REPORT OF THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY OF THE NEW YORK CITY BAR

Comments on the Proposed Ethics Rules
Governing Lawyer Advertising and Solicitation Issued by
the Presiding Justices of New York State's Appellate Division

November 15, 2006

I. INTRODUCTION

On June 14, 2006, the Presiding Justices of New York State's Appellate Division approved for public comment proposed ethics rules governing lawyer advertising and solicitation (the "Proposed Rules," appended hereto as Appendix A). The Presiding Justices have invited the public to comment on the Proposed Rules on or before November 15, 2006. The comments of the Association of the Bar of the City of New York (the "City Bar") are set forth in this report.

The report is organized as follows. Section II provides (1) an overview of recent initiatives by bar associations to address issues concerning lawyer advertising and solicitation, and (2) a summary of the more significant aspects of the Proposed Rules. Section III of this report summarizes the City Bar's comments on the Proposed Rules concerning lawyer advertising and solicitation. Section IV provides the City Bar's detailed comments concerning the Proposed Rules.

I. OVERVIEW

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

The promulgation of the Proposed Rules by the Presiding Justices of the Appellate Division were preceded by suggestions from New York bar associations of

changes to the current ethics rules governing lawyer advertising and solicitation. In June 2005, 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 determine whether the Model Rules of Professional Conduct (the "Model Rules") should replace New York's Lawyers' Code of Professional Responsibility (the "NY Code").[1]

On November 5, 2005, the Task Force presented a preliminary report concerning 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:

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[1] In 2002 and 2003, the House of Delegates of the American Bar Association ("ABA") adopted wide-ranging amendments to the Model Rules, which had been initially adopted by the ABA in August 1983 and which have now been adopted in some form by 48 other states. In January 2003, COSAC, chaired by then-NYSBA President Steven Krane, began an evaluation of the ABA's revised Model Rules for the principal purpose of determining whether the Model Rules should replace the NY Code. 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 that it ask the Courts of the State of New York to adopt the NYSBA's proposed Model Rules. (COSAC's report is available at www.nysba.org.) It is anticipated that the NYBSA's House of Delegates will consider COSAC's proposed Model Rules in 2006-2007 and will vote whether to adopt the proposed Model Rules in 2007. As noted below, the NYSBA's House of Delegates accelerated its consideration of the Model Rules concerning lawyer advertising and solicitation, and approved the Task Force's proposals at its January 27, 2006 meeting.

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 State 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 that:

New York's current ethics rules concerning lawyer advertising and solicitation 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 Task Force, however, recommended certain changes to COSAC's proposed ethics rules concerning lawyer advertising and solicitation.

The NYSBA should adopt guidelines concerning lawyer advertising and solicitation 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 concerning advertising and solicitation.

To aid in the enforcement of ethics rules concerning lawyer advertising and solicitation, lawyers should be required to file electronically all advertisements in a central location, and there should be random sampling of these electronically filed advertisements by an entity under the supervision of the Office of Court Administration ("OCA") to determine if they comply with the applicable ethics rules. If any of the randomly sampled advertisements are found not to be in compliance with the applicable ethics rules, the matter would be referred to the appropriate grievance committee for expedited review, to the extent practical.

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, including the

Task Force's (i) proposed ethics rules concerning lawyer advertising and solicitation, (ii) proposed educational guidelines concerning lawyer advertising and solicitation, and (iii) proposed enforcement procedures. The City Bar recommended certain changes and additions to the Task Force's proposals in its Preliminary Report. As a result of the City Bar's comments, the Task Force made certain changes to its proposed ethics rules regarding lawyer advertising and solicitation. 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. The Task Force's final report and proposed ethics rules concerning lawyer advertising and solicitation are publicly available.[2]

B. Summary of the Proposed Rules

As mentioned above, on June 14, 2006 the Presiding Justices of New York's Appellate Division issued for public comment the Proposed Rules relating to lawyer advertising and solicitation. The Proposed Rules are expansive and cover a wide array of issues relating to lawyer advertising and solicitation. When the Proposed Rules were approved for public comment, Chief Administrative Judge Jonathan Lippman called the proposal "the most sweeping reform since 1990" and "unprecedented." John Caher, *Courts Back Lawyer Advertising Restrictions*, N.Y.L.J., June 15, 2006, *available at* http://www.nylj.com. The Presiding Justices initially provided a 90-day public comment period (ending September 15, 2006). On September --, 2006, the Presiding Justices extended the public comment period to November 15, 2006. The Proposed Rules will

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

take effect on January 15, 2007. The most significant aspects of the Proposed Rules are as follows:

> The Proposed Rules contain definitions of "advertisement" and "solicitation" that are expansive, as well as a definition of "computer-accessed communication."
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> Proposed Disciplinary Rule ("DR") 7-111, 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).
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> Lawyers who file "initiating pleadings" (*e.g.*, a complaint) would have to certify that the matter was not obtained through "illegal 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.
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> Out-of-state lawyers who advertise or solicit legal services in New York would be subject to professional disciplinary proceedings within New York if they violate the lawyer advertising and solicitation rules.
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> The Proposed Rules cover all manner of electronic communications, including web sites, e-mails and other means of communicating with clients via the Internet.
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> The Proposed Rules would impose expansive new content-based restrictions on lawyer advertising. For example, the Proposed Rules provide 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 Proposed Rules would prohibit lawyers from using current client testimonials, from portraying judges, from re-enacting courtroom or accident scenes and from using courthouses or courtrooms as props. Lawyers would also be barred from using paid endorsements, and from using recognizable voices of a non-attorney celebrity to tout the lawyer's skills.
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> The Proposed Rules also would require lawyers to verify objectively the claims they make in their advertisements, and to include a disclaimer making clear that their past results for other clients was not a guarantee of future success in other matters.

