

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

**FORMAL OPINION 2020-2: WHETHER LAWYERS MAY USE RETARGETING IN  
ONLINE MARKETING**

**TOPIC:** Lawyer’s use of retargeting in online marketing materials

**DIGEST:** A lawyer’s website may use retargeting as an online marketing strategy provided that the retargeted advertisements comply with the rules governing attorney advertising and solicitation. A lawyer who uses retargeting does not engage in dishonest or deceptive conduct in violation of the Rules so long as the lawyer discloses, in some form, that the website collects data from visitors for advertising purposes.

**RULES:** 1.0(a); 7.1; 7.3; 8.4

**QUESTION:** Can a lawyer’s website use retargeting as an online marketing strategy?

**OPINION:**

**I. Introduction**

As technology continues to evolve, so does online marketing. Unlike “traditional” advertisements, such as a billboard or newspaper ads, online advertising allows the advertiser and marketing professionals to more narrowly target the recipients of the ad based on a variety of factors including demographic information and even whether an individual has previously viewed the advertiser’s products.

One common method of online marketing is known as “retargeting,” which occurs when a “cookie” (a unique piece of code) is placed in an individual’s web browser after that individual visits the advertiser’s website. The cookie enables an advertiser to market directly to that individual as he or she later browses the web. For example, suppose an individual visits the website of a clothing retailer and then, after viewing the retailer’s website, navigates to another website such as a news publication which displays advertisements alongside the articles. The individual may notice that he or she will begin to see advertisements on the news website for the same or similar products that the individual was just viewing on the retailer’s website. This is not a coincidence and is quite possibly because the retailer was using retargeting as part of its advertising strategy. The rationale behind retargeting is that an individual who has already visited the advertiser’s website has, at least to some extent, shown an interest in the advertiser’s product or service and is therefore more likely to be a potential customer.

This Opinion addresses the ethical implications for lawyers under the New York Rules of Professional Conduct (the “Rules”) when using retargeting and similar online advertising techniques.

## **II. Retargeting: An Overview**

Retargeting is a technology that allows an advertiser, such as a law firm, to market to an individual on different online platforms after that individual has first visited the advertiser's website. To implement a retargeting campaign, an advertiser must employ a retargeting service, which operates on certain search engines and social media platforms. The retargeting service not only offers the retargeting code to the advertiser, but it will also deliver the advertiser's (retargeted) advertisements to the service's network of participating websites. Once the advertiser adds the retargeting code to its website, every subsequent visitor to the advertiser's website receives a "cookie" in their web browser. This cookie is a small file that stores information regarding the visitor's website visits. The cookie does not store sensitive information, such as the visitor's name, address, or other personally identifiable information. Moreover, because of how the retargeting technology is implemented, the advertiser would not ordinarily know the IP address, email, or any specifically identifiable information of any website visitor who receives a cookie. When the visitor leaves the advertiser's website and visits a different website, if the retargeting service provider features advertisements on other websites to which the visitor navigates, the law firm's advertisements may appear.

Law firms, like many other businesses, may want to take advantage of retargeting in order to maximize the impact of the firm's advertising. As detailed below, although we do not believe that the ethics rules prohibit lawyers from using retargeting, lawyers should be mindful of their ethical obligations when creating and sending retargeted advertisements.

## **III. Retargeted Advertisements Must Comply With the Advertising Rules**

If an on-line communication constitutes an "advertisement," it is subject to various regulations under the Rules. *See generally* NYCBA Formal Op. 2015-7 (2015) (providing detailed analysis of advertising rules in the context of social media). These include:

- The advertisement may not contain statements that are false, deceptive or misleading [Rule 7.1(a)(1)];
- The advertisement, under certain circumstances, must contain the words "Attorney Advertising" [Rule 7.1(f)];
- The advertisement may not use meta tags or other hidden computer code that, if displayed, would violate the Rules [Rule 7.1(g)];
- The advertisement must include the name, principal law office address, and telephone number of the lawyer or law firm [Rule 7.1(h)];
- The law firm must pre-approve any advertisements, and any advertisement contained in a computer-accessed communication must be retained by the law firm for at least one year [Rule 7.1(k)]; and
- The advertisement may not otherwise violate a Rule [Rule 7.1(a)(2)].

Rule 1.0(a) 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. It does not include communications to

existing clients or other lawyers.” A lawyer’s retargeting communications constitute advertisements if they are made by the lawyer regarding the lawyer’s services and the primary purpose of the communications is retention of the lawyer for pecuniary gain. *See* NYSBA Ethics Op. 967 (2013). For the purposes of this Opinion, we assume the law firm is creating a retargeting advertisement in order to obtain paying clients.

