ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm has decided to host a business development event at which several clients and prospective clients who are small business owners will set up tables and booths to sell and promote their products and services. It's not only a chance to generate some new business for the firm, it's also an opportunity for the firm's attorneys, clients, and other business contacts to network with one another and do some holiday shopping. In the past, the event has been very successful. This is my first year serving as the chair of the committee organizing the event and I have a couple new ideas that I think will maximize our opportunity to promote the firm and generate business.

First, I'd like to organize a raffle for a few door prizes. The firm will purchase products from each of the vendors attending the event and wrap them in gift baskets with the firm's colors and logo. I'm thinking that we could even throw in a few attorney business cards or some pens or other small items with the firm's name. Instead of using traditional raffle tickets, however, attendees at the event will enter the raffle by "adding" the firm on various social media platforms (Facebook, Twitter, and LinkedIn) and using a special hashtag for the event. Are there any specific ethics rules or regulations implicated by conducting the raffle in this way, or by conducting the raffle at all?

In conjunction with the raffle, I'd really like to use the event as an opportunity to build up the firm's ratings and reputation online. Like many firms, we're listed on sites like Avvo and Lawyers.com, but we're a small firm and only have a handful of reviews at the moment. Therefore, I was thinking that we could offer our current and past clients who are present at the event a discount on future legal services if they leave us an online review. If we offer this type of promotion, are we violating any ethics rules?

Sincerely,

I. M. Hopeful

Dear I.M. Hopeful:

Business development is crucial to the success of any business, and law firms of all types and sizes are looking for new and innovative ways to reach potential clients, and to strengthen their relationships with existing clients. Social media platforms and online professional referral services offer smaller law firms like yours an opportunity to reach a larger audience, and to grow their practices in new and exciting ways. But when engaging in a new form of marketing, lawyers must be guided by their ethical obligations and must consider how they might apply to new business development initiatives. As lawyers, we are subject to a strict set of guidelines that govern advertising for our services and the solicitation of new business from existing or potential clients. The starting point for any firm event or online marketing campaign should be the applicable New York Rules of Professional Conduct (RPC). Your question implicates issues of attorney advertising (RPC 7.1), payment for referrals (RPC 7.2) and attorney solicitation (RPC 7.3). So before addressing the specifics of your question, we must first summarize the parameters and requirements of these rules and assess the distinctions between these related but distinct ethical concepts.

Attorney Advertising and Solicitation

RPC 7.1 governs advertisements by lawyers and law firms, and RPC 1.0(a) defines the term "advertisement" as "any public or private communication made by or on behalf of a lawyer . . . , the primary purpose of which is for the retention of the lawyer or law firm." However, as the New York State Bar Association (NYSBA) has noted, "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising." (NYSBA Comm. on Prof'l Ethics, Op. 873 (2011).) For example, as Comment 8 to RPC 7.1 makes clear, "communications by a law firm that may constitute marketing or branding are not necessarily advertisements." "[P]encils, legal pads, greeting cards, coffee mugs, T-Shirts or the like with the firm name, logo, and contact information printed on them do not constitute 'advertisements' within the definition of [RPC 7.1] if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter." (RPC 7.1 Comment [8].) In other words, the threshold issue of whether a business development campaign constitutes an "advertisement" under RPC 7.1 depends upon the intent of the lawyer or law firm. Communications intended to promote general awareness of the firm or lawyer's existence are not "advertising" under RPC 1.0(a). By contrast, communications intended to promote the retention of a law firm by a particular client, for a particular purpose, will constitute "advertising."

When an offer or marketing effort does constitute an advertisement under RPC 1.0(a), the lawyer and law firm is then subject to all the requirements of RPC 7.1 For example, RPC 7.1 prohibits the dissemination of advertisements containing false statements, the

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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portrayal of fictitious law firms, or the use of paid endorsements or testimonials without disclosing that they are being compensated. (*See* RPC 7.1(a), (c).) However, pursuant to RPC 7.1(b), an advertisement may include information pertaining to: legal and non-legal degrees and education; names of clients regularly represented (provided they give prior written consent); and a description of the legal fees charged for initial consultation, or contingency fee rates in civil matters (so long as it is accompanied by the disclosure required by paragraph (p)). So once a particular marketing effort qualifies as an "advertisement" under RPC 1.0(a), it is important to review and abide by the requirements of RPC 7.1, so as to avoid any unintentional ethical violation.

