

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two thick, black horizontal bars.

**NEW YORK
CITY BAR**

**COMMENTARY ON NEW YORK'S ETHICS RULES
GOVERNING LAWYER ADVERTISING AND SOLICITATION**

COMMITTEE ON PROFESSIONAL & JUDICIAL ETHICS
AND THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY

MARCH 2009

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44TH STREET, NEW YORK, NY 10036

Table of Contents

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION | 1 |
| II. THE HISTORY OF THE NEW LAWYER ADVERTISING AND SOLICITATION ETHICS RULES | 3 |
| A. The Bar Associations' Recommended Changes to New York's Ethics Rules Concerning Lawyer Advertising and Solicitation | 3 |
| B. Summary of the June 14, 2006 Draft Rules | 5 |
| III. THE PROPER INTERPRETATION AND APPLICATION OF THE LAWYER ADVERTISING AND SOLICITATION ETHICS RULES | 11 |
| A. Rule 8.5 -- Disciplinary Authority and Choice of Law | 11 |
| 1. New York-Licensed Attorneys Based Within and Outside New York | 11 |
| 2. Solicitations Directed to Clients in New York | 14 |
| 3. Law Firms with Offices in New York | 16 |
| B. The Advertising Rules -- What Is Advertising? | 20 |
| C. The Labeling of Advertising | 27 |
| D. Substantive Limits on the Content of Advertising | 29 |
| 1. Requirement of Evidence of Claims Made By Attorneys | 30 |
| 2. Ratings | 32 |
| 3. Specialist/Experts | 35 |
| 4. Actors, Judges, Fictional Characters, etc. | 36 |
| 5. Use of Stock Photos | 37 |
| 6. Use of Monikers | 37 |
| 7. Domain Name | 38 |

| | | |
|-----|--|----|
| 8. | Identification of Clients | 41 |
| 9. | Sensationalism | 43 |
| 10. | Endorsements..... | 45 |
| 11. | Pop-Up Advertisements and Meta Tags | 45 |
| 12. | Description of Fees | 46 |
| E. | Maintaining Copies of Advertisements | 49 |
| F. | Web Site Rules..... | 51 |
| 1. | Labeling | 51 |
| 2. | Maintaining Copies | 51 |
| G. | Solicitation Rules..... | 53 |
| 1. | Definition — What is covered? | 53 |
| 2. | Requirements Relating to Solicitations..... | 55 |
| 3. | RFPs and Other Information Sent Upon Request Are not Solicitations..... | 57 |
| 4. | Limits on the Form of Solicitations | 57 |
| 5. | “Directed to or Targeted at” | 60 |
| 6. | Exception for Certain Legal Services Organizations..... | 61 |
| 7. | Limitations on Contacts in the Case of Personal Injury and Wrongful Death Cases | 62 |
| H. | Certification Rules and Implications | 65 |

**REPORT OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK**

**Commentary on New York's Ethics Rules
Governing Lawyer Advertising and Solicitation¹**

March 2009

I. INTRODUCTION

On February 1, 2007, amendments to New York's ethics rules governing lawyer advertising and solicitation (the "Rules") went into effect.² The Rules make substantial changes to the ways in which attorneys subject to regulation under New York's Rules of Professional Conduct may advertise and solicit business.³ The Rules were the product of an unusual and extended public comment period during which the Presiding Justices of the Appellate Division's four departments received over 100 comments from lawyers, law firms, bar associations and others, including the Federal Trade Commission, concerning the original draft rules published on June 14, 2006. Although the Rules that went into effect on February 1, 2007 (as slightly modified by the new Rules of Professional Conduct, effective April 1, 2009) are arguably less content-restrictive and attempt to define more clearly the type of conduct they seek to regulate

¹ This report was drafted jointly by the City Bar's Committee on Professional Responsibility and Committee on Professional and Judicial Ethics.

² A copy of the Relevant Rules is appended hereto as Appendix A.

³ On December 17, 2008, then Chief Judge Judith S. Kaye and the Presiding Justices of the Appellate Division of the State of New York announced that, effective April 1, 2009, New York's Rules of Professional Conduct ("NY Rules") would replace New York's Code of Professional Responsibility ("NY Code"). Unless otherwise noted, this Report principally will refer and cite to the new NY Rules.

than the draft proposal of June 14, 2006, the final Rules nonetheless remain complicated and ambiguous in many respects. Consequently, lawyers are left with the difficult task of attempting to interpret and apply these Rules in an environment that is rapidly changing as a result of, among other things, the increasing use of electronic mail and the Internet by lawyers as a means of communicating with, or making information available to, the public and current and prospective clients.

Moreover, the Rules potentially infringe on a lawyer's constitutional right to engage in commercial speech. Indeed, as discussed below, a federal district court has ruled that certain provisions of the Rules are unconstitutional, and the enforcement of these provisions has been enjoined. At the time of the publication of this report, the district court's decision is on appeal in the United States Court of Appeals for the Second Circuit.

The primary objective of this report is not to analyze all the potential constitutional infirmities of the Rules, a task that is beyond the scope of this report (and ultimately will be decided by the federal courts), but rather to provide lawyers with guidance as to how the Rules should be interpreted and applied to the wide range of conduct that may fall within their purview (assuming, of course, the Rules are ultimately found to be constitutional).

The report is organized as follows: Section II provides an overview of the history of the Rules and Section III sets forth the City Bar's guidance as to how the Rules should be interpreted and applied by lawyers subject to regulation under the Rules.

**II. THE HISTORY OF THE NEW LAWYER
ADVERTISING AND SOLICITATION ETHICS RULES**

**A. The Bar Associations' Recommended Changes to New York's
Ethics Rules Concerning Lawyer Advertising and Solicitation**

In June 2005, as a result of concern about certain lawyer advertising,⁴ the New York State Bar Association (the "NYSBA") created the Task Force on Attorney Advertising (the "Task Force") to recommend (i) changes to New York's current ethics rules governing advertising and solicitation, (ii) changes in the manner in which these rules are enforced and (iii) a peer review advertising program. The Task Force's work was part of a larger effort by the NYSBA's Committee on Standards of Attorney Conduct ("COSAC") to assess replacement of the NY Code with new rules in the same format as the Model Rules of Professional Conduct (the "Model Rules").⁵

On November 5, 2005, the Task Force presented a preliminary report on proposed lawyer advertising and solicitation ethics rules (the "Preliminary Report") to the NYSBA's House of Delegates for informational purposes. In its Preliminary Report, the Task Force identified, among other things, the following key issues concerning the current state of lawyer advertising and solicitation in New York:

⁴ See A. Vincent Buzard, President's Message, N.Y. STATE BAR ASS'N J., June/July 2005 at 6.

⁵ On September 30, 2005, COSAC issued a comprehensive report recommending, among other things, that the NYSBA approve the change from the NY Code to the Model Rules, and ask the Courts of the State of New York to adopt the proposed change. (COSAC's report is available at www.nysba.org.) On February 1, 2008, the NYSBA submitted proposed Model Rules to the Presiding Justices of the Appellate Division of the State of New York and, as noted above, on December 17, 2008 it was announced that the NY Rules, adopting many of the NYSBA proposals, would become effective April 1, 2009.

- Certain instances of potentially false, deceptive or misleading advertisements in print and broadcast media and on the Internet.
- An apparent lack of enforcement of the existing ethics rules concerning lawyer advertising and solicitation.
- The potential role that the NYSBA and local bars could play in addressing advertising and solicitations that violate the ethics rules.
- The perceived need to educate lawyers about the ethics rules relating to advertising and solicitation and to educate potential consumers about these rules and the process of retaining lawyers generally.

In its Preliminary Report, the Task Force generally recommended (among other things) that:

- New York's current lawyer advertising and solicitation ethics rules should be amended. The Task Force concurred with COSAC's recommendation that the NYSBA, as well as the New York state courts, adopt the Model Rules format to replace the NY Code.
- The NYSBA should adopt guidelines concerning lawyer advertising and solicitation ethics rules that would be used to educate (i) the public about retaining a lawyer and the types of lawyer advertising and solicitation that may violate the ethics rules, and (ii) lawyers about the ethics rules on advertising and solicitation.

At the time of its presentation to the NYSBA House of Delegates in November 2005, the Task Force circulated the Preliminary Report for comment to interested sections and committees of the NYSBA and other bar associations, including the City Bar. The City Bar reviewed the Task Force's Preliminary Report and recommended certain changes and additions to the Task Force's proposals in its Preliminary Report. As a result of the City Bar's and others' comments, the Task Force made changes to its proposed lawyer advertising and solicitation ethics rules. The City Bar supported the Task Force's proposals (with some exceptions) that were ultimately

approved by the NYSBA's House of Delegates on January 27, 2006. Neither the City Bar nor the NYSBA recommended regulating the content of lawyer advertising. The Task Force's final report and proposed ethics rules concerning lawyer advertising and solicitation are publicly available.⁶

B. Summary of the June 14, 2006 Draft Rules

On June 14, 2006 — approximately six months after the NYSBA's Task Force issued its final report and proposed ethics rules — the Presiding Justices of New York's Appellate Division issued for public comment proposed rules relating to lawyer advertising and solicitation. Although the proposed rules adopted certain of the Task Force's recommendations, they proposed much greater restrictions than the Task Force's recommendations, including content-based regulations, and had the potential to place great compliance burdens on lawyers. New York Court of Appeals Judge Eugene F. Pigott Jr., who was Presiding Justice of the Appellate Division, Fourth Department, when the draft rules were proposed, explained that the "new rules grew out of a concern of the presiding justices over the 'explosion' of attorney advertising, and their suspicion that some of the ads were not only distasteful but misleading."⁷ According to Judge Pigott, the Presiding Justices "were concerned about lawyers who wanted to give the impression

⁶ The Task Force's final report and proposals regarding lawyer advertising and solicitation are available online at http://www.nysba.org/Content/ContentGroups/Reports3/Report_from_Task_Force_on_Lawyer_Advertising/LawyerAdvertisingReport.pdf.