The Proposed Rules also include new retention and filing requirements for lawyer advertisements and solicitations. Most advertisements would have to be retained by lawyers for three years, not one year as required by the current DR. In addition, most advertisements and solicitations would have to be filed with the Disciplinary Committees. Moreover, the Proposed Rules would require 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 Committee.

The Proposed Rules would require every advertisement and solicitation to be labeled "Attorney Advertising" on the first page, and the packaging used to transmit the advertisement or solicitation would be required to contain such a label in "red ink."

II. SUMMARY OF THE CITY BAR'S RECOMMENDATIONS ON THE PROPOSED ETHICS RULES CONCERNING LAWYER ADVERTISING AND SOLICITATION

The City Bar agrees with many of the Proposed Rules concerning lawyer advertising and solicitation, and believes that the overall objective of the Proposed Rules the prevention of lawyer advertising that is false, deceptive and misleading to protect consumers is laudable. However, the City Bar believes that the Proposed Rules suffer from at least two major flaws.

First, the City Bar respectfully submits that the Proposed Rules contain 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 the consumers' selection of a lawyer.[3] If adopted, the Proposed Rules would

[3] The New Yorkers for Free Speech Co. have submitted a letter to the Presiding Justices that succinctly demonstrates 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 of the Office of Court Administration, dated September 20, 2006, attached hereto as Appendix B.

fundamentally change the way lawyers and their clients and/or potential clients communicate. The City Bar believes that the public benefits from the free flow of commercial information from lawyers and needs truthful information from and about lawyers in order to be able to identify legal issues and select a lawyer. Accordingly, the City Bar believes that any rules governing lawyer advertising need to strike the right balance between the legitimate interest in informing the public about the need for, and availability, nature and costs of, legal services with the interest in protecting the public against lawyer advertising that may be false, misleading or deceptive and prevent the bar from being held in disrepute. The City Bar believes the Proposed Rules are overbroad because they would have the effect of restricting or chilling the content of lawyer advertising to the potential detriment of the consumers of legal services.

Second, the City Bar believes that certain elements of the Proposed 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. For instance, and as will be discussed more fully below, the City Bar does not believe it is necessary for lawyers to retain for three years *and* file with the Disciplinary Committees most advertisements and solicitations, including every iteration of web sites. Those retention and filing requirements in combination would create a tremendous burden on lawyers in New York, without any evidence that such requirements would help alleviate any of the perceived problems relating to lawyer advertising. In addition, the City Bar also believes that clients would be embarrassed and lawyers may be placed at a competitive disadvantage with other lawyers if, as required by the Proposed Rules, their solicitations filed with the Disciplinary Committees were subject to inspection by the

public and, thus, other lawyers. These are just two examples of how the Proposed Rules seem to be unworkable as a practical matter or would create an unnecessary burden on lawyers without any corresponding benefit. These two examples and other aspects of the Proposed Rules that would likely create practical problems are discussed below. In this report, the City Bar recommends a number of changes to address those likely practical problems.

The City Bar's recommended changes to the Proposed Rules are summarized immediately below and discussed more fully in Point III.

> The advertisement definition in the Proposed Rules is too broad, and the words "public communication" are ambiguous. Accordingly, the City Bar believes that the definition of advertisement that was contained in the Task Force's final report should replace the definition in the Proposed Rules.
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> The definition of solicitation in the Proposed Rules is overbroad. The City Bar recommends modifying the proposed definition by eliminating the word "advertisement" from it, and adding a requirement that in order to be a solicitation, a significant motive for the communication must be the lawyer's pecuniary gain. The "pecuniary gain" requirement mirrors the qualification contained in the Model Rules.
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> The so-called "cooling-off period" of proposed new DR 7-111 (and subpart (e) of proposed Section 1200.8) should be eliminated for the reasons discussed below.
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> Section 130.1-1a, Signing of Papers, should be modified to clarify the phrase "illegal conduct." In addition, the reference to new Proposed Rule DR 7-111 in Section 130.1-1a should be eliminated to be consistent with the change suggested immediately above.
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> The proposed language to Section 1200.5, Disciplinary Authority and Choice of Law, should not be adopted at this time because as formulated, the rule would subject lawyers who solicit New York clients but render services only out-of-state to disciplinary authority in New York. Moreover, the Proposed Rules lack a conflicts-of-law provision, and there are no multi-jurisdictional practice rules in effect (and those practice rules will not be reconsidered until at least 2007).

Subsection (a) of Section 1200.6, Publicity and Advertising, should be eliminated because it attempts to impose content-based restrictions on advertisements that would likely violate lawyers' First Amendment right to engage in commercial speech, without any evidence that it would address the perceived abuses in lawyer advertising.

Section 1200.6 should not address the issue of solicitation because that issue is more appropriately addressed in Section 1200.8, and it would create practical problems if included in Section 1200.6.

The prohibition against false, deceptive or misleading advertisements in Section 1200.6 should be qualified by the word "materially," as it is in the Model Rules adopted by 48 other states.

Section 1200.6 should not prohibit advertisements from including "an endorsement of, or testimonial about, a lawyer or law firm from a current client"; "a paid endorsement of, or testimonial about, a lawyer or law firm"; "the voice or image of a non-attorney spokesperson that is recognizable to the public other than the voice or image of a former client as permitted" by the Proposed Rules; and a depiction of "the use of a courtroom or courthouse." These proposed restrictions on lawyer advertising would run afoul of lawyers' First Amendment right to engage in truthful, non-misleading commercial speech.

Subsections (e) and (f) of Section 1200.6 should be eliminated because they are unnecessary given that the Proposed Rules already prohibit false, deceptive or misleading advertisements, and because the plain language of those subsections would effectively prohibit lawyers from engaging in any form of advertising. The Proposed Rules' disclaimer concerning "guaranteed results" is impracticable in short television or radio spots (30 seconds or less) because it would consume too much of the advertisement time that has been paid for by the lawyers.