The RPC impose even stricter requirements with respect to attorney solicitations, which should not be confused with mere attorney advertisements. "A 'solicitation' in Rule 7.3(b) is by definition an 'advertisement' that meets additional criteria, so something cannot be a 'solicitation' unless it is first found to be an 'advertisement.'" (NYSBA Comm. on Prof'l Ethics, Op. 873, citing RPC 7.3 Comment [1].) RPC 7.3(b) defines a "solicitation" as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Notably, subject to certain narrow exceptions, RPC 7.3(a)(1) expressly prohibits in-person solicitation, as well as solicitation by "telephone contact, or by real-time or interactive computer-accessed communication." Comment 9 to RPC 7.3 makes clear the underlying policy goals of the prohibition against in-person solicitation: "in-person solicitation, [] has historically been disfavored by the bar because it poses serious dangers to potential clients." For example, "a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration" and "[t]hese same risks are present in telephone contact or by real-time or interactive computer-accessed communication." (RPC 7.3, Comment [9].) Ordinarily, however, "email communications and web sites are not considered to be real-time or interactive communication." (*Id.*) As a result, mass emails, or the posting of an offer on a firm-website or social media page is unlikely to constitute a "solicitation" under RPC 7.3(b). By contrast, communicating with a client via a text message or online messaging platform such as Facebook, Messenger or WhatsApp would likely constitute a "real time or interactive communication" and, thus, could potentially qualify as a solicitation. (*Id.*)

Conducting an Event and Raffling Prizes

So what does all of this mean for your event and your raffle? The NYSBA Committee on Professional Ethics has concluded that "[a] law firm may hold a party or a sporting event to promote the firm's name, but its lawyers may not use those occasions to engage in in-person solicitation of its guests unless those guests fall within one of the exclusions in Rule 7.3(a)(1)" such as "a close friend, relative, former client or existing client"). (NYSBA Comm. on Prof'l Ethics, Op. 1136 (2017).) In addition, the invitation to any such event "may not seek the law firm's retention in a matter" unless it complies with the public filing and record-keeping requirements of RPC 7.3(c). (*Id.*) Also, to the extent the invitation qualifies as an "advertisement" (i.e., its primary purpose is pecuniary gain), it must comply with the requirements of RPC 7.1. As for giving away or raffling of a prize, so long as the offer complies with applicable law and does not constitute illegal conduct, the RPC do not prohibit a law firm from giving a client or potential client a prize in exchange for attending an event or for joining the firm's social network. (*See* NYSBA Comm. on Prof'l Ethics, Ops. 873 and 1136.) The lawyer or law firm may even require the winner of the prize to retrieve it from the law firm's office, so long as they do not "use that opportunity to solicit the winner's legal matters (as opposed to, say, using the moment for a photo opportunity with the winner for release to the press to raise public awareness of the firm)." (NYSBA Comm. on Prof'l Ethics, Op. 1136.) Attorneys should therefore be very mindful of the restrictions of RPC 7.3 when meeting with a client or potential client who has come to the firm's event or offices to claim a raffle price.

So to summarize, you can organize a firm event, but you should consider whether the invitation to the event constitutes either an "advertisement" or a "solicitation" under RPC 1.0(a) or 7.3(b) respectively. Putting some firm-branded merchandise into a gift basket would likely be construed as an effort to raise "general awareness and branding" of the sort discussed in Comment 8 to RPC 7.1, and it is therefore unlikely to constitute attorney advertising for the purposes of RPC 7.1. In addition, you may conduct a raffle to give away prizes to current or potential clients for attending the event or using your suggested hashtag, so long as the receipt of the prize is not contingent upon retaining the firm, and the claiming of the prize is not used as an opportunity to solicit the winner's business.