⁷ John Caher, NY Judges Reached Out to Bar on Ad Rules, N.Y.L.J., January 26, 2007 at 6.

that they are the best, when they were often quite young and inexperienced.”⁸ Judge Pigott clearly was concerned about the impression that certain advertising may have on the public. Judge Pigott remarked, at the time, that “[w]hat you and I do as lawyers is serious. And on TV are these pop-ups who make a joke about it.”⁹

Shortly after the draft rules were approved for public comment, then-Chief Administrative Judge Jonathan Lippman (now Chief Judge of the Court of Appeals) called the proposal “the most sweeping reform since 1990” and “unprecedented.”¹⁰ The Presiding Justices initially provided a 90-day public comment period (ending September 15, 2006). In early September 2006, however, the Presiding Justices extended the public comment period to November 15, 2006, and stated that the final rules would take effect on January 15, 2007. The most significant aspects of the draft rules were as follows:

- The draft rules contained definitions of “advertisement” and “solicitation” that were very expansive, as well as a definition of “computer-accessed communication” that was quite broad.
- Proposed Disciplinary Rule (“DR”) 7-111 (now embodied in Rule 4.5), Communication After Incidents Involving Personal Injury or Wrongful Death, would prohibit lawyers from soliciting personal injury and wrongful death clients for 30 days after disasters. A limited exception would permit solicitations within 30 days of the disaster where there is a short notice of claim period (e.g., 15 days).
- Lawyers who file “initiating pleadings” (e.g., a complaint) would be required to certify that the matter was not obtained through “illegal

⁸ Id.

⁹ Id.

¹⁰ John Caher, Courts Back Lawyer Advertising Restrictions, N.Y.L.J., June 15, 2006, available at <http://www.nylj.com>.

conduct” (or, if it was, that those who engaged in the illegal conduct are not participating in the matter or sharing in any fee therefrom), and that the matter was not obtained in violation of Proposed DR-7-111.

- Out-of-state lawyers who advertised or solicited legal services in New York would be subject to professional disciplinary proceedings within New York if they violated the lawyer advertising and solicitation rules.
- All manner of electronic communications, including web sites, e-mails and other means of communicating with clients via the Internet, were covered by the draft rules.
- The draft rules recommended imposing expansive new content-based restrictions on lawyer advertising. For example, the draft rules provided that “the content of advertising and solicitation shall be predominantly informational, and shall be designed to increase public awareness of situations in which the need for legal services might arise” In addition, the draft rules proposed prohibiting lawyers from using current client testimonials, from portraying judges, from re-enacting courtroom or accident scenes and from using courthouses or courtrooms as props. The draft rules proposed that lawyers would be barred from using paid endorsements, and from using recognizable voices of a non-attorney celebrity to tout the lawyer’s skills.
- The draft rules also proposed that lawyers would be required to verify objectively the claims made in advertisements, and to include a disclaimer making clear that their past results for other clients were not a guarantee of future success in other matters.
- The draft rules also included new retention and filing requirements for lawyer advertisements and solicitations. Most advertisements would have been required to have been retained by lawyers for three years. In addition, most advertisements and solicitations would have been required to have been filed with the Disciplinary Committees. Moreover, the draft rules would have required lawyers to retain copies of their web sites every time they changed, regardless of the nature of the change, and then subsequently file a copy of the web site with the Disciplinary Committees.
- The draft rules also proposed that every advertisement and solicitation would have to be labeled “Attorney Advertising” on the first page, and the packaging used to transmit the advertisement or solicitation would have to contain such a label in “red ink.”

As mentioned above, on June 14, 2006, the Presiding Justices' draft rules were open to a public comment period, which is unusual for amendments to ethics rules. Associate Judge Pigott apparently said that the Presiding Justices were initially reluctant to solicit opinions from the bar in drafting new ethics rules regarding advertising "largely because they had never done so before."¹¹ Nonetheless, the Presiding Justices apparently had a change of heart, and decided ultimately to publish the draft rules for public comment because, according to Associate Judge Pigott, the Presiding Justices "knew what we didn't know, and we didn't really know how it would impact practice)."¹²

According to public reports, the draft rules generated over 100 comments from lawyers, bar associations, the Federal Trade Commission and others. Although there were numerous particular critiques of the draft rules, those critiques can be placed into two general categories. First, many observed that certain elements of the draft rules would be unworkable as a practical matter or would create a tremendous burden on lawyers without any evidence that they would further the overall objectives of those rules. Second, others argued that the draft rules contained content-based restrictions that would impinge on a lawyer's First Amendment right to engage in commercial speech, and would prevent consumers from obtaining truthful, non-misleading information about the availability of legal services that would be relevant to consumers' selection of

¹¹ Caher, supra note 6, at 1.

¹² Id.

counsel.¹³ In a September 14, 2006 letter, the Federal Trade Commission observed that some of the proposals were overbroad and could restrict truthful advertising and raise consumers' prices for legal services.¹⁴

On January 4, 2007, the Presiding Justices issued the final Rules, which took effect on February 1, 2007. The Rules clearly were revised in many respects to address the numerous comments received from members of the bar and others. The Rules were changed, among other things, to attempt to describe more clearly both what type of conduct was permitted and what was prohibited by the rules. In addition, although the revision of the Rules did not address all of the concerns voiced in the comments, they were obviously changed in certain respects to attempt to reduce the compliance burden that would be imposed on lawyers and law firms by the new Rules (e.g., the three-year retention period for virtually all electronic communications was eliminated). In addition, the final Rules are less content-restrictive than the draft rules. On the day the Rules became effective, a lawsuit was filed in federal court in which it was alleged that the Rules' content-based restrictions violate the Constitutional right of

¹³ Indeed, The New Yorkers for Free Speech Co., which had reportedly hired well-known First Amendment lawyer Floyd Abrams, submitted a letter to the Presiding Justices contending that many of the provisions of the Proposed Rules, if adopted, would violate the United States Constitution and that of New York State. See Letter from Floyd Abrams to Michael Colonder, Counsel, Office of Court Administration, (September 20, 2006).

¹⁴ See Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission, *et al.*, to Michael Colonder, Counsel, Office of Court Administration (September 14, 2006).

lawyers to engage in commercial speech.¹⁵ On July 23, 2007, the district court permanently enjoined enforcement of a number of the Rules restricting advertising content as violating the United States Constitution, but upheld certain other Rules that were challenged.¹⁶ Because the court's decision remains subject to review on appeal, this Report will analyze how the Rules that have been declared unconstitutional should be interpreted and applied.¹⁷

Despite the numerous changes made to the draft, the Rules are nonetheless ambiguous and complicated in a number of respects. As a result, attorneys have been confronted with many questions about how the Rules should be interpreted and applied to the myriad circumstances they confront in their everyday practice. In an effort to provide guidance to lawyers, this Report explains how the Rules generally should be interpreted and applied to a wide range of lawyer conduct that is arguably governed by the Rules. While the disciplinary committees and courts will have the final say on how the Rules should be applied, the City Bar is hopeful that this Report will provide some helpful guidance to lawyers, disciplinary committees and the courts on how the Rules ought to be

¹⁵ John Caher, NY Firm Sues to Block New Attorney Ad Rules, N.Y.L.J., Feb. 2, 2007, at 1; Joel Stashenko, NY Firm Takes Suit Challenging Lawyer Advertising Rules to Trial, N.Y.L.J., Apr. 16, 2007, at 1.

¹⁶ See Alexander & Catalano v. Cahill, 5:07-CV-117, 2007 U.S. Dist. LEXIS 53602 (N.D.N.Y. July 23, 2007).

¹⁷ The City Bar submitted an *amicus curiae* brief in the Second Circuit supporting the district court's unconstitutionality findings and arguing that the 30-day restriction period for solicitations was unconstitutional to the extent it sought to limit information on web sites and in advertising in the media.

applied to the practical situations that lawyers must confront on a daily basis in their practices.

III. THE PROPER INTERPRETATION AND APPLICATION OF THE LAWYER ADVERTISING AND SOLICITATION ETHICS RULES

A. Rule 8.5 -- Disciplinary Authority and Choice of Law¹⁸

1. New York-Licensed Attorneys Based Within and Outside New York

The threshold issue that a lawyer needs to confront when dealing with the new advertising and solicitation rules is, of course, whether the lawyer's conduct is even covered by the Rules. Although the new Rules attempt to supply an answer to this question, the jurisdictional reach of the Rules is not entirely clear, especially given their drafting history. The draft version of DR 1-105 (now codified as Rule 8.5) provided that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this state if the lawyer provides or solicits any legal services in this state." Many bar associations commented that this provision of the draft rules was overbroad. As written, the draft rule arguably could have required New York's Disciplinary Committees to review Internet advertisements that are available worldwide (including in New York) even though the lawyer that created the Internet advertisement is based, for example, in Montana and never provided any services in New York. Such a rule could have required the lawyer in Montana (in this hypothetical example) to comply with the proposed New York rule. Such a rule plainly would have been overbroad. Apparently responding to

¹⁸ The NY Rules (the NY Code, prior to April 1, 2009), promulgated as joint rules of the Appellate Divisions of the Supreme Court effective September 1, 1990, are Part 1200 of Title 22 of the New York Codes, Rules and Regulations ("NYCRR").

these concerns, the Presiding Justices modified this version of Rule 8.5. Thus, it is fair to conclude that the Presiding Justices intended that the extraterritorial reach of the Rules would be limited, unless the Rules expressly state they apply extraterritorially (as they do for solicitations, which are discussed below).

To sort out the jurisdictional reach of the Rules, one needs to consider Rule 8.5, Disciplinary Authority and Choice of Law (22 NYCRR § 1200.5-a). If a lawyer is licensed to practice only in New York, he or she almost always will be subject to the new advertising and solicitation rules. See Rule 8.5(b)(2)(i). To start, a New York-licensed attorney publishing advertisements in New York seeking work from New York residents would unquestionably be governed by the Rules. However, even if a New York licensed-attorney were located in, and advertising out of, the Chicago office of a law firm that had offices in both Chicago and New York, that attorney would be subject to regulation under the new Rules if that attorney was licensed only in New York. Indeed, Rule 8.5(a) states that a “lawyer admitted to practice in this state [sic] is subject to the disciplinary authority of this state [sic], regardless of where the lawyer’s conduct occurs.” (Emphasis added.) Moreover, the lawyer in question cannot be saved by the choice-of-law provisions of Rule 8.5(b) because, even though the lawyer is located in the Chicago office of the New York/Chicago firm, the lawyer is licensed only in New York and is thus subject to New York’s disciplinary rules.

The jurisdictional reach of the Rules potentially changes, however, if an attorney is licensed in both New York and another jurisdiction (e.g., California).