The disclaimer in subsection (g) of Section 1200.6 would be impracticable in short television or radio spots (30 seconds or less) because it would consume too much of the advertisement time, and because there is no real evidence that consumers reasonably believe that advertisements on the radio and television are not, in fact, advertisements and that the attorney is guaranteeing a positive resolution of all or most of his/her cases (currently and prospectively).

Subsection (h) of Section 1200.6 should be eliminated because there is no credible evidence that consumers do not understand that lawyer advertisements are in fact advertisements. Given this lack of evidence, the City Bar does not believe that it is necessary to require lawyers to label their advertisements with the phrase "attorney advertising." Further, the

Proposed Rules require labeling of information that many clients will not consider advertising. This labeling requirement may result in some clients not receiving important communications.

The requirement of the Proposed Rules to include a listing of "all jurisdictions in which the lawyer or member of the law firm are licensed to practice law and all bona fide office locations of the lawyer or law firm" in "computer-accessed communications" such as e-mail should be eliminated because it is unduly burdensome, and would clutter and confuse such communications with little apparent benefit.

The Proposed Rules should not contain a requirement that lawyers retain "a printed copy of each page [of an Internet website] . . . for a period of not less than one year from its first publication or modification." This proposed requirement would be unduly burdensome because of the size of websites and the frequency with which lawyers change the substance of their web sites. The City Bar believes that not all portions of a law firm's web site contain or constitute an "advertisement," and thus law firms should not be required to retain those portions of web sites that are not advertisements. In addition, the Proposed Rule would be less burdensome if lawyers were required to save only material changes to their web sites.

The Proposed Rules should not require lawyers to file all advertisements with the Disciplinary Committees. Rather, the Proposed Rules should require lawyers only to retain all advertisements for three years. As discussed more fully below, the City Bar believes that these proposed changes will not undermine the goal of increased enforcement of the advertising rules, and will at the same time save the Disciplinary Committees (which would be charged with overseeing the retention of what would likely constitute a vast amount of information) money and resources. In addition, lawyers should not be required to file "solicitations" with Disciplinary Committees because of the "public inspection" requirement, which might create competition concerns among lawyers, might lead to the disclosure of confidential information about clients and will discourage important communications with clients about potential problems.

Proposed Section 1200.8, Solicitation and Recommendation of Professional Employment, should prohibit only in-person solicitations that are made where a "significant motive" for the lawyer's communication is the "lawyer's pecuniary gain." That change would bring the Proposed Rules in line with the solicitation rules adopted by 48 other states.

Proposed Section 1200.8 should not govern in-person solicitations made to another lawyer. Such an exception would be consistent with the vast majority of solicitation rules adopted by other states.

The Proposed Rule concerning in-person solicitation should be amended to make it clear that it is not a "solicitation" within the meaning of this rule if (1) lawyers are asked by an individual or business to provide them with information about themselves or their law firm's services, or (2) the individual or business with whom the lawyer communicates regularly retains lawyers to provide services of the type being discussed, either for themselves or their employer.

The Proposed Rules should provide a definition of "real-time computer-accessed communications" so that lawyers know whether particular communications constitute a "solicitation" under the Proposed Rules.

III. THE CITY BAR'S COMMENTS ON THE PROPOSED ETHICS RULES CONCERNING LAWYER ADVERTISING AND SOLICITATION

In evaluating the Presiding Justices' Proposed Rules, the City Bar's Professional Responsibility Committee ("PRC") reviewed, among other things, (1) New York law and ethics rules concerning lawyer advertising and solicitation, including the current DRs and Ethical Considerations, (2) the ethics rules concerning lawyer advertising and solicitation proposed by the Task Force, and (3) other states' ethics rules concerning lawyer advertising and solicitation. The City Bar's PRC, its pertinent subcommittee, other City Bar committees and executive officers of the City Bar collectively met and had numerous telephone conferences concerning the Proposed Rules and also had communications with representatives of other bar associations concerning the Proposed Rules.[4] The City Bar also reviewed the comments concerning the Proposed Rules that were submitted by other organizations, such as the New York County Lawyers' Association and the NYSBA. Based on the foregoing work, the City Bar offers the following comments on the Task Force's proposed ethics rules.

[4] The City Bar's Professional Responsibility Committee, chaired by David G. Keyko, and its Subcommittee on Lawyer Advertising and Solicitation, chaired by Jeffrey T. Scott, had primary responsibility on behalf of the City Bar for reviewing and commenting on the Proposed Rules.

A. Proposed Definitions in Section 1200.1

The Proposed Rules include in Section 1200.1 the following definition of Advertisement: "'Advertisement' means any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services." The City Bar notes that there is no generally accepted definition of "advertising" or "advertisement." The City Bar believes that the Proposed Rules' definition is too broad because it states that "any public communication" made by or on the behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services is an advertisement. That definition, if adopted, would cover virtually every "public communication" made by a lawyer. For example, if a lawyer were teaching a seminar about legal ethics and introduced himself as being from a particular firm, that "public communication" would fall within the literal definition of "advertisement" in the Proposed Rules. Such a "public communication" is obviously not intended to be an advertisement and would not be viewed by reasonable consumers of legal services as being advertising. Further, the Proposed Rules likely did not intend to include this type of "public communication" as an advertisement and it is very unlikely to be subject to abuse and thus require regulation.

In order to limit the overbreadth of the Proposed Rules' advertisement definition, the City Bar believes that this definition should be replaced with the definition that was contained in the Task Force's final report. The definition of "advertisement" in that report is "a communication made by a lawyer to the public or any member or members thereof for the principal purpose of describing the services provided by the lawyer and encouraging the public to retain the lawyer." The City Bar believes that this

definition is more appropriate than the definition in the Proposed Rules because it properly limits the definition to those types of communications that have been typically considered advertisements, namely, those that have the "principal purpose" of attracting business for the lawyer.

