.1] to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” Further, “[i]n the case of a website, the required words or statements [must] appear on the home page.” Thus, the disclaimer required by Rule 7.1(e) and the label “Attorney Advertising” required by Rule 7.1(f) must comply with these formatting requirements.

Similarly, Rule 7.4(c)(2) provides that the following required disclaimer language must be “prominently made” when an attorney states that she is “certified as a specialist” in another jurisdiction: “This certification is not granted by any governmental authority within the State of New York.” Rule 7.4(c)(3), which became effective in 2014, explains that “prominently made” means that the advertisement (if in writing) must be “clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification” and (if spoken aloud) must be “intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.”

#### **3. Procedural Requirements:**

Lawyer advertisements are also subject to certain procedural requirements. For example:

- All advertisements must be “pre-approved by the lawyer or law firm” (R. 7.1(k));
- A copy of all advertisements must be retained for at least three years following initial dissemination, except for “computer-accessed communications” (*id.*);
- Computer-accessed communications must be retained for at least one year (*id.*);
- The contents of any website that qualifies as an “advertisement” must be “preserved upon the initial publication of the website, any major website redesign,

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<sup>6</sup> For lawyers who operate “virtual” law practices, the street address of a shared office space or even a website address may fulfill the “principal law office address” requirement. *See* NYCBA Formal Op. 2014-2 (2014) (permitting lawyers to use the street address of a shared “virtual” office space); N.Y. State Op. 1025 (2014) (permitting lawyers to use a website address as their “principal law office address”).



or a meaningful and extensive content change, but in no event less frequently than once every 90 days” (*id.*); and

- A lawyer is not permitted to “compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item” (R. 7.1(o)).<sup>7</sup>

### **III. Description of LinkedIn**

#### **A. LinkedIn Profiles**

LinkedIn is an on-line professional networking platform, which allows users to register for a free account, upload a photograph, and set up a professional profile.<sup>8</sup> LinkedIn profiles are organized into “sections,” which users can customize in a variety of ways by adding, removing, editing and reordering the sections on their profiles. Some of the most commonly used sections are “Summary,” “Experience,” “Education,” and “Skills & Endorsements,” but other optional sections include “Honors & Awards,” “Volunteering Experience,” “Posts,” “Publications,” “Recommendations,” and more. Even the most basic LinkedIn profiles generally include the attorney’s current employment information, at least some recent employment history, and educational background.

The “Summary” section is the most versatile section of the profile, because it is a basic text box that the user can fill with as much detail as she wants. Many attorneys use this section to describe their practice areas, important professional affiliations, such as committee memberships or chairmanships, professional successes or representative cases, and other information similar to that which might be included on a law firm website.

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<sup>7</sup> Of course, a lawyer may pay “for advertising and communications permitted by [the] Rules” and “may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, marketing personnel and web site designers.” R. 7.2, Cmt. [1].

<sup>8</sup> This Opinion contains a description of LinkedIn and its main features as of the publication date. This Opinion addresses only *individual* LinkedIn profiles and not LinkedIn pages created for a company. As with any social media platform, LinkedIn’s features and terminology can change at any time. In addition to the free version, LinkedIn offers a paid “premium” version, but most individual attorneys do not use this option. LinkedIn also offers additional features, such as job listings, paid advertising and marketing solutions, and online courses, and will likely continue to add and remove features as the platform develops. This opinion does not specifically address the premium version or these additional features, except to note that merely paying for additional features, including advertising and marketing solutions, does not, by itself, convert a communication on LinkedIn into an “advertisement.” The communication must still meet the definition of an “advertisement” under the Rules.

## **B. LinkedIn “Connections” and “Groups”**

Once the user has set up her profile, she can connect with other existing LinkedIn users or invite her personal or professional contacts to join LinkedIn and connect with her. These individuals are referred to as “Connections” on LinkedIn. There are several tools that assist users to find potential Connections on LinkedIn. For example, LinkedIn has an algorithm that allows it to identify and suggest people the user may know on LinkedIn. LinkedIn users can run searches for people they know on LinkedIn, using either the basic search box or an “advanced” search function. They can send individual connection requests to the email addresses of their contacts, or import their contact lists into LinkedIn and send bulk requests. This latter function should be used with extreme caution, to ensure the user does not inadvertently send connection requests to their entire contact list.