Encouraging Online Reviews

In the modern internet economy, consumers of all kinds begin their search for products and service providers with a simple internet search. It is no surprise then that law firms, like virtually all other businesses, are looking for ways to increase their online presence, and to appeal to a younger generation of client that may be looking for legal services through new or previously under-utilized channels like professional review websites such as Avvo. However, your use of Avvo as a marketing and/or referral platform implicates issues of attorney referrals under RPC 7.2 and attorney advertising under RPC 7.1. So before implementing a marketing initiative built around encouraging online reviews of your law firm, you must first consider how

encouraging online reviews as part of a business development initiative could, potentially, run afoul of your ethical obligations under these rules.

Subject to certain limited exceptions, RPC 7.2 prohibits a lawyer from compensating a person or organization for a recommendation resulting in employment by a client. (RPC 7.2(a)). The key to whether you can offer a discount to a client for writing you a review turns on whether the discount is in any way contingent upon the nature or substance of the review itself. The NYSBA has concluded that "Rule 7.2(a) does not apply [if] the [attorney] is asking for a rating, not a recommendation." (NYSBA Comm. on Prof'l Ethics, Op. 1052 (2015).) In other words, a rating is not necessarily a recommendation, so long as the law firm does not attempt to exert any influence over whether the client writes a positive or negative review. Therefore, merely offering a discount for a client review does not, by itself, implicate the prohibitions of RPC 7.2(a). However, the NYSBA Committee on Professional Ethics also opined that "[i]f the inquirer made the credit contingent on receiving a positive review or high scores, or if the inquirer made the credit contingent on being retained by a new client as a result of the rating, then the credit would violate Rule 7.2(a)." (*Id.*) You should therefore make clear to your clients, and to the other attorneys in your firm, that your suggested discount on future legal services cannot be conditioned in any way on the nature or substance of the client's review.

If a client review is in fact positive, you should nevertheless consider the requirements of RPC 7.1 before utilizing it in any of your law firm's advertising or marketing materials. The NYSBA Committee on Professional Ethics recently concluded that Avvo's website "is an 'advertisement' within the meaning of Rule 1.0(a)" and, as a result, "[t]his means that a participating lawyer must determine that the website does not make false, misleading or deceptive statements or claims, or otherwise violate the Rules." (NYSBA Comm. on Prof'l Ethics, Op. 1132 (2017).) For example, "lawyers may not use Avvo ratings (or any other ratings) in their advertising unless those ratings are 'bona fide professional ratings.'" (*Id.*, citing RPC 7.1(b)(1) and Comment [13].) Attorney ratings "are not 'bona fide' unless (among other things) the ratings 'evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests," and are "not subject to improper influence by lawyers who are being evaluated." (NYSBA Comm. on Prof'l Ethics, Op. 1132 quoting RPC 7.1 Comment [13].) In its recent opinion, the NYSBA Professional Ethics Committee concluded that it "lack[ed] sufficient facts to determine (and [did] not decide) whether Avvo's rating system meets the criteria for a bona fide professional rating." (NYSBA Comm. on Prof'l Ethics, Op. 1132.) Law firms looking to capitalize on favorable ratings may wish to further investigate this issue before referencing it in any advertising or marketing materials.

While you did not raise this particular issue in your inquiry, you should also consider whether your law firm's relationship with Avvo itself could potentially violate RPC 7.2. In its recent ethics opinion, the NYSBA Committee on Professional Ethics considered the propriety of Avvo's so-called "marketing fee" – a monthly fee paid by participating attorneys for each legal service the attorney has completed during the prior month. (See NYSBA Comm. on Prof'l Ethics, Op. 1132.) "As an example, Avvo's website tells lawyers that 'if a client purchases a $149 document review service with you . . . you will be charged a $40 marketing fee.'" (*Id.*) As the NYSBA Committee on Professional Ethics observed, "[t]he marketing fee raises questions about whether lawyers who participate in Avvo Legal Services are improperly sharing legal fees with a nonlawyer." (*Id.*) This turns on whether the law firm is paying Avvo for its marketing services (which is permissible), or whether the firm is paying Avvo to recommend the firm to potential clients (which would violate RPC 7.2(a)). (*See id.*) Comment [1] to RPC 7.2 notes that "lead generators" are improper to the extent the lead generator "states, implies, or creates a reasonable impression that it is recommending the lawyer" and the committee concluded that Avvo – as it was operating – was in fact making a "recommendation" to potential clients for the benefit of the participating lawyers. (NYSBA Comm. on Prof'l Ethics, Op. 1132.) Accordingly, the NYSBA Committee on Professional Ethics opined that "[a] lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a)." (*Id.*).