According to Rule 8.5(b)(2)(ii), if a lawyer is licensed in New York and another jurisdiction, “the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices.” (Emphasis added.) Thus, if a New York-licensed attorney is also admitted to practice law in California, the new Rules would apply to that attorney’s advertising if the lawyer “principally practices” in New York. If that attorney “principally practices” in California (or any other jurisdiction other than New York), the new advertising Rules generally would not regulate that attorney’s advertising. However, the new Rules may apply to the advertising of the California- and New York-licensed attorney in this hypothetical if the “predominant effect” of the advertising was in New York. Thus, even if an attorney who is licensed in both New York and California is located in California and principally practices in California, the attorney may nonetheless find himself or herself subject to regulation, and potential discipline, in New York for advertising if a Disciplinary Committee in New York were to find that the advertising had a “predominant effect” in New York.¹⁹

In determining the jurisdictional reach of the Rules in light of Rule 8.5(b)(2)(ii), one of the issues that attorneys also will need to consider is whether a lawyer is “licensed to practice” in “another jurisdiction.” This issue will not be difficult

¹⁹ For example, if all of the attorney’s advertising in question was directed to New York and was designed to induce New York residents to retain the attorney, a Disciplinary Committee could find that the attorney’s conduct had a “predominant effect” in New York, and thus, the attorney would be subject to regulation (and potential discipline) in New York under the Rules. Notably, this type of activity if targeted at a defined group of potential clients would also likely be considered a “solicitation” under the new Rules and thus subject to the jurisdictional reach of the new solicitation rules.

to resolve when dealing with a lawyer who is admitted to practice law in more than one state in the United States. In the United States, all of the states have a process through which attorneys are granted licenses to practice law. The difficult questions will arise when the lawyer in question is admitted to practice in New York but is located in a law firm's office outside the United States where he or she is authorized to practice New York law in that jurisdiction. Under such circumstances, although the New York-licensed attorney may not actually receive a "license to practice" law in that jurisdiction, the lawyer often is authorized by the local authorities to practice New York law in that jurisdiction as long as (among other things) he or she agrees to be subject to the disciplinary rules in that foreign jurisdiction. Under such circumstances, it is reasonable to conclude that the lawyer "principally practices" in that jurisdiction, and thus his conduct should be governed by the local ethics rules in that jurisdiction, including any advertising and solicitation rules in that jurisdiction, and not New York's lawyer advertising rules.

2. Solicitations Directed to Clients in New York

The solicitation provisions of the Rules explicitly regulate the activities of out-of-state lawyers and firms soliciting clients in New York. The solicitation provisions of the Rules (see Rule 7.3) specifically apply to "lawyers or members of a law firm not admitted to practice in this State who solicit retention by residents of this State." Rule 7.3(i).²⁰ Accordingly, any solicitation activity (as defined by the Rules, which are

²⁰ See also Former Ethical Consideration ("EC") 2-21 ("All of the special solicitation rules, including the special 30 day (or 15 day) rule, apply to solicitations directed to

discussed below) by an out-of-state attorney or firm directed at a New York resident that violates the Rules is prohibited. Such activity will subject the attorney or firm to discipline through the reciprocal discipline rules of the state in which the firm is resident and/or the attorney is admitted.

Although this aspect of the Rules is relatively clear, the application of this Rule may not be so clear where a lawyer not admitted to practice in New York solicits, for example, California-based representatives of a corporation that has its principal place of business in New York. The language of the Rule states that it applies to lawyers not admitted to practice in the “State who solicit retention by residents of this State.” The New-York based corporation in this hypothetical situation is a resident of this state, and thus, it could be argued that the lawyer is soliciting a resident of the state, especially if the client that ultimately retains the lawyer is the same corporate entity that employs the California-based employees. The City Bar believes whether or not the Rule would apply to such a solicitation requires a fact-intensive inquiry. For example, if the lawyer outside New York solicited California-based employees of the New York-based corporation with the intention of being retained for corporate transactions or litigation that is being handled by the California operations of the New York-based corporation, the better view of the new solicitation Rule is that it should not apply to this solicitation because the

recipients in New York, whether made by a lawyer admitted in New York or a lawyer admitted in another jurisdiction.”) While the former Ethical Considerations of the NY Code have been entirely supplanted by the NY Rules — which, at press time were without official commentary — it is our view that the advertising ECs remain instructive since the newly adopted advertising-related NY Rules provisions almost entirely replicate the advertising-related NY Code provisions.

lawyer was not directly soliciting retention by residents of New York. The solicitation rules should not apply to non-New York lawyers who are soliciting New York-based corporations unless the solicitation is directed to New York-based employees of the corporation or the lawyers know that the retain decision is being made by New York-based employees of the corporation.

3. Law Firms with Offices in New York

There are many law firms in the United States that have offices in multiple states, including New York. The New York office of many “national” and “international” law firms is not the firm’s principal office, and some such firms do not have any principal office at all.²¹ In fact, a large number of “international” law firms have only satellite offices in New York. Law firms that have offices in New York and in other states and/or foreign countries will have to wrestle with whether firm-wide and other advertising has to comply with the Rules.

To tackle a relatively easy issue first, if the New York office of the national or international law firm is running advertising in New York directed at New York residents, the advertisements would be subject to the Rules. The advertising efforts of the New York office of those firms would be required to comply with the Rules, as would the efforts of the firms’ lawyers principally practicing in New York.

The more difficult question to answer is: to what extent would firm-wide advertising campaigns of these national and international law firms or advertising

²¹ See *infra* at 28-29 (for discussion regarding the designation of a “principal” office).

disseminated by non-New York offices of those firms have to comply with the Rules? While the answer to this question will always turn upon the particular facts of each advertisement or advertising campaign, a few general observations can be made. First, to the extent a non-New York office of a national or international law firm disseminates advertising that is not targeted directly or indirectly at New York or New York residents, and does not seek work for the firm's New York-admitted lawyers or New York office, that advertising should not be subject to regulation under the new Rules. However, to the extent a non-New York office has directed the advertisement at New York, particularly with the purpose of being retained by New York residents, or the advertisement seeks work for the New York office (even if it seeks work for other offices as well), the advertising should comply with the new Rules. Moreover, if there is evidence that the non-New York office directed an advertisement at New York to solicit retention by New York residents, the non-New York office (and its lawyers) would be subject to regulation under the solicitation rules (assuming, of course, that the particular communication was within the definition of solicitation, discussed below). See Rule 7.3(i).

Because it appears that the Presiding Justices intended to limit the jurisdictional reach of the advertising provisions of the Rules, it seems that the better interpretation of the Rules is that firm-wide advertising of national and international law firms with New York offices that is not disseminated in New York should not be governed by the Rules. For example, if an international law firm runs an international advertising campaign, the advertising that is disseminated outside New York should not have to comply with New York's advertising rules. However, if the international law

firm (with the New York satellite office) were to run the advertisement directly in a New York-focused publication, such as The New York Post, the better argument is that the advertisement should comply with the New York rules.²²

A difficult question arises when a national or international law firm runs an advertising program that is not specifically targeted to New York residents but nonetheless results in advertisements appearing in New York because issues of a national or international publication (for example, The Wall Street Journal) are distributed in New York. Should the law firm that has run this advertisement be required to comply with New York's new Rules concerning advertising when the advertisement was not specifically directed to New York residents but instead ran nationally and/or internationally in various jurisdictions that do not have advertising requirements similar to New York? The City Bar believes that unless the law firm's principal office (or one of them) is in New York, such an advertisement should not be governed by the Rules because the advertisement was not specifically directed to New York residents, but rather was run nationally and/or internationally by a law firm that has a national or international focus. Such a conclusion is entirely consistent with the objective of limiting the

²² Communications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Thus, advertisements in such publications as The New York Law Journal or The American Lawyer would not be considered advertisements within the new definition of advertising. See Former EC 2-6(b) ("Communications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising.")

extraterritorial reach of the Rules to advertisements that are specifically directed at New York.

One final issue that should be addressed concerning the jurisdictional reach of the Rules is whether the Rules apply to the web site of a law firm that has only a satellite office in New York. As an example, if a law firm is based in Los Angeles, should it be required to comply with the Rules' requirements relating to web sites (assuming, of course, that the web site is an advertisement within the meaning of the Rules)? If the web site merely is accessible to residents of New York, but is not directed specifically to New York residents, then the web site arguably should not be governed by the Rules. For example, if the Los Angeles-based firm has done 99.5% of its work for clients based in California over the past decade, and only .001% for clients based in New York, and it does not presently seek to be retained by New York residents, then that firm should not be required to comply with New York's new Rules. However, even if a Los Angeles-based firm did as little work for New York residents as just described, where the firm consciously seeks retention by New York residents, the better view of the Rule is that the firm's web site should comply with the Rules.

In order to provide some guidance to lawyers and law firms that have practices in multiple states, including New York, the City Bar believes that the better interpretation of the Rules is that a lawyer's or law firm's web site should comply with the Rules if the lawyer or law firm in question currently solicits or advertises (other than just in national publications) in New York (whether or not through the solicitation or

advertisement is through a means other than the web site). Under these circumstances, it is fair to require lawyers and law firms to comply with the Rules' web site requirements because, even if they are not principally based in New York, they are soliciting or advertising in New York.

B. The Advertising Rules – What Is Advertising?

The initial draft of the advertising rules did not contain a definition of “advertising.” Heeding comments from the Bar, one was added. The definition of advertising in the Rules is broad in scope, going far beyond newspaper and billboard ads, handbills, mass mailings, and radio and television commercials, all of which are also included. Rule 1.0(a) defines advertising as follows: “‘Advertisement’ means 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.”

Rule 1.0(a).

Notably, a public or private communication made by or on behalf of a lawyer or law firm can only be an advertisement if its “primary purpose” is “for the retention of the lawyer or law firm.” Thus, in order to qualify as an advertisement within the Rules, it is not sufficient that the public or private communication have as one of its purposes the “retention of the lawyer or law firm.” Rather, a lawyer’s public or private communication only falls within the definition of advertisement if the “primary” purpose

is the retention of the lawyer or law firm.²³ In order to be the primary purpose, the retention of the lawyer or law firm must be the principal reason for the communication. For example, when a lawyer speaks at a CLE forum, the lawyer's communications at the CLE forum should not be considered an advertisement within the meaning of the Rules because their primary purpose is to educate fellow lawyers, even though the speaker may also hope that he or she is retained by someone as the result of the work.²⁴ Likewise, if a lawyer is interviewed by the press about certain legal issues, such a communication should be considered "public" but not an advertisement because the primary purpose of the interview is to educate the public about particular legal issues. This type of communication should not be considered an advertisement merely because the lawyer being interviewed hopes that his or her public exposure may also result in a greater opportunity to be retained by viewers of the interview.²⁵

²³ Former EC 2-6(a) provided in part that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by the lawyer consists of communications made in any form about the lawyer or the law firm's services, *the primary purpose* of which is for retention of the lawyer or law firm for pecuniary gain as a result of the communication." (Emphasis added.)