LinkedIn users can also join “Groups” that are organized around a range of affiliations, including educational institutions, professional organizations or associations, and personal or professional interests. For example, an Intellectual Property attorney may choose to join three different LinkedIn Groups comprised of law school alumnae, members of a national copyright society, and lawyers interested in combating international human rights abuses. LinkedIn users can join existing Groups or they can start and manage their own Groups.

## **C. “Skills and Endorsements” and “Recommendations”**

Two significant features of LinkedIn for the purposes of this Opinion are “Skills and Endorsements” and “Recommendations.” The “Skills and Endorsements” feature allows LinkedIn users to endorse each other for up to fifty Skills, through a quick, one-click process. LinkedIn has a function that displays suggestions for endorsing other users for particular Skills. Since it is easy to click the endorsement button without much thought, this feature can result in users being endorsed for Skills in which they have little or no experience. LinkedIn users can opt out of being suggested for Endorsements, by selecting that option on their LinkedIn profile. LinkedIn users can customize their list of Skills by adding those that more accurately reflect their practice areas and experience or deleting those that are irrelevant or misleading. Users can also “hide” Endorsements if they feel they do not accurately reflect their skill sets or the endorsers do not have a factual basis to make the endorsement. Users can opt out of “Skills and Endorsements” completely by selecting that option under their LinkedIn profiles.

“Recommendations” is a feature that allows LinkedIn users to write comments or reviews about other LinkedIn members. Recommendations can be displayed on the user’s profile or can be hidden. A Recommendation can be withdrawn or edited by the writer at any time. Users can ask for Recommendations by sending a request to other LinkedIn members.

## **D. Interacting on LinkedIn**

LinkedIn users may share information and interact with each other in a variety of ways, including:

- Inviting LinkedIn members to connect, provided you have their email address;

- Sending a private message to one of your LinkedIn Connections (similar to email or instant message);
- Requesting that one of your LinkedIn Connections introduce you to one of their Connections;
- Posting a status update or photograph to the timeline;
- Liking, sharing, or commenting on another user’s status update;
- Publishing articles or blog posts using LinkedIn’s publishing feature (currently called “Pulse”);
- Posting messages, links or information in a LinkedIn Group and interacting with other members of the Group;
- Endorsing the Skills of other LinkedIn users; and
- Writing or requesting “Recommendations” from other LinkedIn users.

#### **E. Privacy Controls on LinkedIn**

LinkedIn has multiple privacy and notification settings, which can be customized in a variety of ways. Although it would be impossible for this Opinion to cover all of these, the following is a list of the most relevant privacy options:

- Visibility of LinkedIn profile: Users can choose whether to display their LinkedIn profile – or particular sections and elements of their profile – to members of the public or limit visibility of their profile to other members of LinkedIn;
- Visibility of connections: Users can select whether their list of Connections is visible to other connections;
- Visibility of activity feed: Users can choose whether the actions they perform on LinkedIn can be seen by all LinkedIn users or only Connections;
- Visibility of profile views: Users can choose what someone sees when viewing their profiles;
- Following updates: Users can select whether their status updates can be followed by all LinkedIn users or only Connections; and
- Blocking: Users can block other LinkedIn members from viewing their profiles.

#### **IV. Applying the Definition of Attorney Advertising to LinkedIn**

For an attorney’s LinkedIn profile or other content to be subject to the advertising regulations, it must fit within the definition of an “Advertisement” and it must not be subject to any exceptions or exclusions from that definition. Accordingly, to constitute advertising, the LinkedIn content must meet all five of the following criteria: (a) it must be made by or on behalf of the lawyer; (b) its primary purpose must be for the retention of the lawyer by new clients for

pecuniary gain; (b) the LinkedIn content must relate to the legal services offered by the lawyer; (c) its intended audience must be potential new clients; and (d) the LinkedIn content must not fall within a recognized exception or exclusion to the definition of attorney advertising. We discuss each of these criteria in turn.

### **A. Is the LinkedIn Communication Made “By or on Behalf of the Lawyer”?**

Most LinkedIn content clearly meets this criteria, because it is usually created and posted by the lawyer herself. Even if the content is created and posted by a third party, such as a marketing consultant or assistant, it is still being done “on behalf of the lawyer.”

