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

**COMMENTS ON PROPOSED ETHICAL CONSIDERATIONS FOR LAWYER ADVERTISING**

**October 2007**

In general, the City Bar commends the drafters of the proposed Ethical Considerations. The ECs are clear and concisely worded. Furthermore, the ECs have been written with a good sense of what is practical.

Nevertheless, the City Bar believes that with the uncertainty over which of the new lawyer-advertising rules may survive judicial scrutiny, and the extent to which those rules may change, the City Bar believes that the wisest course would be to postpone adopting any ECs until after litigation concerning the rules concludes.

With that said, the City Bar offers the following comments on ECs 2-2 to 2-3, 2-6 to 2-8, 2-10, 2-12 to 2-13, 2-15, and 2-20 to 2-26.[1] Each EC is quoted in full, and then followed by the City Bar's comments.

**Paragraphs 2-3**

> The public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. To assist the public in obtaining legal services, lawyers may make known their services not only through reputation but also through advertising.
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> a) Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients.
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> b) To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising is not false, deceptive or misleading.
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> c) Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to

[1] The City Bar has no comment on EC 2-1, 2-4, 2-5, 2-9, 2-11, 2-14, 2-16, 2-17, 2-18, or 2-19.

make the lawyer's communication considered as a whole not materially misleading.

d) A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation.

**e)** A communication to a prospective client that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is misleading and improper.

*City Bar Comments*: ECs 2-2 and 2-3 both cover the same ground. Because EC 2-3 more clearly sets forth the principles, the City Bar recommends deleting EC 2-2.

If EC 2-2 were kept, the City Bar recommends that it be reworded. It is a bit of an exaggeration to say that persons of moderate means have an "acute need" for lawyer advertising. The City Bar suggests that the last two sentences of EC 2-2 (if kept) should be changed to read: "People of moderate means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While lawyers' reputations may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work."

**Paragraph 6**

a) Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers 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. However, non-commercial communications motivated by a not-for-profit organization's interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, nor make a material false statement of fact or law.

b) By definition, communications to existing clients are excluded from the advertising rules. A client who is a current client on any matter is an existing client for all purposes of the rules governing advertising. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations.) Communications to former clients which are germane to the earlier representation are not considered to be advertising. 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.

c) Topical newsletters or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However a newsletter or blog which 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.

d) 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.

e) The 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. For example, if an attorney circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by DR 2-101(E)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true.

*City Bar Comments*: The City Bar has three main comments with respect to this EC. First, the City Bar believes that the EC concerning the lawyer advertising definition should provide guidance on the meaning of the phrase "primary purpose." 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, to qualify as an advertisement under 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 lawyer's or law firm's retention. To be the primary purpose, the lawyer's or law firm's retention must be the *principal* reason for the communication. For example, when a lawyer speaks at a CLE forum, the lawyer's communications a the CLE forum would not be an advertisement within the meaning of the Rules because their primary purpose is to educate fellow lawyers or lay people, even though the speaker may also hope that he or she is retained as the result of the speech and materials. Likewise, if a lawyer is interviewed by the media about certain legal issues, that public communication should not be considered an advertisement because the primary purpose of such an 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.

Second, the City Bar recommends clarifying here that "advertisement" can include firm websites or blogs where the website or blog meets the other criteria of "advertising." While this concept is implicit in the new rules, it is nowhere expressly stated. For example, DR 2-101(f) appears to presume that law firm websites, at least, can constitute "advertising" for purposes of the new advertising rules (the "Rules"):

> Every advertisement other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical (and any websites or blogs related thereto), or made in person pursuant to section 1200.8(a)(1) of this Part, shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a website or blog.

Nevertheless, some firm websites or blogs on their face may not have, as their primary purpose, retention of the law firm. For example, many law firm websites or blogs are directed primarily at recruiting law students and lateral candidates, or providing information on legal developments, and would not constitute "advertising."