The Commentary to the Proposed Rules should provide guidance as to the types of communications that are or are not considered advertisements. For example, the Commentary to the ethics rules can explain that it is advertising within the meaning of the ethics rules when lawyers use traditional media, such as print (*e.g.*, newspapers, magazines and periodicals), radio, television or billboards or other outdoor signs, to communicate to the general public or any members thereof about the services they provide. The Proposed Rules can also explain that certain types of communications are not considered advertisements, such as communications by lawyers to former or existing clients that primarily describe developments in the law (*e.g.*, a memorandum describing a recently enacted statute or recent court decision) or presentation of speeches or papers at conferences or meetings. Although a former or existing client may decide to retain a lawyer based in part upon the fact that the lawyer has demonstrated substantive knowledge about a particular legal subject, communications that primarily describe developments in the law are plainly not advertisements because they do not directly describe to the reader the services provided by the lawyer, nor are they principally aimed at encouraging the lawyer to retain the lawyer. Moreover, such communications serve an important purpose in educating the public and other lawyers about developments in law that may directly or indirectly affect the reader. Thus, the City Bar recommends that

communications by lawyers that primarily describe developments in the law be omitted from coverage of ethics rules concerning advertising.

To further clarify the definition of advertisement, the City Bar also believes that directories containing lawyers' names, telephone numbers and other contact information compiled by bar associations or other organizations (such as Martindale-Hubbell) should be exempt from the lawyer advertising rules. Such directories do not typically provide the reader with any significant information about the services provided by lawyer beyond the name, educational background, and address or other contact information of the lawyer, and the public typically has to take affirmative steps to obtain such directories (*i.e.*, they usually are not sent to the public). For these reasons, these types of directories should not be considered to be advertisements within the meaning of ethics rules.

The City Bar believes that the definition of solicitation in the Proposed Rules is also overbroad. "Solicitation" is defined in the Proposed Rules as "any advertisement or other communications directed to or targeted at a specific recipient or group of recipients, including a prospective client, or a family member or legal representative of a prospective client, concerning the availability for professional employment of a lawyer or law firm." As an initial matter, the City Bar believes that this definition would be improved if the definition of advertisement, which is incorporated into the solicitation definition, is modified as noted above. The City Bar also recommends modifying the proposed solicitation definition by adding the qualification that in order for the communication to be considered a solicitation, a significant motive

for the communication must be the lawyer's pecuniary gain. This requirement mirrors the qualification contained in the Model Rules, and would properly limit the solicitation ethics rules to those types of communications that have been traditionally considered solicitations.[5]

B. Proposed Section 1200.41-a, Communication After Incidents Involving Personal Injury and Wrongful Death

The Presiding Justices have proposed a new rule, DR 7-111, that would create a 15- or 30-day period (the so-called "cooling-off" period) in which lawyers could not contact a person, their family members or legal representatives about potential personal injury or wrongful death claims. Specifically, proposed DR 7-111 provides that:

> In the event of an 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 an individual, by a lawyer or law firm, representing or seeking to represent a party to any pending or potential litigation or proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

Although the City Bar is unaware of any actual study that has demonstrated that the type of communications that are meant to be addressed by this rule are actually widespread, the City Bar acknowledges that some people may consider this type of communication inappropriate because an individual who has been involved in an accident or that

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[5] The City Bar believes that the definition of "computer-accessed communication" is appropriate.

individual's family members may be susceptible to undue influence at or about the time of an accident that has caused an injury or death. As a result, the City Bar understands the desire to regulate communications to such individuals or their family members at or about the time of the incident in question.

Notwithstanding these issues, the City Bar does not believe that proposed DR 7-111 should be adopted for the following reasons. Although some may believe that the proposed rule would protect individuals from inappropriate communications at a moment when they may be vulnerable to undue influence, the City Bar believes that the practical implications of the "cooling-off" period may be extraordinarily detrimental to the potential plaintiffs' legal rights. A significant problem is that an individual who has been in an automobile accident may lose important rights under the insurance laws if lawyers are not permitted to communicate to them shortly after the time of the accident. For example, in order to be entitled to "no-fault" benefits under the insurance laws, the no-fault statute requires a claim to be filed within 30 days of the incident in question. Although the proposed rule contains a shorter cooling-off period (15 days) when a filing must be made within 30 days, even a 15-day cooling off period could seriously jeopardize a person's legal rights. Many individuals who are involved in accidents do not even know about the no-fault requirements, and thus without the assistance of an attorney immediately after the accident, they run a grave risk of foregoing important no-fault benefits. *See* Ethical Consideration 2-2 (stating that "The legal profession should help the public to recognize legal problems because *such problems many not be self-revealing and often are not timely noticed*.) (emphasis added).

Moreover, even if the individuals are aware of their no-fault rights, there is typically a significant amount of work that must be completed before the no-fault claim can be filed. For example, potential clients of lawyers (*e.g.*, an injured passenger or pedestrian) frequently do not have a copy of a police report that contains the insurance code for the subject vehicle (police reports generally remain at the precinct of origin for 30 days before they are forwarded to Albany). The insurance codes that are on the police reports are absolutely essential to determine the carrier and where the claim form for no-fault benefits must be filed. In some cases where the individual has the police report, the insurance codes are either incorrectly recorded or not recorded at all, and the lawyer has to obtain this information from some other source. The amount of work that frequently needs to be completed before filing a no-fault claim is difficult to complete within 30 days, let alone the 15 days the rules would permit.

