Report of the Committee on Professional Responsibility
New York City Bar

Comments on the Ethics Rules Governing Lawyer Advertising and Solicitation Proposed by The New York State Bar Association's Task Force on Lawyer Advertising

January 13, 2006

I. INTRODUCTION

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. As part of its work, the Task Force reviewed, among other things, current New York law and ethics rules concerning lawyer advertising and solicitation, the ethics rules concerning lawyer advertising and solicitation proposed by the NYSBA's Committee on Standards of Attorney Conduct ("COSAC"),[1] and other states' ethics rules concerning lawyer advertising and solicitation.

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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 of Professional Conduct (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 New York's Lawyers' Code of Professional Responsibility (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 these proposed Model Rules in 2007. As noted below, the NYSBA's House of Delegates has accelerated its consideration of

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.[2] 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:

> Potential false, deceptive or misleading advertisements in print and broadcast media and on the Internet.
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> An apparent lack of enforcement of the existing ethics rules concerning lawyer advertising and solicitation.
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> The potential role that the State and local bars could play in addressing advertising and solicitations that violate the ethics rules.
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> 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 a lawyer 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, has recommended certain changes to COSAC's proposed ethics rules concerning lawyer advertising and solicitation.
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> 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 concerning the ethics rules concerning advertising and solicitation. The Task Force has provided the NYSBA with proposed outlines for these educational programs.

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the Model Rules concerning lawyer advertising and solicitation, and will vote on these particular proposals at its January 27, 2006 meeting.

[2] The Task Force's report is available online at http://www.nysba.org/Content/ContentGroups/Reports3/Report_from_Task_Force_on_Lawyer_Advertising/LawyerAdvertisingReport.pdf.

> 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 and expedited 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 Association of the Bar of the City of New York (the "City Bar"). The City Bar has reviewed the Task Force's 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.[3] Although the City Bar generally agrees with the Task Force's proposals, the City Bar has identified certain aspects of the Task Force's proposals that the City Bar recommends should be modified or supplemented. The City Bar has set forth below the reasons for its recommended changes and additions to the Task Force's proposals so that both the Task Force and the NYSBA's House of Delegates, which will debate and vote on the Task Force's proposals at its January 27, 2006 meeting, will have the opportunity to consider the City Bar's reasoning with respect to these issues.

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[3] The City Bar's Professional Responsibility Committee ("PRC"), chaired by David G. Keyko, and its Subcommittee on Lawyer Advertising and Solicitation, chaired by Jeffrey T. Scott, had primary responsibility for reviewing and commenting on the Task Force's proposals concerning lawyer advertising and solicitation. The PRC and the relevant subcommittee collectively met and/or had telephone conferences on numerous occasions to consider and discuss the Task Force's proposals concerning the ethics rules relating to lawyer advertising and solicitation. Although not every member of the PRC agreed with every comment contained in this report, the comments in this report concerning the Task Force's proposals reflect a consensus view of the PRC.

The City Bar understands that Chief Judge Judith S. Kaye of the New York Court of Appeals has formed the Committee of the Administrative Board (the "Administrative Board") to review the current New York Disciplinary Rules regarding advertising and solicitation and to consider amending them. As of the date of this report, the City Bar understands that the Administrative Board has not yet issued a formal report or recommendations. The City Bar is hopeful that the Administrative Board will consider the NYSBA's and City Bar's views concerning the ethics rules that should guide lawyer advertising and solicitation in whatever formal report or recommendations are made. The City Bar also expects that it (and other bar associations) will be given an opportunity to review and comment on the work of the Administrative Board concerning any proposed lawyer advertising and solicitation ethics rules and procedures, and that the Courts of the State of New York will work closely with the City Bar and other bar associations in formulating rules and procedures concerning lawyer advertising and solicitation.

The City Bar notes that both it and the Task Force have accelerated their review of the proposed rules to meet external deadlines. However, given the complexity of these issues, the important First Amendment and other public policy considerations at stake, and the implications of lawyer advertising and solicitation rules for the Bar and the public, the City Bar believes that a more extended review and comment period would be beneficial to all interested parties.[4]

Section II provides the City Bar's recommendations regarding the proposed changes to the ethics rules concerning lawyer advertising and solicitation. Section III of

[4] The City Bar notes that the New York State Bar Association's Committee on Professional Ethics has also expressed concern regarding the accelerated review that these proposed rules have received, and has asked for a "more measured consideration" of the Task Force's proposal.

this report sets forth in detail the City Bar's comments on the Task Force's proposed ethics rules. Sections IV and V of this report summarize the Task Force's proposals regarding (i) educational guidelines concerning lawyer advertising and solicitation and (ii) enforcement procedures, respectively, and the City Bar's comments, if any, concerning these proposals.