There are, however, two categories of LinkedIn content that are arguably generated by third parties: Endorsements and Recommendations. Although the lawyer has the power to add particular Skills, which are then displayed to third parties to select as Endorsements, the act of endorsing is done by someone other than the lawyer. Likewise, although a lawyer may request a Recommendation, the third party is free to decline or accede to the request. The NYSBA Ethics Committee recently opined that a “client’s freely given review or rating [on Avvo] is not an ‘advertisement’ within the definition in Rule 1.0(a) because the review is not made ‘by or on behalf’ of the lawyer.” NYSBA Ethics Op. 1052 (2015) (concluding that a lawyer may offer clients a financial incentive to rate and review the lawyer on Avvo).

Unlike Avvo, however, LinkedIn does not have an option to give a negative rating, only an “Endorsement,” which is equivalent to a positive rating. In other words, as on Facebook, there is only a “thumbs up” option, but not “thumbs down” option. Further, LinkedIn does not invite objective “reviews” but “Recommendations,” which have an inherent positive connotation. More to the point, LinkedIn gives the attorney power to hide Recommendations, making it highly unlikely that a LinkedIn profile will contain a negative or even a neutral review. The Committee’s conclusion in Opinion 1052 – that ratings and reviews are not made “by or on behalf of the lawyer” – was based on the fact that the client was free to give a negative, positive, or neutral rating or review, which is not the case for LinkedIn Endorsements and Recommendations. On that basis, we distinguish Opinion 1052, and conclude that LinkedIn Endorsements and Recommendations constitute communications made “by or on behalf of the lawyer.”

### **B. What Is the “Primary Purpose” of the Lawyer’s LinkedIn Profile or Content?**

For a communication to constitute attorney advertising, it must have as its *primary* purpose the retention of the lawyer for pecuniary gain. *See* NYSBA Ethics Op. 1009 (2014) (noting that each communication must “be assessed in light of the circumstances of its circulation” to determine whether “its primary purpose is to obtain clients”) (citing NYSBA Ethics Op. 873 (2011)). This definition recognizes that a communication may have multiple purposes, one of which may be to attract new clients. As Professor Simon notes in his treatise on the New York Rules, “a communication can have several significant or substantial purposes but only one ‘primary’ purpose.” Roy D. Simon, *Simon’s New York Rules of Professional Conduct Annotated*, 25 (2015 ed.); *see also* NYSBA Ethics Op. 1039 (2014) (observing that for a communication to constitute an “advertisement,” retention of the lawyer by a client must be “*the* primary purpose,” not merely “*a* primary purpose”) (emphasis in original).

Yet, before we can determine the “primary purpose” of a communication, we must first understand whose “purpose” or intent we are considering. It is not immediately apparent whether the drafters of Rule 1.0(a) intended to articulate a purely subjective standard (i.e. did the attorney *believe* the primary purpose of her communication was to attract clients?), an objective standard (i.e. would a *reasonable person* believe the primary purpose of the communication was to attract clients, regardless of the attorney’s subjective intent?), or a hybrid subjective-objective standard (i.e. did the attorney *reasonably* believe her primary purpose was to attract clients?). The comments to Rule 1.0 offer no guidance on this issue.

Ethics opinions interpreting the term “primary purpose” tend to gloss over this threshold question, referring to the “purpose” or “intent” of the communication itself, rather than the intent of the individual making the communication. *See, e.g.*, NYSBA Ethics Op. 848 (2011) (discussing the “intent of the communication” as one of the relevant factors). Nevertheless, these opinions suggest that “intent” refers to the intent of the lawyer making the communication, although that subjective intent may be inferred from the circumstances and the content of the communication. *See, e.g.*, NYSBA Op. 1009 (2014) (“It seems clear *from the nature of the press releases and the tweets that their primary purpose* is to secure clients.”) (emphasis added); NYSBA Ethics Op. 967 (2013) (“Since the inquirer’s blog will not discuss legal matters and *it appears that the inquirer does not intend to solicit clients for a law practice*, the blog will not be considered an advertisement even though its name indicates that the author is an attorney.”) (emphasis added).

In NYSBA Ethics Op. 873, for example, the Committee addressed whether an attorney was ethically permitted to offer a prize for people to join his online social network. For the prize offer to be considered an “advertisement,” the Committee explained, “the communication offering the prize must be for the ‘primary purpose’ of the inquirer’s retention.” NYSBA Ethics Op. 873. “The fact that business development *might be the inquirer’s ultimate goal* in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to *expand the inquirer’s personal social circle, with the aim of meeting potential new clients.*” *Id.* (emphasis added).