²⁴ See Former EC 2-7(b) ("A lawyers' 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.")

²⁵ However, there is a risk that a lawyer could run afoul of the advertising rules if the lawyer circulates a news article about the lawyer to prospective clients. Former EC 2-6(e) specifically provided that "[t]he circulation or distribution to prospective clients by an attorney of an article or report published about the lawyer by a third party is advertising if the attorney's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise." As an example, if the circulated article contains information that "is

Focusing on the word “private” in the Rule, a communication from a lawyer to one lay person may be considered advertising, depending on its content. A personal letter, fax or e-mail from a lawyer seeking legal work sent to a single businessperson who is a prospective client would be an advertisement. Even a private conversation can be considered advertising assuming it meets the requirements of the advertising definition. Given that private communications may qualify as advertisements, it might be argued that responses to requests for proposals, commonly called “RFPs,” even though they are specifically excluded from the definition of “solicitation” (Rule 7.3(b)), could be advertisements. However, former EC 2-6(d) made clear that RFPs were not advertisements:

Communications such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer’s services are not advertising. *Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer’s written response to a prospective client who has asked the lawyer to outline his qualifications to undertake a proposed retention or the terms of a potential retention.*

See Former EC 2-6(d) (emphasis added). Because the lawyer or law firm is merely responding to a request from a prospective client, such communications do not logically

reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by [former] DR 2-101(E)(3) [now, Rule 7.1(e)(3)].” In addition, the lawyer has an obligation to make any necessary corrections or qualifications about the circulated article if it contains “misinformation about the lawyer’s qualifications,” even if the incorrect information was “through no fault of the lawyer or because the article is out of date” Id.

fall within the traditional definition of advertising. In addition, sending information to clients would not be an advertisement because communications of any sort with “existing” clients are not considered advertisements.²⁶ Former EC 2-6(b) stated that “[a] client who is a current client on any matter is an existing client for all purposes of the rules governing advertising.” If the RFP is sent to inside counsel only, it also would not be considered advertising for an additional reason: communications with other lawyers fall outside the definition of advertisement.²⁷ This latter exclusion was no doubt added because it was felt that other lawyers know what is and is not advertising and are unlikely to be misled by what fellow lawyers say in an attempt to be retained. Put simply, other lawyers do not need the protection of the advertising rules. There, unfortunately, is no exclusion for sophisticated buyers of legal services (e.g., a corporate executive who regularly retains counsel), even though they too do not need the protection of the lawyer advertising Rules. The City Bar has taken the position that it believes such an exception should be created.

Can communications with the subsidiary of an existing client that the lawyer has never represented be considered client communications and thus not advertising? Under some circumstances, as a number of ethics opinions have explained, see NY County Lawyers Op. 684 (1991), a lawyer may be considered to represent

²⁶ See Former EC 2-6(b) (“By definition, communications to existing clients are excluded from the advertising rules.”)

²⁷ Id. (“Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm.”).

various corporate affiliates of the corporation for which the lawyer is performing legal services. If a lawyer considers an affiliate of a client to be a client for the purpose of avoiding the application of the advertising rules, is there a risk that the lawyer would have to deem the affiliate a current client for conflict purposes? Similarly, could considering a client for whom the lawyer has performed no services for a substantial period of time to be an existing client for purposes of the advertising rules be viewed as an admission that the client is a current and not former client under the conflict rules? Former EC 2-6(b) provided that “[w]hether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations,” and that “the term ‘current client’ for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a ‘current client’ for purposes of a conflict of interest analysis.” Thus, former EC 2-6(b) acknowledged that the meaning of “current” or “existing” client for the purposes of the advertising rules is not necessarily synonymous with the meaning of “current client” under other ethics rules. The City Bar believes that corporate affiliates of clients and persons and entities not currently being represented but with whom the lawyer maintains an ongoing relationship may be considered “current clients” for purposes of the advertising rules. Considering a person or corporation a client for purposes of the advertising rules therefore should not be an admission by the lawyer that the person or corporation is a client for conflicts purposes.

Will communications with a prospective client’s in-house counsel, where copies of the communications are simultaneously copied to business people, fall outside the lawyer-communications exception to the Rules? The City Bar believes that

communications that are directed primarily to in-house counsel generally should not be considered advertising. In-house lawyers, who are representing the corporate client, are sophisticated consumers of legal services who can represent the interests of the corporation and the business people who also receive the lawyer communication. Communications, however, that are directed to business people will not fall into the lawyer communication exception even if a copy of the communication is sent simultaneously to in-house counsel.

Another form of lawyer communications that may be considered an advertisement is the now ubiquitous web site. Most web sites have at least some sections that are primarily intended to attract new business, and thus those portions of the web sites will be considered advertisements in New York. However, there are other web sites or sections of a law firm's web site, such as those that contain employment opportunity information, a list of the attorneys' names, the location of offices, or scholarly articles on the law, that are not advertisements, and thus should not be considered advertisements under the Rules.

Likewise, brochures created exclusively to recruit law students to join a law firm or legal department would not be a communication "primarily" intended to attract new business. Similarly, neither an invitation to a CLE event at which a lawyer is speaking nor the speech at the CLE event would be considered an advertisement, as long as the invitation or speech also does not describe in a more than summary fashion the

firm's practice.²⁸ An article published in a legal publication would not be considered an advertisement.²⁹ However, if the article is no more than a description of the lawyer's practice or a recitation of how the lawyer was successful in handling the matter that is the subject of the article, the piece would likely cross the line and becoming advertising.³⁰ An update on legal developments mailed to clients, former clients and prospective clients also should not be considered advertising, again as long as it does not include a detailed discussion of the firm's practice or tout that the firm handled the particular matter being reported. See Former EC 2-6(d). A resume, if used to obtain new employment, would not be advertising, but if used as part of pitch materials for new business, could be.³¹ An advertisement in a benefit journal that was the result of buying tickets to a charitable event would not be considered an advertisement, so long as the advertisement does not

²⁸ Indeed, former EC 2-7(b) specifically provided that "[a] lawyers' 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." Former EC 2-7(b) does, however, caution lawyers that educational programs could be considered attorney advertising in certain circumstances: "Such a 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."

²⁹ See Former EC 2-6(c) ("Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising.")

³⁰ See Former EC 2-6(d) ("However, a newsletter, client alert or blog that provides information or news primarily about the lawyer or law firm (e.g., the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising.")

³¹ A resume sent in response to a request from a prospective client would not be an advertisement. A resume that is included in material considered an advertisement would not need to include a disclaimer or label if the disclaimer or label was included elsewhere in the materials.

include anything more than a cursory description of the firm.³² Finally, a press release or other communication with members of the press describing an event in which a lawyer or law firm has participated or a change in the lawyer's or law firm's practice would not generally be an advertisement. If the press release is sent to a prospective client, on the other hand, such a communication probably would be considered an advertisement.

C. The Labeling of Advertising

Communications that are considered advertisements must now be labeled "Attorney Advertising" under Rule 7.1(f). This label must be placed on the first page of any presentation or document (that does not mean the cover), the home page of a web site, and within self-mailing brochures or postcards. E-mails must state "ATTORNEY ADVERTISING" (in all capital letters) in the subject line. Because of this requirement, it may be prudent to tell prospective clients to search their spam filters for your communications, or to send them via regular mail. Excluded from the labeling requirement are radio and television advertisements, and those appearing in a "directory, newspaper, magazine, or other periodical." Former EC 2-5 further provided that "[t]he label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press

³² Former EC 2-8 stated that "[a]s members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising."

releases to news outlets, and as to which there is no risk of such confusion or concern.” Former EC 2-5 did caution, however, that “[a]n advertisement in a newspaper may nevertheless require the label if it is a paid article about a law firm adjacent to other articles written by the newspaper where there is a reasonable risk that readers will confuse the two. The ultimate purpose of the label is to inform readers where they might otherwise be confused.”

All labels and disclaimers (which are discussed immediately below) mandated by the Rules must be “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” Rule 7.1(i). There is no requirement that the label be on every page, be in red ink, or be of a particular size, as in some states. As a practical matter, no one should quibble with the size of the “attorney advertising” label if it is at least the same size type as the smallest type elsewhere in the advertisement.

The Rules require advertisements that create an expectation about the results the lawyer may be able to achieve, compare the lawyer’s services to those offered by other lawyers, include client testimonials or endorsements or describe or characterize the quality of the lawyer’s services — i.e., most advertisements — be accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome.” Rule 7.1(e)(3). The Rules do not indicate where the disclaimer should be located in the advertisement, except to state that the disclaimer should be “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” Rule 7.1(i). For

brochures, appearance of the disclaimer once — either on the first page, the last page or the page where the information appears necessitating the disclaimer — should be sufficient. For web sites, it is has become common practice for the disclaimer to appear on the home page. If the disclaimer is on the home page, the disclaimer need not appear on other pages of the web site. As noted above, the disclaimer need only be legible; the lawyer's disclaimer should avoid any objection under the rule if it is at least in the same size type as the smallest text on the home page.

Advertisements must also include the “name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.” Rule 7.1(h). This Rule has caused a problem for firms that heretofore have had no principal office. For example, some national firms have since had to designate one of their offices as their principal offices for the purpose of New York's Rules. Former EC 2-23 provided that “[l]aw firms that have no office they consider their principal office may comply with [Rule 7.1(h)] by listing one or more offices where a substantial amount of the law firm's work is performed.”

D. Substantive Limits on the Content of Advertising

The Rules place a number of substantive limits on the content of advertising which are discussed below. As noted above, on July 23, 2007, the United States District Court for the Northern District of New York held that certain of the Rules' content-based restrictions violate lawyers' Constitutional right to engage in commercial

speech, and enjoined enforcement of those aspects of the Rules.³³ That decision is currently on appeal in the United States Court of Appeals for the Second Circuit. This report does not analyze whether or not the district court's decision was correct as a matter of constitutional law. Rather, it explains how lawyers should interpret and apply the Rules assuming they are ultimately found not to violate the New York or U.S. Constitutions.