Third, the City Bar believes that EC 2-6(b) is unclear when it says that a current client for conflict purposes may not be a current client for the advertising rules. This needs to be explained. The City Bar suggests that the following sentences be added: "Current client for purposes of the advertising rules should be interpreted more broadly than it is for determining whether a lawyer has a conflict of interests. For example, unlike under the conflict rules, a current client can be considered to be an individual who is regularly communicating with a lawyer to facilitate the lawyer's representation of her employer, a party who, while they have no current active matters, still would probably consider a firm to be their lawyers, and an affiliate of a corporations being represented by the lawyer." The exclusion of publications targeted at lawyers is appropriate. In general, the advertising rules should not be read expansively to cover people who do not need the protection of the rules or communications that are not likely to be misleading.

**Paragraph 7**

> a) The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise.
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> b) A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is

to educate and inform rather than to attract clients. 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.

c) A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for non-lawyers should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

*City Bar Comments*: EC 2-7(a) states that "legal problems ... often are not timely noticed." The City Bar does not believe this is correct. As an alternative, the City Bar suggests that the EC be amended to say: "legal problems ... might not be timely noticed."

**Paragraph 8**

As 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. As a matter of conventional understanding, such sponsorship is understood to be for altruistic purposes rather than commercial ones.

*City Bar Comments*: EC 2-8 appropriately addresses lawyers' participation with charitable events. The City Bar recommends that the following be added to the list of permissible information: "a brief description of a law firm."

**Paragraph 10**

a) Descriptions 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. Accordingly, 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.

b) On the other hand, descriptions of characteristics of the lawyer or law firm which compare the lawyer of law firm with other lawyers or law firms are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, 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."

*City Bar Comments*: The City Bar believes that EC 2-10(b) is too restrictive, and suggests that it be changed to make clear that all subjective comparisons are not precluded. The City Bar recommends adding the following language: "All subjective comparisons, however, are not prohibited. Accordingly, although a lawyer or law firm should not advertise that it is the 'Best' or 'Most Experienced', it is acceptable to say that a firm with well-credentialed lawyers was 'second to none' or to characterize a trial lawyer who has handled many trials as 'one of the most experienced' trial lawyers."

**Paragraph 12**

In their advertisements, lawyers may identify clients that they regularly represent or have regularly represented in the past, provided that a client whose name is used has given informed consent in writing before the client's name is used. A client is "regularly represented" if the lawyer has served the client over an extended period of time in multiple matters. A lawyer advertisement may not include an endorsement or testimonial from a client regarding a matter that is still pending, but may include testimonials and endorsements by clients and former clients as to matters that have concluded. Testimonials or endorsements, when permitted, must comply with DR 2-101 (E)(1), (2) and (3).

*City Bar Comments*: EC 2-12, in the City Bar's view, is not necessary and its interpretation of the DR 2-101(b)(2) is controversial. The City Bar believes that EC 2-12 should be deleted.

DR 2-101(b)(2) is not new. The legal community has been following it for years with no apparent difficulty. There is no need to issue an EC at this time on what this rule means. The City Bar also notes that DR 2-101(b)(2) lists a series of practices that are permitted, and thus provides a safe harbor. The Rule does not say that client names may never be used except under the conditions in the rule. Specifically, the City Bar believes that the Disciplinary Rule was not

intended to restrict lawyers to listing only "regularly represented" clients. In some practice areas, like debtors' bankruptcy and divorce work, there are few repeat clients.

Further, the prohibition on the use of endorsements from a client regarding a pending matter also is clear. Thus, even if it is found constitutional, the City Bar believes that no EC need be issued to explain the prohibition.

**Paragraph 13**

> An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer. However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, 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.

*City Bar Comments*: EC 2-13 refers to the economic interest of the rating firm. This reference should be clarified to make it clear that if a lawyer or firm must make a payment to be rated, the rating is not *bona fide*. A for-profit rating agency can issue *bona fide* ratings, as long as the attorneys and firms do not pay to be rated.