This language suggests that the Committee was focused on identifying the lawyer’s *subjective* goals in offering the prize, and attempting to determine which of those goals was his “primary purpose” (i.e. his subjective interest in widening his social network versus his more attenuated – though still subjective – goal of attracting new clients down the line).<sup>9</sup> Nevertheless,

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<sup>9</sup> At first glance, NYSBA Ethics Op. 1039 (2014) suggests that the attorney’s subjective opinion may not be the decisive factor in determining her primary purpose in making a particular communication. There, the inquiring lawyer published a blog that provided legal and publishing information to authors. She stated in her inquiry that her blog “is labeled an ‘attorney advertisement’ because *a primary purpose* of the blog is to advertise her services.” NYSBA Ethics Op. 1039 (emphasis in original). The Committee noted that the definition of “advertisement” requires that “*the primary purpose* must be the retention of the lawyer or law firm.” *Id.* (emphasis in original). The Committee concluded that the attorney’s precautionary approach to labeling her blog “attorney advertisement” was “not dispositive” as to whether the blog was, in fact, an “advertisement” under the definition in Rule 1.0(a). *Id.* Upon closer

in evaluating whether the prize offer was an advertisement, the Committee looked to the *content* of the communication as evidence of the lawyer’s subjective intent, and drew a distinction between a prize offer that expressly mentioned the lawyer’s services and one that did not. Thus, the Committee explained:

If the prize offer is merely posted on the [lawyer’s] own social networking sites and people gain a chance to win the prize simply by connecting with the [lawyer] – not for retaining the [lawyer] – it is not likely to be an “advertisement” even if the site elsewhere identifies the inquirer as an attorney. *If, however, the prize offer itself describes the [lawyer] as an attorney or describes the [lawyer’s] legal services or law firm (or both), the prize offer would be an “advertisement” subject to all of the strictures of Rule 7.1, such as the mandatory use of the label “Attorney Advertising.”* (emphasis added).

We conclude that the “primary purpose” standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.

It should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the *primary* purpose of attracting paying clients. Whether that is her primary purpose depends on how she uses LinkedIn, who her Connections are, and what type of information she posts. We also cannot ignore the relevance of the type of platform LinkedIn is and its effectiveness as an advertising tool. Social networking websites are – if used for business development at all – primarily a form of indirect marketing. In light of this objective reality, it is likely that many attorneys who use LinkedIn have purposes that are not primarily about attracting paying clients. A lawyer’s objectives in using LinkedIn may include, among other things:

- Networking with college and law school classmates, former co-workers, other colleagues;
- Networking with current or former clients;
- Networking with people who have similar interests;
- Tracking the career developments of friends and colleagues;
- Sharing the lawyer’s own career developments with LinkedIn Connections;
- Keeping up-to-date on developments in the lawyer’s practice areas or other areas of interest;

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analysis, however, it appears that the Committee’s conclusion was based, not on a rejection of the attorney’s own subjective view of her primary purpose, but on the Committee’s uncertainty as to whether the attorney had correctly applied the definition of the term “advertisement” to her blog.

- Publishing and sharing articles, blog posts, or other content relating to the lawyer’s practice areas or interests;
- Maintaining a dynamic online “resume”;
- Job searching;
- Having a digital substitute for a traditional business card;
- Enhancing the lawyer’s “brand” or reputation; and
- Publicizing the lawyer’s expertise and availability for speaking engagements, press interviews, articles, and other opportunities to expand her reputation as an expert on a particular subject matter.

Given LinkedIn’s many possible uses, there should be clear evidence that a lawyer’s *primary* purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an “advertisement.” In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer’s Association (“NYCLA”), which concluded that “if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney *must treat his or her LinkedIn profile as attorney advertising* and include appropriate disclaimers pursuant to Rule 7.1.” NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the *content* of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an “advertisement,” such as the primary purpose of the communication and the intended audience. Including a list of “Skills” or a description of one’s practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer’s LinkedIn profile an “advertisement.”

### **C. Does the Lawyer’s LinkedIn Profile or Other Content Relate to the Legal Services Offered by the Lawyer?**

For many lawyers, their individual LinkedIn profiles consist of their current employment, some recent employment history, contact information, and educational background. In our view, this information, alone, merely constitutes biographical and employment information, and does not relate to the legal services offered by the lawyer.