1. Requirement of Evidence of Claims Made By Attorneys

Rule 7.1(d) states that as long as a lawyer complies with subdivision (e) of the rule, advertisements may contain (1) "statements that are reasonably likely to create an expectation about results the lawyer can achieve," (2) "statements that compare the lawyer's services with the services of other lawyers," (3) "testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients," and (4) "statements describing or characterizing the quality of the lawyer's or law firm's services." Rule 7.1(e)(2) provides that advertisements may contain the aforementioned information in subdivision (d) provided that (1) such information does not violate other provisions of the rule, (2) the information "can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated," and (3) the information contains the appropriate disclaimer (*i.e.*, "Prior results do not guarantee a similar outcome"). See also Former EC 2-9.

³³ See Alexander & Catalano v. Cahill, 5:07-CV-117, 2007 U.S. Dist. LEXIS 53602 (N.D.N.Y. July 23, 2007).

The “factual basis” requirement is the aspect of this rule that likely will generate the most confusion about how to comply with Rule 7.1(e)(2). By reviewing the initial draft rules, a lawyer is able to gain some insight into how he or she may comply with this factual basis requirement. The provision in the June 12, 2006 draft of the Rules that the statements must be “objectively provable” was eliminated. Thus, it appears that subjective claims are permitted, provided they can be factually supported. Thus, for example, a law firm brochure may claim that the firm is one of the top ten bankruptcy firms in the state if the firm has facts to support the claim. If the firm states that it has a great record for winning cases, it should have records available to substantiate the claim.

Moreover, former EC 2-10(a) explicitly allowed for certain subjective claims “even though they cannot be factually supported.” For example, former EC 2-10(a) stated that: “[d]escriptions of characteristics of the lawyer or law firm which are not comparative and do not involve results obtained are permissible, even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality and would not be likely to mislead potential clients.” (Emphasis added.) Consequently, “a lawyer or law firm could advertise that it is ‘Hard Working’ or ‘Dedicated’ or ‘Compassionate’ without the necessity to provide factual support for such subjective claims.” See Former EC 2-10(a).

However, the former ECs also made it clear that lawyers run the risk of violating the Rules if they make comparative statements that cannot be factually supported. Former EC 2-10(b) provided that “[o]n the other hand, descriptions of

characteristics of the lawyer or law firm which compare the lawyer or law firm with other lawyers or law firms are not susceptible of being factually supported and could be misleading to potential clients.” Consequently, “a lawyer or law firm may not advertise that it is the ‘Best’ or ‘Most Experienced’ or ‘Hardest Working.’ Similarly, some claims which involve results obtained are not susceptible to being factually supported and could be misleading to potential clients. Accordingly, a lawyer or law firm may not advertise that it will obtain ‘Big \$\$\$’ or ‘Most Money’ or ‘We Win Big.’” Id.³⁴ Thus, lawyers should avoid comparative subjective statements, because such statements will be hard to support with facts.

2. Ratings

Rule 7.1(b)(1) states that advertisements may include information as to “bona fide professional ratings.” Of course, the obvious question to be asked is: what does “bona fide professional rating” mean as used in Rule 7.1(b)(1)? The Rule itself does not supply a definition of “bona fide professional rating.” However, former EC 2-11 provided useful guidance as to what types of ratings qualify or do not qualify as “bona fide professional ratings.”

³⁴ The former ECs also made clear, however, that even “true factual statements may be misleading if presented out of context of additional information needed to properly understand and evaluate the statements.” Former EC 2-9(b) provided the following illustrative example: “a truthful statement by a lawyer or law firm that its average jury verdict for a given year was \$100,000 may be misleading if that average was based on a large number of very small verdicts and one \$10,000,000 verdict.” Thus, lawyers must consider carefully whether even true factual statements can be considered to be misleading if the lawyer fails to disclose other information needed to understand and evaluate those statements.

As an initial matter, former EC 2-11 stated that “[a]n advertisements may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the ‘past results’ disclaimer as required by Rule 7.1(D)-(E).” Former EC 2-11 further provided, however, that a “rating is not ‘bona fide’ unless it is unbiased and nondiscriminatory.” While EC 2-11 did not provide a precise definition of what “unbiased” and “nondiscriminatory” mean for the purposes of this Rule, EC 2-11 stated that the rating “must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated.” Thus, it seems clear that a lawyer cannot advertise a “rating” the lawyer has received from a “rating service” if the lawyer, or someone on behalf of the lawyer, has paid the rating agency for the rating. In addition, a lawyer would violate the Rules if even though the lawyer did not pay the rating service, the lawyer suggested to the rating service that he or she would direct future business to the rating service, either through his or her own firm or other corporate entities. Such a practice would plainly constitute “improper influence,” and would result in a rating process that was biased and thus a rating that was not “bona fide.”

Before lawyers advertise a professional rating they have received, they will need to determine whether the rating service evaluated the lawyers based on “objective criteria” or “legitimate peer review.” Former EC 2-11 did not explain, however, what would qualify as “objective criteria” or “legitimate peer review.” Despite

the lack of guidance, there are a few observations that can be made about this particular aspect of EC 2-11.

First, it seems almost beyond legitimate dispute that a lawyer cannot advertise a professional rating he or she has received unless the lawyer knows what “criteria” or “peer review” process was used. Without this information, the lawyer could never determine whether the “criteria” were “objective” or the “peer review” was “legitimate.”

Second, until ethics opinions are issued or court decisions are rendered interpreting the meaning of the “bona fide professional rating,” lawyers will have to make subjective determinations as to whether the “criteria” used by the rating service are “objective” and the “peer review” process is “legitimate.” However, lawyers who make these subjective determinations resulting in a decision to advertise a professional rating they have received will subject themselves to potential second guessing by disciplinary committees as to whether the rating service actually used “objective criteria” or the “peer review” process was legitimate. Thus, the City Bar believes that lawyers should satisfy themselves that the “criteria” or “peer review” process used is reasonably objective, comprehensive and administered fairly before the advertise the rating.

Former EC 2-11 raised one additional issue that lawyers will need to consider before advertising a professional rating that they have received. Former EC 2-11 stated that “the rating service must fairly consider all lawyers within the pool of those who are purported to be covered, and that “a rating service that purports to evaluate all

lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.” Thus, it seems clear again that before a lawyer advertises a rating that he or she has received, the lawyer needs to determine whether the rating service has “fairly consider[ed] all lawyers within the pool of those who are purported to be covered.” However, the City Bar believes that assuming the rating service publishes information concerning the pool of lawyers evaluated for the purposes of rating the lawyers, lawyers should be entitled to rely on the representations made by the rating service about whether it applied its criteria “to all lawyers within th[e] geographic area, practice area, or age group” that were evaluated (unless the lawyer is aware of information that undermined or contradicted the rating service’s representations). Indeed, if the rule were otherwise, lawyers would almost never be able to advertise professional ratings they have received because it would be virtually impossible for any lawyer to verify independently whether the rating service applies its criteria to all the lawyers within the particular pool of lawyers covered by the rating service’s evaluation.

3. Specialist/Experts

The Rules did not make any changes to DR 2-105 (now Rule 7.4), Identification of Practice and Specialty. The City Bar and others recommended to the Presiding Justices during the public comment period that lawyers should be able to identify areas of law in which the lawyer “specializes.” It seems beyond serious dispute that lawyers can and do become specialists in particular areas of the law based on repeated experience. Indeed, most lawyers are no longer “general practitioners”

providing every sort of legal service to their clients. Moreover, lawyers have a Constitutional right to convey to consumers facts about themselves as lawyers and the services they provide, so that consumers can make an informed decision about whom to retain. For these reasons, the City Bar and others recommended that the advertising rules should be amended to allow lawyers to inform the public that they specialize or are specialists in particular areas of law if it can be supported as a factual matter, even if based solely on the experience of the lawyer and the lawyer has not received any particular specialist certification. This recommendation was not adopted in the Rules. Thus, lawyers are limited to identifying the specialties set forth in Rule 7.4 with an appropriate disclaimer.

4. Actors, Judges, Fictional Characters, etc.

Rule 7.1(c)(3) states that an advertisement shall not “include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case.” This is one of the aspects of the Rules that was found to be unconstitutional in Alexander & Catalano v. Cahill. Putting aside the potential Constitutional issues potentially raised by this Rule, the Rule is relatively straightforward. Thus, assuming this Rule is not ultimately found to be unconstitutional, lawyers should avoid using any of these aforementioned fictional characters in their advertisements.

5. Use of Stock Photos

One seemingly benign rule is Rule 7.1(c)(4), banning advertisements that “use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same.” What immediately comes to mind are television and radio commercials involving actors portraying lawyers and clients, dramatizing heroic moments from the practice of law last seen when “L.A. Law” was on the air. Such advertisements may not be acceptable even with disclosure and disclaimer. What is not obvious is whether the rule will require a disclaimer if a law firm uses stock photographs to illustrate brochures. For example, firms often use such photos to portray “clients” or “scenes” because the firm does not have available photos of actual clients or projects on which the firm has worked. Although the Rule might be read to require disclosure if stock photos are used of buildings, scenery and the like, the better view is that Rule was not meant to require disclosure in such cases and so none should be required. Of course, stock photos may not be used in a manner that is misleading, *i.e.*, when the photograph is useful to suggest the firm has worked on matters that it has not, its employees have a different appearance than they in fact do, or the firm is located where it is not.

6. Use of Monikers

Even when a lawyer is allowed to describe his or her past successes under the Rules — accompanied, of course, by the appropriate disclaimer — a lawyer may not do so using “a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.” Rule 7.1(c)(7). The limitation on the use of mottos carries no

exceptions. Therefore, if a lawyer wants to include a phrase in advertisements to capture the essence of his practice or firm, he should be descriptive of what he does and not how he thinks of himself or his firm.

As noted above, there is a case pending in federal court seeking a declaration that the content-based restrictions of the Rules are unconstitutional. One of the plaintiffs in that case had used a number of advertising techniques regularly used in product advertising, including referring to themselves by a moniker — “heavy hitters.” That nickname arguably “implies an ability to obtain results,” which would violate the Rules. However, the federal district court has ruled that the restriction on the use of monikers is unconstitutional, and that decision is now on appeal in the Second Circuit.