The consequence of a late notification under the no-fault statute is a denial of benefits. No-fault benefits do not constitute a lien and, thus, are not repaid out of the proceeds of the client's recovery at the conclusion of litigation. If no-fault benefits are declined, the client's own insurance becomes the primary coverage and pays for the treatment received by the client. However, virtually all insurance policies today contain a third-party indemnity provision that requires that the insurance carrier be reimbursed for all medical benefits. Thus, insurance carriers are typically reimbursed out of the net proceeds of the client's recovery. This means that at the conclusion of the case the client will receive less than he or she would have if no-fault benefits were available. In the worst case scenario, a client who does not have private insurance may be forced to either receive treatment in exchange for a lien against any recovery in litigation or forego

treatment altogether. Such potential consequences are obviously not in the interest of injured persons. Given that individuals and/or their family members may not know that they need to file their no-fault claims within 30 days of the incident without the assistance of a lawyer, the City Bar is not in favor of the cooling-off period.[6]

In almost all automobile accidents, product liability actions and other similar matters, the preservation of evidence is essential to the prosecution of the case and the outcome of the matter. Many individuals who do not have the assistance of counsel do not appreciate this fact. Accordingly, if proposed DR 7-111 were to be adopted, there is a risk that individuals who do not have the assistance of counsel would fail to preserve important evidence.

Another significant problem with the cooling-off period is that there is no equivalent restriction on insurance carriers or a potential defendant to a legal action that limits contact with a potential plaintiff. As a result, defendants potentially would have an advantage in evidence collection. In addition, the proposed cooling-off period would provide a window of opportunity for an insurance carrier and/or the potential defendant to a legal action to contact the potential plaintiff to attempt to settle any potential action for a fraction of its value. A potential plaintiff may be subject to undue influence or overreaching if they have to deal with a potential defendant without the assistance of counsel, and may settle a potential legal action for an amount far below its proper value because of undue influence by the defendant or sheer ignorance of his or her rights and

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[6] This issue could be remedied by a change to the no-fault statute to account for this cooling-off period. Such a change, however, would not cure all the problems with the proposed cooling-off period.

other related issues (as to which a lawyer could have properly advised that individual). The City Bar believes a cooling-off period at the very least would only be appropriate if there were similar restrictions placed on others who may try to contact the person in question. This, however, would not cure the preservation of evidence problem for potential plaintiffs, because insurance carriers would still likely begin to preserve evidence supporting their position immediately following the accident.

C. Proposed Section 130-1.1a, Signing of Papers

Section 130.1-1a, Signing of Papers, provides in part that:

> By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of the Subsection, and (2) where the paper is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom, and (ii) the matter was not obtained in violation of 22 NYCRR 1200.41-a [DR 7-111].

First, the City Bar believes that the reference to proposed Rule DR 7-111 should be eliminated because the City Bar believes that the proposed cooling-off period also should be eliminated for the reasons discussed above.

Second, the City Bar also believes that the phrase "illegal conduct" is ambiguous and should therefore be clarified. "Illegal conduct" is generally understood to be a violation of a criminal statute. If the rule is intended to cover any other conduct, then the rule should expressly state that. Indeed, because of the vagueness of the

reference, we believe that the specific types of conduct intended to be covered should be referenced in the rule.

Finally, the City Bar believes that lawyers should not be found to have violated this Proposed Rule if they had no knowledge that the matter was obtained through "illegal conduct." For example, a lawyer could be asked by a client to replace another lawyer who has been handling a litigation, and unbeknownst to the second lawyer, the litigation had been obtained by the first lawyer through "illegal conduct." In order to address this issue, the Proposed Rule could be amended, as suggested by the NYSBA, to provide "where the paper is an initiating pleading (i) the lawyer has no personal knowledge that the matter was obtained through illegal conduct."

D. Proposed Section 1200.5 Disciplinary Authority and Choice of Law

Section 1200.5 [DR 1-105] provides 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." The City Bar agrees with the broad proposition that if a lawyer who is admitted to practice in a state other than New York solicits clients in New York for work on New York matters, he should be subject to regulation in this state. But the City Bar agrees with the NYSBA's comment that this provision is overbroad. As drafted, this rule would subject lawyers who solicit clients in New York but render services out of the state to the disciplinary authority in New York. In addition, as the NYBSA noted, the rule could also require the 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 require the lawyer in Montana (in this hypothetical example) to comply with the proposed New York rule. Such a rule would plainly be overbroad.

The City Bar believes that if this rule were adopted, other aspects of the rules would need to be revised as well. The City Bar shares the NYSBA's concern that the "predominant effect" standard set forth in DR 1-105(b)(2) to help determine what state's ethics rule would apply appears to be inadequate to address the case of an Internet advertisement. Moreover, the Proposed Rules do not contain a choice-of-law provision, and there are no multi-jurisdictional practice rules in effect (and these practice rules will not be reconsidered until at least 2007). For these reasons, the City Bar agrees with the NYSBA that this provision is not appropriate at this time.

E. Proposed Section 1200.6 Advertising and Solicitation

1. Content-Based Restrictions

As noted above, the City Bar believes the Proposed Rules (Section 1200.6) are overbroad because they would restrict the content of lawyer advertising in violation of the United States Constitution and that of New York State to the detriment of the consumers of legal services. The City Bar respectfully submits that at least two subsections of Section 1200.6 that attempt to restrict the content of lawyer advertising 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 the consumer's selection of a lawyer. (The City Bar notes that both the NYCLA and the NYSBA also commented that

certain provisions of Section 1200.6, if adopted, may present First Amendment problems because of their attempt to regulate the content of advertisements.)