Certain other types of LinkedIn content also do not meet this criteria. For example, status updates, blog posts, or articles about legal developments or other topics, which a lawyer posts or shares on LinkedIn, do not relate to her legal services. *See* NYSBA Ethics Op. 1062 (2015) (“Materials may not be considered advertising as defined in Rule 1.0(a) if they are ‘topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law’”); N.Y. State 967 (2013) (blog written by an attorney is not an “advertisement” if the primary purpose of the blog is not retention of the attorney). Thus, if an attorney links to an article or blog post or directly publishes content through LinkedIn’s “Pulse” feature, those activities would not be communications related to the lawyer’s services. Likewise, online discussions with other LinkedIn members, including postings to a LinkedIn Group, are not

related to the lawyer's legal services, even if the subject matter relates to one of her practice areas. *See* NYSBA Ethics Op. 899 (2011) (responding to legal questions on the Internet is not an advertisement, unless the response expressly encourages the reader to retain the lawyer's services.).

On the other hand, if the lawyer includes additional information, such as a description of her practice areas or a list of Skills that are relevant to her legal practice, that content would relate to the lawyer's legal services and would, thus, meet this third element of the definition of "advertisement." Displaying an Endorsement of a Skill that is relevant to a lawyer's legal practice would also meet this criteria. For example, if a lawyer displays an endorsement for "litigation" or "matrimonial" or "appeals," that is information that relates to her legal services. On the other hand, an endorsement for "writing" or "public speaking" or "technology" does not necessarily relate to her legal services and may not fulfill that element of the definition. Likewise, a Recommendation from a client or colleague that describes a positive experience working with the lawyer or touts her legal prowess would meet this criteria, because it relates to the lawyer's legal services. But a Recommendation that describes the lawyer's commitment to public service, social justice or volunteerism does not relate to the legal services offered by the lawyer to clients.

#### **D. Who Is the Intended Audience for the Lawyer's LinkedIn Profile or Other Content?**

An important factor in determining whether a lawyer's LinkedIn content is an "advertisement" is its intended audience. The following factors may be relevant to this assessment:

- *Who are the lawyer's LinkedIn Connections and how active is she in expanding her list of Connections?* Is the lawyer connected primarily to friends, family members, other lawyers, and/or current or former clients, or does she have a significant number of Connections who are potential new clients for her legal services? Does she actively seek out new Connections with individuals who may be potential clients and request introductions from her Connections to those types of individuals?
- *What types of LinkedIn Groups does the lawyer join and how active is she?* Does the lawyer belong to LinkedIn Groups that are likely to include a significant proportion of potential clients for her legal services, and does she interact regularly with other members of those Groups?
- *What elements of her LinkedIn profile are visible to the public?* Do the lawyer's privacy settings allow members of the public to view profile information that appears designed to attract new clients, such as detailed descriptions of her practice areas and Recommendations relating to her legal services, or are these features restricted to her Connections?

If the lawyer generally limits her Connections to other lawyers, friends, family, current clients or former clients, or if she is not particularly active in trying to expand her list of Connections, these may be indications that she does not use LinkedIn primarily as a tool to



attract new business. Likewise, if she is not a member of any Groups that target her potential client base or she is not particularly active in such Groups, that may also suggest a lack of intent to advertise her services to potential clients. Although not dispositive, a lawyer's privacy settings may be an indication of whether she intends her profile to be found by potential clients who are searching for an attorney online.

#### **E. Does the LinkedIn Profile or Other Content Fall Into a Recognized Exception to the Definition of "Advertisement"?**

Assuming a lawyer's LinkedIn content meets all of the criteria discussed above – i.e. it is a communication that relates to the lawyer's services and is primarily for the purpose of attracting new clients for pecuniary gain – it constitutes attorney advertising, unless it falls within a recognized exception to the definition of an "advertisement." As discussed above, these exceptions are as follows:

- It is a communication with another lawyer or an existing client;
- It is a communication with a former client that is germane to the former representation;
- It is a communication in response to an inquiry from a potential client regarding the lawyer's services;
- It constitutes general marketing or branding, the purpose of which is to raise awareness about the lawyer's services, rather than retention of the lawyer for a particular matter; or
- It consists of topical or educational information, including information about legal developments in the lawyer's practice area, unless it expressly encourages retention of the lawyer.