7. Domain Name

Rule 7.5(e) provides that “[a] lawyer or law firm may utilize a domain name for an internet Web site that does not include the name of the lawyer or law firm provided: (1) all pages of the Web Site clearly and conspicuously include the name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate [the NY Rules].” Rule 7.5(f) also addresses domain names, providing that a “lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate [the NY Rules].”

These new Rules will undoubtedly affect many lawyers and law firms because thousands of law firms (whether solo practices or international law firms) have created web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a "domain name." As long as a law firm's name complies with other disciplinary rules, it is always proper for a law firm to use its own name as its domain name. For example, the law firm of Smith & Jones may use the domain name www.smithandjones.com. Former EC 2-13(b) stated that a law firm can also use "its initials or some abbreviation or variation of its own name as its domain name." Thus, Smith & Jones could use www.SJ.com, www.SandJ.com, or www.smijon.com. Lawyers also may prefer to use terms other than the law firm's name for a variety of reasons (e.g., easier for clients to remember). For example, if Smith & Jones are divorce lawyers, it may prefer to use a domain name such as www.divorcelawyers.com. Accordingly, a law firm may use a domain name for an Internet web site that does not include the name of the law firm provided the domain name meets four conditions. See Former EC 2-13(b)(i)-(iv).

First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. (Pages of the web site created by others, commonly known as "links," need not include the name of the law firm.)

Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Smith & Jones use the domain name

www.divorcelawyers.com, the firm may not advertise that people contemplating divorces should “contact www.divorcelawyers.com” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement.

Third, the domain name must not imply an ability to obtain results in a matter. For example, Smith & Jones could not use the domain name www.bestdivorceterms.com because such a name implies that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances.

Finally, the domain name must not otherwise violate a disciplinary rule. If a domain name meets the three criteria mentioned above but violates other disciplinary rules, then the domain name is improper under this rule as well. For example, if Smith & Jones are solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.smithandjones.com because the two lawyers would be holding themselves out as having a partnership when they are in fact not partners.

The same restrictions that apply to law firms also apply to individual lawyers who create their own web sites, whether the individual lawyers practice as solo practitioners or practice in association with a law firm. However, a lawyer who practices in association with a law firm may create his or her own individual web site using his or her individual name as a domain name without mentioning the name of the law firm with which he or she practices. For example, if Smarty Jones is a member of Smith & Jones, he may use the domain name www.SmartyJones.com and is not required to mention his association with Smith & Jones anywhere on the web site.

Some lawyers also may wish to use their domain names as telephone numbers. A lawyer or law firm may use a telephone number that contains a domain name as long as the domain name does not violate a disciplinary rule. Former EC 2-14 stated that “lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers and legal words as telephone numbers.” For instance, “the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.”

Former EC 2-14(b) allowed lawyers to “use telephone numbers that contain a domain name, nickname, moniker, or motto.” Former EC 2-14(b) warned, however, that “[a] lawyer or law firm may use such telephone numbers as long as they do not violate any disciplinary rules, including those governing domain names.” Therefore, under former EC 2-14(b), a personal injury lawyer could use 1-800-ACCIDENT or 1-800-INJURY-LAW, but the lawyer could not use 1-800-WINNERS or 1-800-GET-CASH because those telephone numbers imply an ability to obtain results in a matter. This limitation may be affected by the Second Circuit’s decision in Alexander & Catalano v. Cahill.

8. Identification of Clients

Rule 7.1(b)(2) provides that an advertisement may include information as to the “names of clients regularly represented, provided that the client has given prior written consent.” Thus, in their advertisements, lawyers may use the names of clients that they regularly represent or have regularly represented in the past, provided that a

client whose name is used has given prior written consent after full disclosure of the manner in which the client's name will be used. The use of a client's name in a lawyer's advertisement is an implied endorsement of the lawyer's services.

A potential issue presented by this Rule is whether a lawyer may include the names of clients who they have represented on only one occasion. In draft ECs, COSAC initially took the position that a lawyer or law firm can identify only the client if the lawyer has served the client over an extended period of time in multiple matters.³⁵ One could certainly argue that one-time clients may not be in the best position to assess the quality of the lawyer's services, in contrast to clients who have used a lawyer or law firm repeatedly. However, as the City Bar conveyed to COSAC, this reasoning is not persuasive because there is nothing inherent about a one-time engagement that would preclude the client from assessing the quality of the lawyer's services. In response to the City Bar's and others' comments, COSAC agreed that an EC regarding Rule 7.1(b)(2) was unnecessary.

The City Bar believes that the better interpretation of Rule 7.1(b)(2) is that it does not prohibit lawyers from identifying clients in advertisements who they may have represented on one occasion. Indeed, if this Rule were limited to clients who the lawyer has represented on more than one occasion, it seems clear that many lawyers would be prevented from identifying their clients in a significant number of matters they handled. For example, a lawyer who handles matrimonial matters, such as divorce proceedings,

³⁵ See COSAC EC 2-12 (draft August 31, 2007) [on file with the City Bar].

would likely be prevented from identifying the names of many clients because most of his or her clients would likely have retained the lawyer on just one occasion. Likewise, many securities and antitrust litigators, as well as bankruptcy lawyers, would be prevented from identifying many clients because most corporations are typically involved in securities and/or antitrust litigation or bankruptcy filings on one occasion in a ten- or twenty-year period. As long as the client has given their written consent as required by the Rule, the lawyer or law firm should be able to identify their one-time client assuming, of course, the advertisement satisfies all the other requirements of the Rules.

Rule 7.1(b)(2) provides a safe harbor. It does not preclude the listing of client names where the client has not given written permission. A client may be listed in advertisements without prior written permission where (i) the fact of the representation is not confidential (such as where the representation was public), (ii) the client does not have a policy against the use of its name by counsel or others, (iii) disclosure of the matter will not embarrass the client or remind the public of an event the client would like the public to forget, and (iv) the client has not told the lawyer that the client does not wish its name to be listed.

9. Sensationalism

Rule 7.1(c)(5) states that an advertisement shall not “rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated

to legal competence.” This Rule has been declared unconstitutional in Alexander & Catalano v. Cahill.

Assuming this Rule is ultimately found to be constitutional, however, the Rule undoubtedly will be difficult for lawyers to apply because it does not provide any meaningful guidance as to what it means for advertisements to “rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel.” Showing lawyers who exhibit characteristics unrelated to legal competence is cited as the only example. Thus, a lawyer would run the risk of violating this Rule if his or her advertisement depicted a lawyer running faster than a speeding locomotive, or jumping tall buildings in a single bound. While it would be clear to even the most casual observer that these images were only being used to grab the attention of the viewer (and were not really intended to suggest that the lawyer could actually run faster than a locomotive or jump tall buildings), the lawyer who disseminated such advertisements would potentially be found to have violated the Rule because these traits arguably “demonstrate a clear and intentional lack of relevance to the selection of counsel.” Given that the Rule’s standard is entirely subjective — indeed, it is not a stretch to say that the Rule’s standard approximates Justice Potter Stewart’s “I know it when I see it” standard — lawyers will need to consider carefully whether or not techniques they use in their advertisements can be characterized as having a “clear and intentional lack of relevance to the selection of counsel.” It is clear, however, then the rule was not meant to prevent the use of music, color or graphics in advertisements.

10. Endorsements

Rule 7.1(c)(1) provides that an advertisement shall not “include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending.” Rule 7.1(d)(3) states that an advertisement that complies with subdivision (e) of the rule may contain “testimonial or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients.” This Rule also has been declared unconstitutional by a federal district court, and its enforcement has been enjoined. In any event, even if the Rule were found to be constitutional, the application is relatively straightforward. Based on the plain language of the Rule, lawyers’ advertisements can include the testimonial or endorsement of a current client for matters that are no longer pending, but not for matters that are pending (assuming, of course, the advertisement complies with Rule 7.1(e) as well).

11. Pop-Up Advertisements and Meta Tags

Rule 7.1(g)(1) and (2) respectively provides that a lawyer or law firm shall not use “a pop-up or pop-under advertisement in connection with computer-accessed communications³⁶], other than on the lawyer or law firm’s own web site or other internet presence,” and “meta tags or other hidden computer codes that, if displayed, would violate [the NY Rules].” See also Former EC 2-15. While the application of the rule is

³⁶ “‘Computer-accessed communication’ means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.” Rule 1.0(c).

straightforward, like other aspects of the Rules, a federal district court has declared this Rule unconstitutional, and has enjoined its enforcement.

12. Description of Fees

Accurate information about the fees charged by a lawyer or law firm often assists a prospective client in choosing counsel, especially if the prospective client does not regularly hire attorneys or is not familiar with the ways in which lawyers charge for their services. Rule 7.1(b)(4), 7.1(l) and 7.1(p) provide the relevant framework for analyzing what lawyers need to disclose about their fees and other non-legal services in advertisements.

Rule 7.1(b)(4) provides that an advertisement may include information as to “legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.”

Rule 7.1(l) reads as follows:

If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were

not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

Rule 7.1(p) states that all “advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).”

Based on the foregoing, lawyers may advertise legal fees for initial consultation; contingent fee rates in civil matters; hourly rates; and fixed fees for specified legal and nonlegal services. Lawyers may also advertise a range of fees for legal and nonlegal services (for example, “uncontested divorces from \$300 to \$700”), provided that the lawyer makes available to the public, free of charge, a written statement clearly describing the scope of each advertised service.

If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm must not charge more than the advertised fees for the specified services. If a lawyer were to charge more than the top of the range or more than the advertised hourly rate, the advertisement would be false, deceptive, or misleading, and would therefore violate Rule 7.1(a).

Likewise, if lawyers or law firms advertise fixed fees for specified legal or nonlegal services, they must not charge more than the advertised fixed fees for the specified services. But clients who come to lawyers seeking the specified services sometimes need other legal or nonlegal services in addition to, or instead of, the services

specified in the advertisement. If the client agrees in writing that the services to be performed are not the legal services referred to or implied in the advertisement, and agrees that a different fee arrangement will apply to the additional or different services, then the lawyer may charge more for the additional or different services than the fixed fee advertised for the other services.

Similarly, during a lawyer's work on a particular matter, the lawyer may realize that the services actually provided went beyond the scope of the advertised services. If the client agrees in writing that the services that were performed were not the legal services referred to or implied in the advertisement, and agrees to a different fee arrangement for the additional or different services, then the lawyer may charge more for the additional or different services than the fixed fee advertised for the other services.