#### **IV. Retargeted Advertisements Must Also Comply With the Solicitation Rules**

A solicitation is a subset of attorney advertising and is subject to additional regulation under the Rules. Rule 7.3(b) defines solicitation as:

[an] 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.<sup>1</sup>

Whether a retargeting advertisement constitutes a solicitation turns primarily on whether it is “directed to, or targeted at, a specific recipient or group of recipients.”

A communication can be “directed to or targeted at” a specific individual or group of people based either on the content of the communication or how it is distributed. *See* Roy D. Simon, *Simon’s New York Rules of Professional Conduct Annotated* at 1786 (2020 ed.) (“Whether an advertisement is “directed” or “targeted” depends on the method of delivery as much as on the content of the message.”). Comment [3] to Rule 7.3 states that an advertisement may be directed to or targeted at a specific recipient or recipients if “it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages).”<sup>2</sup> *See also* NYSBA Formal Op. 1039 (2014) (a lawyer’s advertisements directed to

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<sup>1</sup> We observe that the requirement in Rule 7.3(b) that a solicitation be an “advertisement initiated by or on behalf of a lawyer” for the primary purpose of retaining clients is somewhat redundant given that Rule 1.0(a) already requires that an advertisement be a communication “by or on behalf of a lawyer or law firm . . . the primary purpose of which is for the retention of the lawyer or law firm.”

<sup>2</sup> Comment [3] also states that an advertisement can be “directed to or targeted at” a recipient or recipients if it is made by “in-person or telephone contact or by real-time or interactive computer-accessed communication.” We assume for the purposes of this Opinion that the advertisement at issue does not contain any characteristics that would make it a “real-time or interactive” communication. *See* Rule 7.3(b) Cmt. [9] (“Ordinarily, email communications 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. However, instant messaging (“IM”), chat rooms, and other similar types of conversational computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communication.”); NYSBA Op. 1009 (2014) (tweets from a law firm are not real-time interactive for the purposes of solicitation rule).

individuals who subscribed to a blog the lawyer also operated would likely constitute solicitations). An advertisement placed in the public media (e.g., newspaper, television, billboard or website) is presumed not to be a solicitation if it does not refer to “a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers,” even though the advertisement may be intended to attract clients who need legal services in a particular area of law. Rule 7.3(b), Cmts. [3] & [4].

One difference between retargeting and most other forms of direct advertising is that a lawyer who employs retargeting typically does not know the identity of any of the specific visitors who receive the retargeted ads. *Accord* NYSBA Formal Op. 1039 (analyzing lawyer’s use of emails received when individuals subscribed to a newsletter). With retargeting, the lawyer and the retargeting service do not usually receive any identifying information about the visitor and, instead, know only that the retargeting recipient has visited the lawyer’s website in the past. In other words, a lawyer who employs retargeting has no way of knowing the identity of the individual who visited his website or even if the individual who visited the lawyer’s website is the one who regularly uses the internet browser in which the cookie was placed. Under these circumstances, we do not believe that the use of retargeting technology makes an advertisement sufficiently targeted to require compliance with the solicitation rules. *See, e.g.*, NYSBA Op. 1016 (2014) (“[T]he reality that some of the recipients of [a] proposed advertisement might be in need of the legal services offered by the attorney does not transform the advertisement into a solicitation”); Simon at 1786 (“A solicitation is ‘directed to, or targeted at, a specific recipient’ if the lawyer knows the name, mailing address, email address, or telephone number of the recipient.”).

Our conclusion that the use of retargeting technology does not, by itself, constitute solicitation, assumes that the advertisements being disseminated are not sufficiently targeted by their content. For instance, a simple advertisement containing the lawyer’s name and contact information would not become a solicitation if it was disseminated through retargeting. However, if the advertisement was targeted at a specific group of individuals (e.g. members of a specific organization or individuals who may have a common claim against the same defendant) then the lawyer would be required to comply with the solicitation rules. *See* NYSBA Op. 1009 (2014) (advertisement becomes 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.”); Simon at 1790-91 (listing hypothetical examples of advertisements and solicitations). In that event, the lawyer must (among other things):

- File a copy of the solicitation with the local Attorney Grievance Committee in the jurisdiction where the lawyer or law firm practices.<sup>3</sup> The lawyer also must not make any reference to the fact of filing in the solicitation itself [Rule 7.3(c)(1)-(2)];
- Refrain from sending any solicitations related to a potential personal injury or wrongful death claim arising from a specific incident for thirty days from the date

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<sup>3</sup> In general, filing a hard copy of the solicitation at the time of its dissemination should suffice to comply with Rule 7.3(c); however, lawyers should consult the Grievance Committee in the judicial department where the lawyer or law firm practices for specific guidance concerning the proper practice and procedures.

of the incident and disclose how the lawyer obtained the identity of the recipient and learned of his or her potential legal need. *See* Rule 7.3(e)-(f); and

- Display the lawyer’s name, principal office address and telephone number in the solicitation [Rule 7.3(h)].