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

The City Bar agrees with the vast majority of the Task Force's proposed substantive changes. However, the City Bar recommends that some aspects of the Task Force's proposals be changed or supplemented. The City Bar's recommended changes and additions are summarized below and discussed more fully in Point III.

> The Commentary to proposed Rule 7.1 (or the applicable Ethical Considerations) should provide lawyers with guidance as to what types of communications by lawyers to the public are and are not "advertisements," especially because the Task Force has proposed increased enforcement of the ethics rules concerning lawyer advertising. *See* Point III.A.1.
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> The Disciplinary Rules (or proposed Rule 7.1) should not contain a requirement that lawyers file all advertisements in some central electronic depository. Rather, the ethical rules should require lawyers only to retain all advertisements (as COSAC has suggested), and the retention period should be three years, instead of the four years proposed by the Task Force. As discussed more fully in Point III.A.2, the City Bar believes that these proposed changes will not undermine the Task Force's goal of increased enforcement of the advertising ethics rules, and will at the same time save the OCA (or whatever entity would be charged with overseeing the proposed central electronic depository) money and resources.
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> The Disciplinary Rules (or proposed Rule 7.1) should not require lawyers to include in advertisements their addresses registered with OCA and all principal offices in New York. Rather, lawyers should be required to identify in advertisements *only one* office (whether in New York or elsewhere) where legal services are available. Further, there should be some precision as to what "advertisements" will require an address. The

City Bar believes that this minor change would not prejudice consumers (who are primarily interested in ascertaining whether the lawyer has a local presence) and would not impede the ability of the Grievance Committees in New York to determine whether they have jurisdiction over a potential disciplinary matter relating to advertising. *See* Point III.A.3.

The Disciplinary Rules (or proposed Rule 7.1) should require only lawyers who prepared, approved or placed an advertisement to certify in their lawyer biennial registration forms that they are in compliance with the advertising rules. The City Bar believes that it is impractical and unnecessary to require each lawyer at a law firm to certify compliance with the advertising rules if the lawyer had no role in the preparation, approval or placement of the advertisement by that law firm. The City Bar understands that the Task Force is considering a modification along these lines, and proposes some language for consideration in Point III.A.4.

The Disciplinary Rules and/or Ethical Considerations (or proposed Rule 7.3) concerning in-person solicitation should be amended to make it clear that it is not a "solicitation" within the meaning of this rule if (i) lawyers are asked by an individual or business to provide them with information about themselves or their law firm's services, or (ii) the individual or business with whom the lawyer communicates regularly retains lawyers to provide services of the type being discussed, either for themselves or for their employer. *See* Point III.C.

The Disciplinary Rules (or proposed Rule 7.3) also should provide a definition of "real-time electronic contact," so that lawyers know whether particular electronic communications constitute a "solicitation" under the ethical rules. *See id.*

The Disciplinary Rules (or proposed Rule 7.4) should be amended, as COSAC recommended, to allow lawyers to identify themselves as "specialists" as long as that statement complies with all other applicable ethics rules, including but not limited to the rule that attorney communications shall not be false, deceptive or misleading. *See* Point III.D.

Although the City Bar's discussion is presented in terms of comments on the rules proposed by COSAC and/or the Task Force, the substance of the City Bar's recommendations does not depend on approval of a change to the Model Rules format. In general, the City Bar's comments on proposed "Commentary" would be appropriate

for Ethical Considerations, while comments on the proposed "Rules" would generally apply to Disciplinary Rules.

That said, the City Bar notes that it supports the proposed change to the Model Rules, and particularly in the context of lawyer advertising and solicitation rules, because broadcast and internet media readily cross jurisdictional lines.