First, subsection (a) of Section 1200.6 provides 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 and shall be presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm to provide such services." Such a restriction would bar so-called "tombstone" advertisements, which do little more than set forth the name of a lawyer or law firm. Tombstone advertisements are common in charitable event programs and publications aimed at lawyers. Although the City Bar generally agrees that lawyers should try to create advertisements that are consistent with the proposed general concepts (and believes that the vast majority of lawyers are doing that today), the City Bar is concerned that if this subsection were approved as a rule, it would prevent consumers of legal services from receiving truthful, non-misleading information that may be relevant to their decision as to whom to select as an attorney. The City Bar believes that the "predominance" requirement of subsection (a) would likely have a chilling effect on the content of advertisements because lawyers would be concerned about violating subsection (a), which would operate to deprive consumers of legal services of information that may be necessary to their decision of selecting an attorney. The City Bar believes that consumers benefit from the free flow of commercial information from lawyers, and they need truthful information concerning lawyers in order to be able to select a lawyer. As long as lawyers are providing potential consumers of legal services with information that is truthful and not misleading, they should not be constrained in

what they say to consumers about themselves, their services or information relating to their practice. Moreover, although a detailed analysis of constitutional principles is beyond the scope of this report, the City Bar believes that the content-based restrictions in subsection (a) would run afoul of a lawyer's First Amendment right to engage in truthful, non-misleading commercial speech, and would be subject to a likely successful challenge in court. For these reasons, the City Bar would urge the Presiding Justices not to include subsection (a) in any ethics rule relating to lawyer advertising that is ultimately approved.

For the same reasons, the City Bar also believes that Section 1200.6 should not prohibit advertisements from including "an endorsement of, or testimonial about, a lawyer or law firm from a current client;" "a paid endorsement of, or testimonial about, a lawyer or law firm;" "the voice or image of a non-attorney spokesperson that is recognizable to the public other than the voice or image of a former client as permitted" by the Proposed Rules; or "the use of a courtroom or courthouse."[7] Although one may believe that advertisements that contain such items are distasteful, the City Bar believes that they are not inherently misleading. Thus, such advertisements should not be restricted unless they contain false, deceptive or misleading information. Indeed, the City Bar believes that those proposed restrictions would run afoul of a lawyer's First Amendment right to engage in commercial speech as long as the advertisements did not contain false, deceptive or misleading information.

[7] This restriction would lead to peculiar results. A number of bar associations' seals contain such images. Use of the seal on advertisements would therefore run afoul of this rule.

2. Section 1200.6 Should Not Cover Solicitation

Section 1200.6 should not address the issue of solicitation because that issue is addressed in Section 1200.8, and it would create practical problems if included in Section 1200.6. For example, proposed subsection (a) requires a solicitation to be designed to "increase public awareness of situations in which the need for legal services might arise." Such a requirement does not seem to make sense for solicitations. In addition to this problem, Section 1200.6 would require lawyers to file their solicitations with the Disciplinary Committees, and they would be available for public inspection, including other lawyers. Such a requirement may place lawyers at a competitive disadvantage or provide other lawyers with a competitive edge by revealing what types of services they are offering and what types of legal matters they are pursuing. Moreover, the "publicly available" solicitation may contain information about the prospective client that could be embarrassing or otherwise inappropriate to disclose publicly. The result of this rule would be to discourage communications about potential legal issues to the detriment of clients. For example, a lawyer engaged to represent a client in connection with a lawsuit who observes a potential corporate governance issue would be ill-advised to mention this to the client. Such a communication, designed at least in part to garner a new assignment for the lawyer's firm, would be deemed a solicitation that would have to be filed and thus be publicly available. The client would most certainly hope its counsel would alert it to such potential issues, but not at the cost of public disclosure of the potential problem. In light of these practical problems, and because the subject matter of solicitation is covered by another rule, the City Bar proposes that all references to solicitation be removed from Section 1200.6.

3. The Use of the Word "Materially"

The prohibition against false, deceptive or misleading advertisements in Section 1200.6 should be qualified by the word "materially" as it is in the Model Rules adopted by 48 other states. By adding this requirement, lawyers would not be subject to disciplinary actions for minor mistakes or inaccuracies that may appear in their advertisements (such as a typographical error in their address or phone number).

4. Subsections (e) and (f)

Subsection (e) of Section 1200.6 states that a lawyer's advertisement may not contain the following items unless the advertisement complies with subsection (f) of Section 1200.6: (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 former clients;" or (4) statements describing or characterizing the quality of the lawyer's or law firm's services." Subsection (f) in turn provides, among other things, that the information in the advertisement has to be "objectively verified by the lawyer or law firm as of the date on which the advertisement or solicitation is first disseminated."

The City Bar believes that these subsections, if approved, would operate to restrict or limit lawyer advertising impermissibly. The City Bar believes that in many cases it may be difficult (if not impossible) to "objectively verify" statements in advertisements "characterizing the quality of the lawyer's or law firm's services." For example, if a trial lawyer says in an advertisement that he is a "skilled trial lawyer," could this statement be "objectively verified" if the lawyer has won twenty-five trials, but has

lost eleven trials? In addition, and perhaps more importantly, the Proposed Rule does not make it clear how the trial lawyer would "objectively" verify the statement he is a "skilled trial lawyer." The Proposed Rule does not make it clear who has to make the "objective" verification. Would it be sufficient for a partner or other colleague to tell the trial lawyer he is a "skilled trial lawyer"? Would it be sufficient for the lawyer to point to his twenty-five wins at trial for his "objective" evidence? This simple example demonstrates that this Proposed Rule is fraught with ambiguities, and would likely have a chilling effect on lawyers who wanted to engage in truthful advertising because the lawyer (who, in the example, is in fact a "skilled trial lawyer") would be concerned about violating the rule. As a result, the City Bar submits that these subsections should be removed from Section 1200.6. Because the Proposed Rules already prohibit false, deceptive or misleading advertisements, the City Bar does not believe that the objectives of the rules would be undermined if subsections (e) and (f) were removed. If a lawyer advertises that he is a "skilled trial lawyer," as in the example above, and he is not, that lawyer will be subject to discipline for engaging in false advertising.

5. The Disclaimers

Subsection (f) provides that all advertisements shall be "accompanied by a disclaimer, which shall be spoken in television and radio advertisements and shall appear in writing in television advertisements and in any written or computer-accessed communications: 'Prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained." Subsection (g) provides that "Television or radio advertisements, or recorded solicitations, shall be preceded or followed by a spoken statement that the advertisement

or solicitation contains 'an advertisement for legal services.' Such a statement shall also appear in written form in television advertisements."