Lawyers who practice in New York must obey not only the disciplinary rules, but also statutes regulating lawyers, including the New York Judiciary Law. Accordingly, all advertisements that contain information about the fees charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery, no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3). Under Judiciary Law § 488(3), a lawyer may pay court costs and expenses of litigation on behalf of an indigent or pro bono client; a lawyer may advance court costs and expenses of litigation, and may make repayment contingent on the outcome of the matter; or a lawyer, in an action in which an attorney's fee is payable in whole or in part as a

percentage of the recovery in the action, may pay the court costs and expenses of litigation and not require repayment.

A lawyer or law firm that offers this financial arrangement, however, must not, either directly or in any advertisement, state or imply that his or her ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are “unique in the area” or are “unlike other firms” or are available “only at our firm,” or words to that effect, unless that is in fact the case. See Former EC 2-16.

E. Maintaining Copies of Advertisements

Rule 7.1(k) provides that:

All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

Rule 7.1(k) is substantially less onerous than the filing requirements that were contained in the draft proposal (which would have required that most advertisements be filed with the Disciplinary Committee, and that almost every change to

a web site, regardless of how insignificant, would have to be saved as well).

Nonetheless, the Rules do impose a new burden: lawyers now must retain copies of advertisements for a period of three years if in print, and for one year if the advertisement is in a computer-accessed communication.³⁷ (The lawyer does not have to keep the recipient list for the advertisement unless the advertisement also is a solicitation.)

Former EC 2-23(a) expressly stated that DR 2-101 (now Rule 7.1(k)) allows a lawyer to retain the copy in any medium:

Where these Disciplinary Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

The retention requirements for web sites are discussed immediately below in Section II.F.2.

³⁷ Notably, if an advertisement is sent by e-mail, that advertisement should probably always also be considered a solicitation because solicitation means “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. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” Rule 7.3(b) (emphasis added). Assuming all the other requirements of the solicitation definition are satisfied and one of the exceptions does not apply, an advertisement that is sent by e-mail should be considered a solicitation because it is “directed to, or targeted at, a specific recipient or group of recipients” given that it is always sent to specific e-mail addresses. An advertisement that also is a solicitation will have to comply with the solicitation rules, including the requirement to file it with the pertinent Disciplinary Committee. The solicitation rules are discussed in greater detail below.

F. Web Site Rules

1. Labeling

Rule 7.1(f) appears to assume that all law firm web sites constitute “advertising”:

Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a web site.

(Emphasis added.) Thus, despite the numerous exceptions to “advertisement” set forth in the Rules, and the wide variation in web site contents, it appears that this provision could be read as a per se rule that all lawyer web sites are “advertisements” and must have the requisite “Attorney Advertising” label on its home page. The City Bar does not agree that this is the proper reading of the rule. (See discussion supra Section III.B). For web sites that are advertisements — probably the vast majority — the label need not be on any other page (as was contemplated by the proposed Rules). Type size, color and page placement of the label are not specified — and, of course, type size would depend on the size of the computer screen — but Rule 7.1(i) requires that the label be “clearly legible and capable of being read by the average person.” The “attorney advertising” label should comply with the rule if the type size of the label is at least the same size type as the smallest size type elsewhere in the advertisement.

2. Maintaining Copies

Lawyers and law firms have to retain copies of their web sites which constitute advertisements under certain circumstances. Under Rule 7.1(k), a lawyer must

retain a copy of the web site upon initial publication and no less frequently than every 90 days thereafter. In addition, if the web site undergoes a “major web site redesign” or “meaningful and extensive content change,” the lawyer also will be required to retain a copy of that version of the web site regardless of whether the lawyer has been saving a copy of the web site every 90 days.

The Rules do not explain what it means for a web site to undergo a “major web site redesign” or a “meaningful and extensive content change.” Nonetheless, it seems obvious — based on the plain language of the Rule and the fact that draft proposal was changed in the final Rule to address comments concerning the burdens that would have been placed on lawyers by the draft proposal’s requirements that copies of the web sites be retained if any change was made — that minor changes to portions of the web site (such as changes to a lawyer’s biographical information, the types of cases or matters handled by the firm, “current news” about the firm on the web site, etc., or new descriptions of lawyers who have joined the firm, provided that the new lawyers represent a small percentage of the firm’s lawyers) will not require the law firm to save a copy of the web site. However, if the law firm or lawyer engages in a major overhaul of the web site (for example, such as changing the look of the home page and all other pages, the organization of the web site, etc.) or completely re-writes entire sections such that it is fair to characterize the change as “meaningful and extensive,” then the lawyer or law firm would be required under the Rules to retain a copy of the web site and its changes.

Rule 7.1(k) also provides that “[a]ny advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year.” Web sites are not specifically referenced here, but certainly they constitute “computer-accessed communication,” so it should be assumed that the 90-day and web site redesign “snapshots” should be kept for the one-year period. It appears that the immediately preceding sentence of Rule 7.1(k), which provides: “All advertisements shall be pre-approved by the lawyer or law firm and a copy shall be retained for a period of not less than three years following its initial dissemination,” is unintentionally broad and is not intended to apply to web sites and other computer-accessed communication; otherwise, the one-year retention period for computer-accessed communication would be meaningless.

Outside contractors that maintain web sites for law firms with New York offices now should have incorporated these “snapshot” requirements into their standard procedures. Of course, the law firms themselves are ultimately responsible for ensuring that they are in compliance, and so should verify that their contractors are following the retention rules.

G. Solicitation Rules

1. Definition — What is covered?

Under Rule 7.3(b) of the Rules, “solicitation” is defined as:

[A]ny 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.

Former EC 2-18 succinctly broke down the various components of what makes a particular lawyer communication a solicitation:

A “solicitation” means any advertisement:

- a) which is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client);
- b) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law) (see former EC 2-6(c));
- c) which has as a significant motive for the lawyer to make money (as opposed to a public interest lawyer offering pro bono services); and
- d) which is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives.

As an initial matter, it should be noted that while all advertisements are not solicitations, all solicitations must be advertisements. As former EC 2-16 explained, “[B]y definition, a communication that is not an advertisement is not a solicitation (see [former] EC 2-6).” However, if the lawyer’s communication does satisfy the definition of solicitation, not only would that communication be subject to “all of the rules and restrictions governing advertising,” but it also would be subject to the additional requirements imposed upon solicitations. See Former EC 2-17.

As noted above, the New York rules regarding solicitation apply to all solicitations sent to someone in New York, whether or not that sender is admitted to practice in the state. Rule 7.3(i). Thus, if a pitch for business is narrowly targeted to

specific New York recipients, the advertisements takes on a host of additional restrictions if it meets the definition of solicitation in New York.

2. Requirements Relating to Solicitations

The requirements for solicitations are as follows. First, all solicitations must include the name of the lawyer or law firm and the office address, and telephone number of the lawyer or the principal law office of the law firm whose services are being offered. Rule 7.3(h). The method of sending a written solicitation cannot require a recipient to travel to a location where the recipient does not ordinarily receive business or personal mail. Rule 7.3(d). In addition, a lawyer cannot require a signature from the recipient to receive the solicitation. Id.

If a lawyer provides a retainer agreement with the solicitation, the retainer agreement must be labeled "SAMPLE" in red ink in a type size equal to the largest type size in the retainer agreement, and "DO NOT SIGN" on the signature line. Rule 7.3(g).

A lawyer who makes solicitations to recipients in New York State must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee. Rule 7.3(c)(1). If the solicitation was via radio or television, then the attorney must file a transcript of the audio portion. Rule 7.3(c)(1)(ii). If the solicitation was in a language other than English, then the attorney must file an accurate English translation of it. Rule 7.3(c)(1)(iii). A solicitation may not make reference to the fact of filing. Rule 7.3(c)(2). Any filed solicitation is open to public inspection. Rule 7.3(c)(4).

If the solicitation was directed to predetermined recipients, then the lawyer must make a list of the recipients' names and addresses. The lawyer must retain this list for at least three years after the last day the solicitation was disseminated. Rule 7.3(c)(3).

A lawyer is not subject to the filing requirement and does not have to keep a list of the recipients if the solicitation was directed to a close friend, relative, former client, or existing client (as discussed below in Section G.4(a), although in person solicitations are prohibited by the Rules, such solicitations to close friends, relatives, former clients and existing clients are permitted, assuming, of course, that the solicitation otherwise complies with all other applicable Rules). Rule 7.3(c)(5)(i). The sending of professional notices, as defined by the Rules, also is exempt from the solicitation list and filing requirements. Rule 7.3(c)(5)(iii). If a portion of a law firm's web site was designed to target a prospective client affected by an identifiable occurrence, or to target an identifiable prospective client, then the lawyer must comply with the filing and list requirements. Rule 7.3(c)(5)(iii). For example, sections of a web site meant to attract potential class plaintiffs for a lawsuit the law firm has filed, or plans to file, would be a solicitation. In all instances where a lawyer makes any written or computer-accessed solicitation to a predetermined recipient because of a specific occurrence, the lawyer must explain in the solicitation how he or she obtained the identity of the recipient and learned about the recipient's potential legal need. Rule 7.3(f).

3. RFPs and Other Information Sent Upon Request Are not Solicitations.

An explicit exclusion from the definition of solicitation in New York is “a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” Rule 7.3(b). In other words, responses to requests for proposal (“RFPs”) are excluded from the definition of solicitation. Indeed, as discussed above, any information sent by the lawyer at the request of a prospective client is not considered an advertisement and so cannot be a solicitation.

4. Limits on the Form of Solicitations

(a) In-Person and Telephone Solicitations Are Prohibited Unless Made To a Close Friend, Relative, or Former or Existing Client.

Rule 7.3(a) expressly prohibits lawyers from engaging in “solicitation by:

(1) in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former or existing client.” Former EC 2-22 explained the rationale for this nearly absolute bar on certain forms of in-person solicitation as follows: “in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the attorney without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and these are regulated in the same manner.” Former EC 2-22(a). But an in-person solicitation of a close friend, relative, or former or existing client is not barred because, as explained by the former EC, “[c]ommunications with these individuals does not pose the same dangers as solicitations to others.” Former EC 2-22(b).