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

In evaluating the Task Force's proposed ethics rules concerning lawyer advertising and solicitation, the City Bar's PRC reviewed, among other things, New York law and ethics rules concerning lawyer advertising and solicitation, including the current DRs and Ethical Considerations, the ethics rules proposed by COSAC, and other states' ethics rules concerning lawyer advertising and solicitation. The City Bar's PRC and its pertinent subcommittee collectively met and had numerous telephone conferences concerning the Task Force's proposals and also had communications with representatives of the Task Force concerning the Task Force's proposals. Based on this work, the City Bar offers the following comments on the Task Force's proposed ethics rules.

A. Rule 7.1: Communications Concerning a Lawyer's Services

1. Guidance Concerning the Meaning of Advertising and Advertisement

The Task Force, as well as COSAC, considered, but rejected, including definitions of "advertising" and "advertisement" in the proposed ethics rules concerning

advertising.[5] In addition, the Task Force and COSAC considered whether certain categories of documents should be expressly omitted from the advertising filing requirements (*e.g.*, law firm web sites), but they ultimately decided against identifying documents that could be exempted from these rules. As a result, the Task Force's proposed ethics rules concerning advertising do not provide any express guidance as to the types of lawyer communications that qualify as advertising within the meaning of the rule. It appears that the Task Force's objective was to have the proposed ethics rules concerning advertising apply to lawyer communications as broadly as possible; indeed, the Task Force's ultimate "conclusion was to cast the net widely." (*See* Task Force Report at 58.) The City Bar disagrees with this conclusion.

The City Bar understands that the Task Force is, however, willing to consider amending its proposal to provide guidance to lawyers as to what types of communications are or are not "advertising" and "advertisements." The City Bar agrees, and provides the following comments. As a practical matter, lawyers engage in communications with former, existing and prospective clients and the public on a daily basis. Without guidance as to what types of communications are advertisements, lawyers face a serious risk that a communication that was previously not thought to be an

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[5] The Task Force and COSAC both considered and rejected the following definitions:

> For the purpose of these Rules, "advertising" and "advertisement" means any communication about the lawyer or the law firm or about the lawyer's or law firm's services including without limitation, solicitation and publicity and communications made by other [sic] where the lawyer participates in the preparation of the communication that meets the following two criteria:
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> (1) the communication is mailed, distributed, published, broadcast, or otherwise disseminated to the public or any member or members thereof in any fashion; and
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> (2) the dissemination of the communication is initiated by the lawyer or law firm and not by a client or prospective client.

advertisement may be deemed to be one under the Task Force's proposed ethics rules. If the advertising rule changes are intended to "cast the net widely," it could be argued that the intent was to broaden the reach of the ethics rules concerning advertising to reach communications that were traditionally not considered to be advertisements. Moreover, if, as the Task Force recommends, there is to be increased enforcement of the ethics rules concerning lawyer advertisement (and the City Bar agrees with this recommendation), the City Bar is of the view that whatever ethics rules are ultimately adopted by the NYSBA and the New York courts should provide guidance as to what types of communications are or are not advertising.

The City Bar acknowledges that there is ample room for disagreement as to what is the proper definition of "advertising" or "advertisement," and for that reason (among others) it may not be advisable or practical to have the black letter rule contain such a definition.[6] (Indeed, the City Bar believes that the definitions of "advertising" and "advertisement" that the Task Force and COSAC considered were too broad.) Notwithstanding this position, the City Bar believes that the Commentary to the Task Force's proposed Rule 7.1 could readily provide guidance as to what types of communications are or are not advertising in the following ways.[7]

[6] The City Bar acknowledges that neither the Model Rules nor New York's current DRs relating to advertising contain definitions of advertising or advertisement. Moreover, the City Bar is aware that the Model Rules adopted by 48 other states do not contain such definitions. Notwithstanding this information, the City Bar believes that it is prudent, and readily achievable, for the New York courts to provide its lawyers with some guidance as to what types of communications are or are not advertising within the meaning of the ethics rules.

[7] The Task Force and COSAC have both recommended that the Appellate Divisions adopt the Commentary to the proposed ethics rules because they believe that the Commentary would be substantially more authoritative if adopted by the Courts. The City Bar agrees with that recommendation.

First, the Commentary to Rule 7.1 could generally explain that an advertisement has typically been considered to be a communication made by a lawyer to the public or any member or members thereof for the principal purposes of describing the services provided by the lawyer and enticing the public to retain the lawyer. Thus, although the ethics rule itself would not have a definition of advertisement or advertising, the Commentary to that rule would provide at least some baseline guidance to lawyers as to the principal type of communication that should be considered an advertisement.