#### **V. What Are a Lawyer's Ethical Obligations With Respect to Advertisements on LinkedIn?**

As discussed above, the advertising regulations fall generally into three categories: content-based regulations, legibility requirements, and procedural requirements. *Supra*, at II.B. Below, we discuss examples from each of these categories as they relate to advertising on LinkedIn. These are only some of the advertisement requirements; attorneys should review the rules to ensure that all of their advertisements, including those on LinkedIn and other social media platforms, comply with the advertising regulations.

##### **A. The "Attorney Advertising" Label**

Assuming a lawyer's LinkedIn profile or other content falls within the definition of an "advertisement," the lawyer must include the language "Attorney Advertising," as required by Rule 7.1(f). What is unclear from the Rule is where this language must appear on LinkedIn. The Rule specifies that, "in the case of a website," the language must appear "on the home page." But LinkedIn and other social networking sites are not like traditional websites, in that they are dynamic platforms and do not have a static "homepage."

In the absence of a specific rule, therefore, we conclude that the attorney should use reasonable judgment as to where to place the required language, provided it is “clearly legible and capable of being read by the average person.” R. 7.1(i). One option is to include the language in the “Summary” section of the LinkedIn profile. Alternatively, if the communication that constitutes an “advertisement” is contained in a specific update, post or message (and not in the attorney’s LinkedIn profile itself), the “Attorney Advertising” label may be placed in that update, post or message. The attorney is not required to post a general “Attorney Advertising” label on her LinkedIn profile in that situation.

### **B. Name, Principal Law Office Address, and Telephone Number**

Any attorney advertisement must include the name, principal law office address, and telephone number of the lawyer. R. 7.1(h). It is not uncommon for LinkedIn profiles to contain this information already, and, since there is a designated section for “Contact Info,” this is a relatively simple requirement to meet. Obviously, an attorney can include this information in a different section if she chooses, provided it meets the legibility requirements discussed above.

### **C. Pre-Approval of Advertising Content**

All advertising content on LinkedIn must be “pre-approved” by the lawyer. R. 7.1(k). This is a good policy to follow, even if the LinkedIn content does not fall within the definition of an “advertisement.” Lawyers should never rely on marketing professionals or other nonlawyers to approve advertising content without independently reviewing it to ensure that it complies with the advertising rules.

### **D. Preserving Advertising Content**

According to Rule 7.1(k), a copy of all advertisements must be retained for at least three years following their initial dissemination, except for “computer-accessed communications,” which must be retained for at least one year. A “computer-accessed communication” is one 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.” R. 1.0(c). Based on this definition, we conclude that advertisements posted on LinkedIn are “computer-accessed communications” and need only be retained by the lawyer for one year from the date of initial publication. See NYSBA 2015 Social Media Guidelines, at 7 (“[S]ocial media posts that are deemed ‘advertisements,’ are ‘computer-accessed communications, and their retention is required only for one year.’”) (quoting NYSBA Ethics Op. 1009 (2014)).

Rule 7.1(k) also provides that the contents of any website that qualifies as an “advertisement” must be “preserved upon the initial publication of the website, any major website redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.” In our view, this requirement does not apply to individual profiles on LinkedIn, except in the rare circumstance where an attorney’s entire profile constitutes an “advertisement.” Provided any specific advertisements posted on LinkedIn are preserved for at

least one year, as discussed above, there is no separate requirement to preserve the LinkedIn profile on a regular basis.

### **E. Avoiding False, Deceptive or Misleading Communications**

A lawyer may not post any advertisement on LinkedIn that “contains statements or claims that are false, deceptive or misleading.” R. 7.1(a). However, this requirement to avoid false, deceptive or misleading statements exists, regardless of whether the communication is an “advertisement.” R. 8.4(c) (lawyers shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

Thus, all content that an attorney posts on LinkedIn – or any other social media platform – must be truthful and accurate. For example, attorneys should not list practice areas or skills in which they have little or no experience. *See, e.g., In re Dickey*, 396 S.C. 500 (S.C. 2012). In addition, we concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn “at reasonable intervals” to ensure that they are “truthful, not misleading, and based on actual knowledge.” *See also* NYSBA 2015 Social Media Guidelines, at 9 (“A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer’s social media profile” and “must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.”).

### **CONCLUSION:**

An attorney’s individual LinkedIn profile or other content constitutes attorney advertising if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous ways that lawyers use LinkedIn, it should not be presumed that the *primary* purpose an attorney’s LinkedIn content is to attract new clients for pecuniary gain, unless it contains express language or other equally compelling evidence to support that conclusion.

If an attorney’s LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content “Attorney Advertising”; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

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