**Paragraph 15**

> Many law firms have created internet 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 Able and Baker may use the domain name www.AbleandBaker.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm's name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize 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:

> First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm.
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> 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 Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should "contact www.realestatelaw.com" unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement.
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> Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances.
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> Fourth, the domain name must not otherwise violate a disciplinary rule. If a domain name meets the three criteria just listed but violates some other disciplinary rule, then the domain name is improper under this rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

*City Bar Comments*: While it is implicit in the EC, the City Bar believes that the EC should make explicit that a firm may use as its domain name its initials or other phrases that are derivative of the firm's actual name, so long as the domain name is not misleading and does not imply an ability to obtain results in a matter.

The City Bar also believes that subparagraph (c) is potentially confusing and should be changed to read, "If the firm of Able and Baker practices real estate law, for instance, it may prefer a descriptive or colloquial domain name such as www.abrealestatelaw.com."

**Paragraph 20**

> A "solicitation" means any advertisement:
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> 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);
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> whose primary purpose is to persuade recipients to retain the lawyer or law firm (as opposed to providing educational information about the law);

whose significant motive is for the lawyer is to make money (as opposed to a public interest lawyer offering pro bono services); and

which is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives.

Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the rules that govern all advertisements but also by special rules governing solicitation.

*City Bar Comments*: The City Bar believes that this proposed EC ought to help explain the difference between materials whose primary purpose is to persuade recipients to retain the firm and those that are calculated to educate recipients about the law. Many lawyers and law firms distribute "client alerts" and similar publications to prospective clients. These kinds of alerts may be designed to raise the lawyer's or firm's public profile, but their content is intended primarily to update clients on an important legal development or otherwise educate prospective clients about the law. The creation and circulation of such publications is of benefit to the public and should be encouraged, not thwarted. The City Bar believes that the ECs should make clear that such publications are not solicitations unless they affirmatively suggest to recipients that they hire the firm to provide additional advice on the subject matter in the client alert by, for example, suggesting that the recipient contact the author if the recipient needs assistance with matters of the kind described in the alert. So, for example, simply listing the contact information of the lawyer who wrote the client alert, or even describing the author's practice or that of the author's firm, would not transform the publication into a solicitation.

**Paragraph 21**

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 "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). Advertisements so delivered are subject to various additional rules governing solicitation because otherwise they would not be readily subject to disciplinary oversight and review.

An advertisement in a public medium such as newspapers, television, billboards, web sites or the like is presumed not to be "directed to, or targeted at" a specific recipient or recipients. For example, 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. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Similarly, a

> lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or workers compensation law. 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.
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> Second, an advertisement in a public medium such as newspapers, television, billboards, web sites or the like is a solicitation if it 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" is explained in EC 2-22.

*City Bar Comments*: Paragraph 21 is potentially confusing in its failure to specifically discuss DR 2-103(a)(1)'s specific proscription on in-person and similar solicitations. Paragraph 21(b) merely states in general terms that in-person, telephone and real-time or interactive computer solicitations "are subject to various additional rules . . . because otherwise they would not be readily subject to disciplinary oversight and review." The City Bar recognizes that this prohibition is discussed in Paragraph 25, but nevertheless is concerned that practitioners relying on this EC alone (without reading paragraph 25) may not understand that DR 2-103(a)(1) *prohibits* such solicitations "unless the recipient is a close friend, relative, former client or existing client." Indeed, in-person and similar solicitations exempt from DR 2-103(a) under this exception are expressly *not* subject to the filing, content and public inspection requirements of DR 2-103(c). *See* DR 2-103(c)(5)(i). Accordingly, the City Bar believes that the proposed EC should be revised to make clear that (i) in-person, telephone and real-time or interactive computer solicitations are generally prohibited except when directed to close friends, relatives and former or current clients; and (ii) other solicitations (by mail, e-mail or similar means) are subject to DR 2-103(c) filing, content and public inspection requirements.