Conclusion

In an increasingly competitive legal marketplace, law firms are always looking for new ways to get ahead, and to market themselves to new and existing clients. The internet, in particular, is constantly offering new avenues for attorney advertising. Lawyers, however, have a special ethical obligation to ensure that any new marketing initiatives do not violate the RPC. You were right to question whether your raffle and your plan to incentivize client reviews of your firm would run afoul of your ethical obligations. But so long as the raffle is not utilized as an opportunity for solicitation, and provided your proposed client discount is not contingent on the substance of the client's review of your firm, your firm should be able to proceed with its initiatives without violating any of its ethical obligations.

Sincerely,

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14. Mistakes Involving Articles

There are two types of articles — definite and indefinite. For some reason, they lead to problems for many of us.

Here are some common mistakes when it comes to articles:

a. Using a definite article when you should be using an indefinite article, or vice versa.

A definite article, such as *the*, refers to someone or something specific. An indefinite article, such as *a* or *an*, refers to someone or something general.

Correct: *The* main buildings of the New York Supreme Court in New York County are located in *the* Civic Center neighborhood of Manhattan. *Alternately*: "The New York Supreme Court's main buildings are located in Manhattan's Civic Center."

Correct: You could probably find *a* book about that subject in the library.

b. Using *a* and *an* incorrectly.

While *a* and *an* are both indefinite articles, they can't be used interchangeably. *A* should be used before a letter or word that begins with the sound of a consonant, even if the letter is a vowel or the word begins with a vowel (e.g.: *book* or *eulogy*). *An* should be used before a letter or word that begins with the sound of a vowel, even if the letter is a consonant or the word begins with a consonant (e.g.: "F.B.I. agent" or *apple* or *honorable*).

Correct: *A* person should always be polite to others.

Correct: *An* individual can have a great impact on society even if few people follow their example.

c. Using an article before a noun that can't be counted.

Incorrect: She demonstrated *a* courage when she ran into the burning house to save the child.

Correct: She demonstrated courage when she ran into the burning house to save the child.

The column continues in the *Journal*'s next issue with Part II of the Worst Mistakes in Legal Writing. ■

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Attorney Professionalism Forum
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I'm a personal injury attorney practicing at a boutique law firm that offers legal services across multiple areas of practice including financial services, intellectual property, and trusts and estates (just to name a few). Recently, and very sadly, a friend from law school – who was also a personal injury attorney, but with a solo practice – passed away. Through the years, we kept in touch personally and professionally and would occasionally reach out to one another for advice on particular issues. Unbeknownst to me, before he died, my friend informed his secretary that he wanted to refer two of his cases to me. The secretary in turn gave the clients my name and information, and they contacted me to discuss taking over their cases. I'm still in the process of clearing conflicts and evaluating how far each case has progressed. In one of the matters, my friend had conducted a preliminary investigation and gathered some medical records, but had not yet filed the lawsuit. I'm still not sure how much work was done in the other matter. In any event, my friend and I did not have a referral or fee-sharing arrangement, and nothing was written in his will – it was just his verbal instruction to his secretary. If I accept either of these cases, should I pay a referral fee to my friend's estate for the matters I accept? Or, if I determine that I cannot accept these cases and pass them on to a third attorney, can I accept a referral fee?

While I'm on the topic of wills and estates, there's another question I'd like to ask The Forum. A physician I regularly consult and use as an expert in my practice asked me if my firm's trusts and estates group would draft a will for him and his wife. Assuming that the trusts and estates attorneys at my firm draft the will, and I use this doctor as an expert in a future case, will I be required to disclose my firm's representation of him as a client? Will that disqualify him?

Sincerely,
May B. Fee

MEMBERSHIP TOTALS

New Regular Members 1/1/18 - 1/22/18	**356**
New Law Student Members 1/1/18 - 1/22/18	**19**
Total Regular Members as of 1/22/18	**60,642**
Total Law Student Members as of 1/22/18	**8,347**
Total Membership as of 1/22/18	**68,989**