The reach of the term “client” is discussed above in Section III.B. A former officer of a corporation with whom the lawyer regularly deals with when representing the corporation should be considered a “former client” for purposes of the solicitation rules. The issue of whether or not a person falls within the category of “close friend” may present difficulty. Neither the Rules nor ECs provide a definition of “close friend.” Thus, before lawyers decide to rely on the “close friend” exception to the in-person solicitation bar, they should make sure that they have factual support for their conclusion that the person subject to the in-person solicitation was actually a “close friend.” For example, a lawyer will be hard-pressed to prove to a disciplinary committee that his in-person solicitation was not prohibited because the individual subject to the solicitation was a “close friend,” if the lawyer had recently met the individual at a cocktail party and only corresponded or spoke with that individual on a few occasions or the individual has to be reminded who the lawyer was. On the other hand, it seems clear that a lawyer may engage in an in-person solicitation of a person the lawyer has known from school or childhood, who may be considered a close friend. In general, a person with whom the lawyer has had in-person communications over an extended period of a social nature may be considered a “close friend.”

(b) Real-Time Electronic Communications

Under the new Rules, lawyers are prohibited from engaging in solicitation by “real-time or interactive computer-accessed communication.” Although the rules do not provide definitions for “real-time” or “interactive” communications, former EC 2-22(c) provided helpful guidance. First, former EC 2-22(c) stated that “[o]rdinary email

and web-sites are not considered to be real time or interactive communication.” Thus, lawyers are not prohibited from sending an email solicitation, assuming, of course, the email solicitation complies with the applicable solicitation and advertising rules. In addition, “automated pop-up advertisements on a web-site which are not a live response are not considered to be real time or interactive communication.” However, former EC 2-22(c) made clear that “[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real time or interactive communication.” Thus, a lawyer cannot engage in a solicitation in an internet chat room, unless the individual being solicited is among the group of individuals who can be solicited in-person (e.g., relative, close friend, former or existing client).

(c) Other Limitations

Rule 7.3(a)(2)(i)-(v) contains a number of absolute prohibitions. A lawyer shall not engage in solicitation employing false, deceptive, or misleading information, or where the solicitation would otherwise violate the Rules. Additionally, a lawyer may not solicit a recipient who has indicated to the lawyer that he or she does not want to be solicited by the lawyer. Solicitation involving coercion, duress, or harassment is prohibited. If a lawyer knows or should reasonably know that a person’s age, or physical, emotional, or mental state makes it unlikely that the individual will be able to exercise reasonable judgment to retaining counsel, then the lawyer is prohibited from soliciting that person. A lawyer who expects to use another lawyer, not affiliated with the soliciting lawyer as a partner, associate, or of counsel, to handle the representation, and does not disclose this fact, is prohibiting from soliciting a recipient by any means.

5. “Directed to or Targeted at”

In order to qualify as a solicitation, the communication must be, among other things, “directed to, or targeted at, a specific recipient or group of recipients”³⁸ While this language is obviously susceptible to numerous and competing interpretations, former EC 2-19 provided guidance, specifically stating that an “advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways.”

First, an advertisement “is considered to be ‘directed to, or targeted at’ a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer accessed communication or 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).” Former EC 2-19(b).

According to former EC 2-19(c), the second way an advertisement can be “directed to, or targeted at” specific recipients is if a public medium, such as a newspaper, television, billboard or web site, “makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers.” (The term “specific incident” was defined in former EC 2-20 and is discussed below in Section III.G.7) For example, if a lawyer uses a billboard to solicit those injured in a particular airplane or industrial accident, the billboard

³⁸ Rule 7.3(b).

advertisement would be deemed a solicitation and thus be subject to the applicable solicitation rules.

Former EC 2-19(d) explained, however, that “an advertisement in a public medium is not directed to or targeted at ‘a specific recipient or group of recipients’ simply because it is intended to attract potential clients with needs in a specified area of law.” For example, “a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments,” or “an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared towards investors.” Id. EC 2-19(d) concluded: the “fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into a solicitation.” Id.

6. Exception for Certain Legal Services Organizations

The Rules are less restrictive with respect to a lawyer’s interaction with a legal aid office, or public defender office, as defined by the Rules, military legal assistance office, qualified lawyer referral service, as defined by the Rules, and any organization providing legal services to its members, as defined by and meeting the requirements outlined in the Rules. See Rule 7.2(b). As long as there is no interference with the independent judgment that those organizations exercise on behalf of their respective clients, a lawyer may request that those organizations recommend and promote

the use of the lawyer's services as a private practitioner. Also, those organizations may employ the lawyer, his or her partner, associate, or any other affiliated lawyer.

7. Limitations on Contacts in the Case of Personal Injury and Wrongful Death Cases

Rules 4.5(b) and 7.3(e) prohibit lawyers from disseminating (or having disseminated on their behalf, see Rule 7.3(b)) any solicitation relating to a specific incident involving personal injury or wrongful death, until at least 30 days after the incident, in most instances. According to former EC 2-20(a), this restriction applied even where the recipient of the solicitation was "a close friend, relative, or former client, but not where the recipient is an existing client." However, the Rules provide an exception to the 30-day time limit for cases where a filing must be made on the victim's behalf as a legal prerequisite to claim in less than 30 days. In those situations, the Rules imposes a 15-day moratorium on communications with victims, their families and legal representatives. See Rule 7.3(e).

The prohibition's primary purpose apparently is to provide a cooling-off period during which victims, their families and legal representatives can remain undisturbed by unseemly lawyer solicitations. While the Rule arguably benefits victims, their families and legal representatives by protecting them from aggressive lawyer solicitations during an emotionally vulnerable period, it also has the potential to harm the victims of accidents. For example, injured parties may not have existing counsel or knowledge of who to turn to for representation, and in such cases, solicitation may be the best way for the party to find a lawyer quickly enough to protect their rights. In addition,

even though the Rule provides a 15-day limit in the case of necessary filings, this can still give the client very little time to retain a lawyer to ensure that the client's interests and rights are protected.

In an attempt to level the playing field between the plaintiff and defense bar, Rule 4.5(a) essentially imposes the no-contact provisions of Rule 7.3(e) to lawyers representing defendants in such specific incidents. Rule 4.5(a) provides, in relevant part, that, in the event of a specific incident involving potential claims for personal injury or wrongful death, "no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants" within the same 30-day period (or 15-day period where there is a looming filing deadline) applicable to plaintiffs' lawyers in Rule 7.3(e). See Rule 4.5(a). This provision prevents defense lawyers from exploiting the ban on plaintiffs' lawyers' solicitations. Defense counsel and their agents are prohibited from approaching victims or their families or representatives to resolve claims before the victims or their families or representatives have had the opportunity to hear from lawyers seeking to represent them concerning the accident. However, though defendant counsel and their agents may not contact injured parties, there is nothing stopping the defendant or its, his or her insurers from contacting the potential, unrepresented plaintiffs and resolving the case before the plaintiff has found a lawyer to advise the plaintiff of its, his or her rights.

Former EC 2-20 provided some guidance as to what “incidents” are covered by Rules 4.5 and 7.3(e). Former EC 2-20(b) stated that a “specific incident” is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) which causes harm to one or more people.” For example, “[s]pecific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.”

Former EC 2-20 explained, however, that “specific incident” is not intended to cover situations where potential claimants may have been injured over a period of years from defective products, such as medication or asbestos. Former EC 2-20(c) stated:

A solicitation which is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places does not relate to a specific incident and is not subject to the special 30 day (or 15 day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people (see former EC 2-19(b)-(c)).

Thus, for example, “solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication does not relate to a specific incident and are not subject to the special 30 day (or 15 day) rule.”

Former EC 2-20(d) noted that advertisements from personal injury lawyers that generally advertise the types of plaintiffs they help or types of cases handled

will not typically run afoul of Rule 4.5. Specifically, former EC 2-20(d) stated that “[a]n advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30 day (or 15 day) rule solely because a specific incident has occurred within the last 30 (or 15) days.” For instance, “a law firm that advertises on television or in newspapers that it can ‘help injured people explore their legal rights’ is not violating the 30 day (or 15 day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared.” Indeed, “[u]nless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30 day (or 15 day) blackout period.”

Finally, “if a lawyer directs or targets an advertisement to the addresses of those killed or injured in a specific incident, then the advertisement is a solicitation subject to the 30 day (or 15 day) rule even though it makes no reference to a specific incident.” Former EC 2-20(e).

H. Certification Rules and Implications

As part of the lawyer advertising amendments, Part 130 of the Rules of the Chief Administrator was also amended to include a provision that a lawyer signing a complaint (or other “initiating pleading”) certifies that he or she did not obtain the engagement through “illegal conduct” or that if the case was obtained in violation of the Rules, those responsible for the illegal conduct will not be involved in the matter and will not receive any fee as a result of it. See Rules of Chief Admin. § 130-1.1-a(b).

Similarly, the lawyer certifies that he or she did not receive the engagement in violation of Rule 4.5 (the moratorium rule applicable to accident cases). Id. at § 130-1.1-a(b)(1)(ii).

This is a particularly powerful provision. Under this rule, an interested litigant — as opposed to a disinterested governmental body — is empowered to prosecute disciplinary rule violations by seeking sanctions (which could presumably include reimbursement of all attorneys' fees and costs incurred in defending an action brought in violation of Rule 4.5). It is not unusual for private litigants to police disciplinary violations, most notably through disqualification motions or lawsuits for breach of fiduciary duty. Here, however, even a defendant that is indisputably liable in a personal injury or wrongful death action arguably could seek sanctions under this Rule against a lawyer who represents a successful plaintiff, solely because the lawyer solicited the engagement before Rule 4.5's "cooling off" period expired. Even more than disqualification motions, the opportunities for gamesmanship are clear.

The use of the term "illegal conduct" could, if broadly interpreted, compound this problem. Specifically, "illegal conduct" should not, in the opinion of the City Bar, include disciplinary rule violations for at least three reasons. First, purely as a statutory interpretation matter, if "illegal conduct" embraced violations of the disciplinary rules, then § 130-1.1-a(b)(2)(ii) of Part 130 (concerning violations of Rule 4.5) would be superfluous. Second, "illegal conduct" generally includes that which is prohibited by law, whereas unethical conduct (i.e., Rules violations) is that which is prohibited by the

NY Rules. Courts generally treat the two differently. Third, courts are reluctant to sanction lawyers, and in keeping with that tradition, they should narrowly construe this provision to prevent it from incorporating the entire NY Rules into the Part 130 certification.