**Paragraph 22**

> Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident.
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> A "specific incident" is a particular identifiable event which causes harm to one or more people at approximately the same time and place. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses and the like.
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> 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 EC 2-21 (b), (d)). 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 do not relate to a specific incident and are not subject to the special 30 day (or 15 day) rule.
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> An 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. Thus, 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. Unless 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.
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> However, if a lawyer compiles an address list for a mailed or e-mailed advertisement by obtaining 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.

*City Bar Comments*: The City Bar generally agrees with this paragraph, with a few generally minor exceptions.

First, in paragraph 22(b), the City Bar believes that the word "approximately" should be stricken from the first sentence. While the City Bar certainly understands that there should be some flexibility to allow for a "specific incident" that has some duration (such as a fire that may last for hours or even days), the use of the word "approximately" is vague and subjects the Disciplinary Rule to misinterpretation. For example, a release of pollutants into drinking water might itself occur at "approximately" the same time and place but still should not satisfy the definition of "specific incident" because its effects would be felt at different times and places.

Second, while subparagraph (c) makes clear that claims stemming from a "common cause " but resulting in harm in disparate times and places are not subject to the special 30-day prohibition on solicitations, the City Bar is concerned that the use of "approximately" may draw into this rule purview circumstances that were intended to be excluded. To clarify this distinction further, the City Bar recommends that the last sentence of sub-paragraph (c) be revised to include "exposure to harmful agents" or similar language.

**Paragraph 23**

> The 30-day (or 15-day) restriction on solicitations relating to a specific incident involving potential claims for personal injury or wrongful death also applies to lawyers or law firms who represent actual or potential defendants or entities

> that may defend or indemnify those defendants. Although defense counsel is not soliciting employment from potential claimants for personal injury or wrongful death, it is improper for defense counsel to contact such claimants during the period of time when potential plaintiff lawyers are barred from doing so. However, if potential claimants are represented by counsel, it is proper for defense counsel to communicate with potential plaintiff counsel even during the 30-day (or 15-day) period.

*City Bar Comments*: EC 2-23 creates a 30-day (or in some cases a 15-day) moratorium so that lawyers will not intrude on grief-stricken people who may not be able to make rational decisions about counsel in the immediate aftermath of a tragedy. The City Bar notes the clarification in the last sentence that makes clear that defense counsel may contact a potential claimant counsel during the 30-day (or 15-day) proscribed period when the potential claimant is represented in respect of the potential claim. While this clarification may not be apparent from the Disciplinary Rule face, it is clearly consistent with the Rule's intent and necessary to prevent undue prejudice to defendants that could arise from a bar on communications with represented plaintiffs during the 30-day (or 15-day) period.

**Paragraph 24**

> All of the special solicitation rules, including the special 30 day (or 15 day) rule, apply to solicitations directed to recipients in New York, whether made by a lawyer admitted in New York or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York directed to a recipient or recipients outside of New York are not subject to the filing and related requirements set out in DR 2-103(C). Whether such solicitations are subject to the special 30 day (or 15 day) rule depends on the application of DR 1-105.

*City Bar Comments*: EC 2-24 briefly mentions the extraterritorial application of the rules, but provides little guidance. The rules' reach is unclear and needs a better explanation. The City Bar believes that the rules were intended to regulate advertisements made by New York-admitted lawyers and law firms with New York offices seeking to obtain work to be performed by lawyers based in New York. In addition, the solicitation rules were aimed at solicitations of work from people living in New York and from New York-based businesses people to represent their companies. See DR 1-105. The City Bar does not believe that the advertising rules were meant to cover, for example: (i) firms with offices both inside and outside New York, when advertising to attract work for their lawyers who are not based or admitted in New York, (ii) New York-admitted lawyers based outside New York and regulated by the bar of a different jurisdiction, when seeking work to be performed in that other jurisdiction, (iii) advertisements of a law firm with offices outside of New York that are run in national publications or publications that circulate primarily outside of New York, that do not list a New York address of the firm and are intended only incidentally to attract business for New York lawyers at the firm, (iv) solicitations sent to a business that happens to be incorporated and/or headquartered business New York, when such solicitations are directed to one of the business offices outside New York seeking work to performed outside New York.