The City Bar believes that the disclaimer in subsection (f) concerning "guaranteed results" is impracticable in short television or radio spots (30 seconds or less) because it would consume too much of the advertisement time that has been paid for by the lawyers.

The disclaimer in subsection (g) of Section 1200.6 would be impracticable in short television or radio spots (30 seconds or less) because it would consume too much of the advertisement time, and because there is no real evidence that consumers do not understand that commercials on radio or television are in fact advertisements.

In addition, the City Bar is unaware of any evidence that would suggest that the proposed disclaimers are necessary or that such disclaimers would be effective. Without such evidence, the City Bar does not believe that a rule mandating the proposed disclaimers should be adopted.

6. "Attorney Advertisement" Label

Subsection (h) of Section 1200.6 requires every advertisement or solicitation, other than those appearing in a radio or television advertisement or in a telephone directory, newspaper, magazine or other periodical, or one made in person pursuant to Section 1200.8(a)(1), shall be labeled "Attorney Advertising." (The packaging used to transmit the advertisement also must have this label.) The City Bar believes that this provision should be eliminated because there is no credible evidence

that consumers do not understand that lawyer advertisements are in fact advertisements. Further, it would discourage clients from reviewing potentially valuable information. Given this lack of evidence, the City Bar does not believe that it is necessary to require lawyers to label their advertisements with the phrase "attorney advertising."

7. Subsection (k)

The requirement of the Proposed Rules to include a listing of "all jurisdictions in which the lawyer or member of the law firm are licensed to practice law and all bona fide office locations of the lawyer or law firm" in "computer-accessed communications" such as e-mail should be eliminated because it is unduly burdensome and does not really provide the recipient of the communication with meaningful information. For example, there are many law firms that have multiple offices across the country and/or world. If the proposed rule were adopted, each lawyer at such a law firm would have to list in their email the dozens of jurisdictions in which lawyers at the firm are licensed to practice law and all bona fide office locations of the law firm. Such information would plainly be irrelevant to virtually all emails that would be sent by the law firm on any given day. The requirement of this Proposed Rule would only serve to clutter and confuse the information contained in emails with very little, if any, apparent benefit.

8. Retention of Web Sites

The Proposed Rules should not contain a requirement that lawyers retain "a printed copy of each page [of an internet website] . . . for a period of not less than one year from its first publication or modification." This proposed requirement would be

unduly burdensome because many law firms' web sites are thousands of pages long if they were printed out to be saved, and many of those web sites are changed or supplemented on a daily or even more frequent basis (requiring the saving of the thousands of pages of web sites on a daily basis). The Proposed Rule would be less burdensome if lawyers were required to save only material changes to their web sites. In addition, the City Bar believes that significant portions of many law firms' web sites do not contain or constitute an "advertisement," and thus the law firm should not be required to retain those portions of the web sites that are not advertisements. For example, the sections of a law firm's web site that contain employment opportunity information, a list of the attorneys' names, the location of offices or scholarly articles on the law should not be considered advertisements, and thus should not be required to be retained under the Proposed Rule.[8]

9. The Retention and Filing Requirements of Subsection (o)

The Proposed Rules require lawyers to retain a copy of all advertisements for three years and, at the time of dissemination, to file all advertisements with the Disciplinary Committees. Although the City Bar agrees that the current enforcement of the advertising ethics rules should be improved, the City Bar does not believe that all advertisements should be filed with the Disciplinary Committees. The City Bar is concerned that the Disciplinary Committees would be required to expend a considerable amount of money and resources to establish and maintain electronic databases to retain

[8] In its comments to the Presiding Justices, the NYCLA has suggested that the Proposed Rules require lawyers and law firms to retain only the "home page" of their web sites. The City Bar believes that this suggestion is a reasonable alternative to the City Bar's own proposal.

the vast amount of information they would receive from lawyers across the state or devote considerable physical space to store this information, which would be almost impossible to organize and maintain. Further, the requirement that every advertisement be filed will likely be difficult to comply with for law firms with more than a few lawyers, particularly those with many offices, including those overseas. As discussed below, the City Bar believes a more cost-effective and efficient solution is available to achieve the goal of enhanced enforcement.

The City Bar assumes that, because it would be impossible for the Disciplinary Committees to review all advertisements as they are filed, the primary reason for the filing requirement is to facilitate sampling of the advertisements by the Disciplinary Committees. The City Bar believes that sampling could be done efficiently without the filing of advertisements with the Disciplinary Committees. As noted above, the Proposed Rules would require lawyers to retain all advertisements for the specified period. Instead of sampling advertisements in the Disciplinary Committees' files (which may be hard to access given the likely volume of filings and the limited resources available to store and review this information), the Disciplinary Committees could simply request lawyers, randomly selected from OCA's list of registered lawyers, to send or make available copies of advertising that they have been required to retain. Copies of advertisements could also be obtained from publishers, which usually keep copies of past publications. Using this suggested procedure, the Disciplinary Committees would receive advertising from an appropriate sampling of lawyers that could thereafter be reviewed by the Disciplinary Committee staffs. Importantly, this random sampling of

lawyer advertising could be achieved without requiring the Disciplinary Committees to expend any money or resources to maintain a huge number of advertisements.[9]

In sum, the City Bar believes that the suggested elimination of the filing requirements (except those currently required by the DRs) from the Proposed Rules does not undermine the goal of increased enforcement of the advertising ethics rules,[10] and would at the same time save Disciplinary Committees money and resources. For these reasons, the City Bar recommends that the Proposed Rule be modified to delete the requirements that lawyers file all advertisements with the Disciplinary Committees (except the requirements in the current DRs).

F. Proposed Section 1200.7 Professional Notices, Letterheads, Signs

The City Bar supports the proposed changes to Section 1200.7.