We note that Rule 7.3(c)(3) also requires a lawyer sending a solicitation to a “predetermined recipient” to retain a list of the names and addresses of all such recipients for at least three years from the date of the last dissemination. In the event a solicitation is disseminated through retargeting, we do not believe this rule applies. The text of Rule 7.3(c)(3) suggests that in order for an individual to qualify as a “predetermined recipient,” the lawyer must have access to certain identifying information. *See* Simon at 1798 (“[Rule 7.3(c)(3)] applies only if the lawyer knows the names – or at least the addresses – of the people who will receive the solicitation.”). While we do not believe that this type of information is limited to “names and addresses,” it must be information that is sufficient to allow the lawyer to identify and directly contact the individual recipient. As noted above, the lawyer using retargeting does not typically have access to this type of information. Under these circumstances, Rule 7.3(c)(3) would be inapplicable.

#### **V. Retargeting Advertisements are not Inherently Dishonest or Deceitful**

In general, a lawyer’s advertising must comport with the Rules, *see* Rule 7.1(a)(2) (providing that a lawyer may not participate in the use of any advertisement that violates a Rule), including Rule 8.4(c), which forbids a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” *See* NYCBA Formal Op. 2015-7 (Rule 8.4(c) prohibits false, deceptive or misleading statements “regardless of whether the communication is an ‘advertisement.’”); *see also* Rule 7.1, Cmt. [3] (to accomplish the purposes of attorney advertising “it is of the utmost importance that lawyer advertising not be false, deceptive or misleading”). Attorney advertising has been viewed particularly stringently, to protect the public against being misled. *See, e.g.,* Rule 7.1, Cmts. [11]-[13]. In some contexts, disclaimers are required to prevent advertising from being misleading. *See, e.g.,* Rule 7.1(e)(3); 7.1(f).

Here, the question is whether it is dishonest or deceitful for a lawyer to disseminate an otherwise permissible advertisement through retargeting when individuals who visit the lawyer’s website do not know that a cookie will be placed in their browser and they will continue to see the lawyer’s advertisements on other websites. There certainly are contexts in which a lawyer’s silence can be impermissibly misleading. *See, e.g.,* NYCBA Prof’l Ethics Comm. Formal Op. 2003-2(2003) (“undisclosed taping smacks of trickery and is improper as a routine practice”); *see also* Rule 4.1, cmt. [1] (“Misrepresentations can also occur by . . . omissions that are the equivalent of affirmative false statements.”). On the other hand, in this day and age, online retargeting is ubiquitous and has been used by advertisers for several years. Consumers have come to understand to some degree that the advertisements they see online are not completely random and that they may receive advertisements for certain content as a result of demographic information or internet search history. We also recognize that visitors to a website are accustomed to receiving a pop-up message notifying the visitor that the website uses cookies for certain purposes and inviting the visitor to view the website’s privacy policies.

Under these circumstances, we do not believe that a lawyer's use of retargeting is inherently deceptive so long as the lawyer makes some disclosure – consistent with standard practice – that the firm uses cookies on its website, which may be used for advertising purposes.<sup>4</sup> While we recognize that some individuals may not anticipate being “followed” across the internet by a lawyer's advertising after visiting the lawyer's website, and may be annoyed by the lawyer's advertising, we do not believe that this practice, without more, means that visitors to the website have been deceived.

## **CONCLUSION:**

A lawyer may use retargeting to disseminate advertisements. The use of retargeting does not, by itself, constitute solicitation. If, however, a lawyer's advertisements are sufficiently targeted by their content, the lawyer must comply with the rules governing solicitation. Additionally, a lawyer does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation by using re-targeting so long as the lawyer's website discloses that the firm uses cookies on its website, which may be used for advertising purposes.

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<sup>4</sup> We also recognize that substantive law may require the firm to make these same disclosures. *See* Cal. Civ. Code 1798 *et seq.* (California Consumer Privacy Act); Regulation (EU) 2016/679 (General Data Protection Regulation). To the extent substantive law requires a firm to disclose retargeting in its privacy policy or to take other measures to comply with applicable privacy laws, failure to do so could violate Rule 8.4(b), which prohibits a lawyer from engaging in “illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.”