The City Bar further suggests that the advertising rules should apply only to out-of-state lawyers who *know or have reason to know* that they are soliciting New York residents. Especially in the case of e-mail solicitation, it can be difficult (if not impossible) to determine where the recipient resides. For example, lawyers may be unaware that they are contacting New Yorkers, when the solicitation is not made in New York and concerns an incident that occurred outside New York and involved mostly residents of the locale where the incident occurred. Careful out-of-state lawyers who do not know whether they are soliciting New York residents would be likely to file their solicitations (even those with no actual New York recipient), resulting in a flood of filings that would overwhelm the disciplinary authorities and likely add no value (because many solicitations may not be directed to New York residents at all). Accordingly, rather than requiring compliance regardless of the lawyer's knowledge, the City Bar recommends adding a sentence limiting the limiting application of the advertising solicitation rules to out-of-state lawyers where the lawyers know or has reason to believe that he or she is soliciting New York residents.

**Paragraph 25**

> DR 2-103(A) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, 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.
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> The prohibitions on in-person or telephone contact or by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, or former client. Communications with these individuals do not pose the same dangers as solicitations to others. When the special 30 day (or 15 day) rule applies, it does so even where the recipient is a close friend, relative, or former client.
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> Ordinary email and web-sites are not considered to be real time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer accessed communication are considered to be real time or interactive communication.

*City Bar Comments*: The City Bar believes that this EC provides helpful guidance to practitioners on in-person and similar solicitations and has two minor suggestions. First, the last sentence of sub-paragraph (b), which states that the 30-day "cooling-off" period in DR 2-103(g) and DR 7-111 applies regardless of whether the solicited party is a lawyer close friend, relative or former client, is out of place here and may be confusing. While the City Bar believes that this sentence is unnecessary (because the "cooling-off" period disciplinary rules contain no exception

on their faces), if such a statement were to be included in the ECs, the City Bar suggests that it should be in Paragraph 23.

More significantly, in discussing the parties with whom DR 2-103(a) permits real-time solicitations, the proposed EC omits "existing" clients, who should be added to the list in the first sentence of sub-paragraph (b).

The City Bar also believes that this EC should clarify that pop-up advertisements (which do not allow an immediate response from the recipient) are not considered a form of real-time or interactive computer-based communication that DR 2-103(a) would prohibit. Of course, the EC should also cross-reference DR 2-101(g) prohibition on pop-up advertising outside of the lawyer's or firm's website (assuming that this proscription survives judicial scrutiny).

**Paragraph 26**

> 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.

*City Bar Comments*: DR 2-101(k) also provides that any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. Websites are not specifically referenced here, but certainly they constitute "computer-accessed" communication, so it should be assumed that these 90 day and website redesign "snapshots" should be kept for that one-year period. It is also assumed that the immediately preceding sentence of DR 2-101(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 inartfully broad and is not intended to apply to websites and other computer-accessed communication; otherwise, the one-year retention period for computer-accessed communication would be meaningless.

**Additional Comment**

The City Bar believes it would be useful to add an EC clarifying that if a law firm has no principal office, it need not declare one. Many national law firms have offices in New York and a substantial number of those firms have not designated any office as their "headquarters" or principal office. Similarly, some small firms have several offices of equal size, none of which is considered the firm's main office. Firms that have no office they consider their principal office may comply with DR 2-101(h) by listing an office where a substantial percentage of the firm's lawyers regularly are based and need not label it as the principal office.