G. Proposed Section 1200.8 Solicitation and Recommendation of Professional Employment

Proposed Section 1200.8, Solicitation and Recommendation of Professional Employment, in part provides that a "lawyer shall not engage in solicitation . . . by in-person or telephone contact or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or current client . . . ." As noted above in Point ---- of this report, the City Bar believes that a

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9 Indeed, the retention and filing requirements are duplicative. There seems to be no reason to require lawyers to retain copies of all advertisements once they have filed them with the Disciplinary Committees, or to file advertisements if they are already required to retain them.

10 The City Bar notes that a failure to cooperate with a Grievance Committee's request to provide materials could itself be a basis for sanctions. *See, e.g.*, N.Y.C.R.R. tit. 22, § 603.4(e).

solicitation should only be deemed to occur when a lawyer communicates in-person about the availability for professional employment where a "significant motive" of the communication is the" lawyer's pecuniary gain." This change would bring the Proposed Rules in line with the solicitations rules adopted by 48 other states, and would properly limit this rule to situations that have been traditionally considered solicitations.

Proposed Section 1200.8 should not govern in-person solicitations made to another lawyer. The vast majority of solicitation rules adopted by other states contain an exception to the in-person solicitation rule for solicitations made to other lawyers. The solicitation rule is primarily designed to protect prospective lay legal clients from being placed in situations where the lawyer may be able to unduly influence, intimidate or over-reach with that prospective client. The proposed exception for lawyers makes eminent sense because there is no real risk that one lawyer could unduly influence another lawyer, who should be knowledgeable about the choices that are available with respect to legal services.

The City Bar believes that the exceptions to the general prohibition against in-person and real-time electronic solicitation in proposed Section 1200.8 should also be expanded to allow lawyers to solicit individuals that regularly retain lawyers to provide the services being solicited by the lawyer, for either themselves or their employer. As noted above, the solicitation rule is designed to protect prospective legal clients from being placed in situations where the lawyer may be able to unduly influence or intimidate a prospective client. However, the City Bar believes this protection is not needed where the person being solicited is a person that regularly retains lawyers to provide the services

being solicited by the lawyer. For example, transactional legal work for investment banks is usually arranged by investment bankers, not inside counsel for the bank. If an investment banker regularly retains lawyers to provide his firm with legal services relating to mergers and acquisitions or other corporate transactions, this banker does not need the prophylactic protection of Rule 7.3. It is unlikely that the lawyer will be able to unduly influence or intimidate the banker into retaining him. Indeed, in this situation, the investment banker is no less experienced a consumer of legal services than a lawyer who is solicited and, as such, should not be within the general prohibition of the in-person solicitation rule. The proposed rule would only serve to limit the banker's knowledge of potential counsel without providing any benefits to him or her.

The City Bar believes that the in-person solicitation rule should provide a definition of "real-time . . . computer-accessed communication" so that lawyers know whether particular electronic communications are a solicitation within the meaning of the rule. The proposed solicitation rule prohibits lawyers from soliciting prospective clients through a "real-time . . . computer-accessed communication," but the proposed rule does not provide a definition of "real-time." The City Bar believes, however, that it is critical that the Proposed Rules provide some definition or examples of "real-time" computer-accessed communication because there is much uncertainty as to what type of electronic communication can be deemed "real-time" communications. Although there is probably general agreement that "instant messaging" and "chat rooms" are "real-time" computer-accessed communication, there is much debate as to whether e-mail or electronic bulletin boards are considered "real-time" communications. (The City Bar believes that e-mail and electronic bulletin boards should not be considered "real-time" computer-accessed

communications because they do not require the immediate response of the recipient of the information that was sent electronically. E-mail and electronic bulletin boards therefore are analogous to letters rather than in-person or telephone contacts.) Given this uncertainty, the City Bar believes that the Proposed Rules need to provide guidance as to what types of electronic communications are "real-time" computer-accessed communications. Without such guidance, lawyers will not know whether their electronic communications are covered by the ethics rules concerning solicitation, and there is also a significant risk that Disciplinary Committees throughout the state will provide inconsistent guidance concerning this issue. Moreover, without such guidance, the Proposed Rule may be found to be "void-for-vagueness" if subjected to a legal challenge.

Finally, the City Bar believes that the in-person solicitation rule should be amended to make it clear that a solicitation does not occur when a lawyer is asked by an individual or business to provide information about the lawyer's or law firm's services. Although the City Bar believes that this type of communication does not fall within the proposed solicitation definition above, the City Bar believes that the Proposed Rules should make this point absolutely clear. After all, in today's competitive legal environment, it is quite common for prospective clients to request or invite many different lawyers to bid or "pitch" for their potential legal business. Not permitting a lawyer to respond to an invitation to meet a prospective client in-person makes no sense.

H. DR 2-105 Identification of Practice and Specialty

The Proposed Rules do not suggest any changes to DR 2-105, Identification of Practice and Specialty. At the suggestion of the City Bar, the Task

Force's proposals approved in January 2006 recommended permitting lawyers to state the areas of law in which they practice and also to state that they are specialists or specialize in a particular field of law.

The City Bar continues to believe 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 services to their clients. Moreover, lawyers have a First Amendment 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 believes that lawyers should be able to inform the public that they specialize or are specialists in particular areas of law. Assuming the lawyers do not violate their ethical obligation to ensure that their communications are not false, deceptive or misleading, consumers should not be harmed by lawyers identifying that they are specialists in particular areas. Indeed, the City Bar believes that the interests of consumers would be advanced if they were permitted to know which lawyers were specialists based on their experience in particular areas of the law. Thus, the City Bar strongly urges the presiding justices to amend DR 2-105 to allow lawyers to identify themselves as specialists, assuming the lawyers comply with all other pertinent ethics rules, including the prohibition against false, misleading or deceptive advertising.