Second, the Commentary can also identify the types of communications that traditionally have been 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.

Third, the Commentary can likewise provide guidance as to the types of communications that have not been typically 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 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 (other than by providing brief biographical information), nor are they principally aimed at enticing

the public to retain the lawyer. Moreover, such communications serve an important purpose in educating the public 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 the coverage of ethics rules concerning advertising. (Notably, these types of communications will still be covered by proposed Rule 7.1's requirement that the communication not be false, deceptive or misleading.)

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 Rule 7.1. 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.*, it is usually not sent by the lawyer to the public or any member thereof). For these reasons, these types of directories should not be considered to be advertisements within the meaning of ethics rules.

Fourth, the City Bar also believes that the Task Force's proposed rules need to provide more guidance as to what types of electronic communications are or are not advertisements. For example, under the Task Force's proposals, a law firm's Web site, blogs or a web-based seminar run by lawyers could be considered advertisements within the meaning of the ethics rules. Although the City Bar agrees that Web sites run by lawyers might contain or constitute "advertisements," the City Bar does not believe that every part of a law firm's Web site should necessarily be characterized as an

advertisement.[8] For example, the City Bar believes that the portions of the Web site that provide only the biographical information of the lawyers at the law firm should not be considered advertisements under the ethics rules. In addition, the portion of a Web site that is used to attract potential employees is not an advertisement that is directed at consumers, nor is it intended to entice a consumer to retain the law firm. Consequently, it should not be covered by the proposed ethics rules. The City Bar believes that the Commentary to proposed Rule 7.1 can provide guidance to lawyers as to those parts of a Web site that are not advertisements within the meaning of the rules, and can also make it clear that the types of electronic communications that are covered by the ethics rules are those that fall within the traditional meaning of advertisements (*i.e.*, a communication made by a lawyer to the public or any member or members thereof for the principal purposes of describing the services provided by the lawyer and enticing the public to retain the lawyer).

The City Bar does not believe that its suggested changes to the Task Force's proposed ethics rules concerning advertising would undermine the Task Force's principal objective of protecting the public through the prohibition of advertising practices that disseminate false or misleading information. Although some of the City Bar's suggested changes would, if accepted by the Courts, make it clear that certain types of

[8] Notably, three states – Florida, Iowa and Texas – do not consider Web sites to be advertisements, either expressly or implicitly because Web sites are deemed to be information requested by a client and thus not a traditional advertisement. Although the City Bar finds that the positions adopted by these three states are reasonable, the City Bar recommends that because of the widespread use of Web sites by lawyers and consumers, Web sites should not be categorically exempted from the ethics rules concerning advertising. Rather, as noted above, the City Bar believes that the Commentary to proposed Rule 7.1 should expressly provide that certain portions of the Web site are not advertisements within the meaning of the rules.

communications are not advertisements within the meaning of the ethics rules, lawyers would still be required under the ethics rules to make sure that these communications are not false, deceptive or misleading. Thus, the public should not be at risk of harm merely because the ethics rules concerning advertising and the relevant commentary provide more guidance to lawyers as to what types of communications are or are not covered by the advertising rules. And, at the same time, such guidance would provide lawyers with notice as to what types of communications are covered (or not covered) by the ethics rules, and would likely lead to more uniform enforcement of these rules by the various Grievance Committees throughout New York.

2. Retention and Filing

Retention. The City Bar agrees with the Task Force's proposed requirement in Rule 7.1 that copies of all advertisements be retained by the lawyer, but the City Bar would reduce the proposed retention period from four years to three years. (COSAC had originally recommended one year, but the City Bar believes that this period is too short and will hamper enforcement efforts.) The City Bar believes that the proposed period can be shortened from four years to three years because the Task Force has recommended accelerated enforcement of possible violations of the proposed ethics rules concerning advertising and because storage of these materials can become unnecessarily burdensome and expensive. Assuming that this recommendation is acted on by the Grievance Committees, the City Bar submits that a four-year retention period would be unnecessary given that enforcement proceedings would be completed sooner.

Proposed Filing of All Advertisements. In an effort to improve the potential enforcement of possible violations of the ethics rules concerning advertisements, the Task

Force has recommended that the rules require the filing of all advertising in accordance with a new court rule. The Task Force has recommended that the courts adopt a central electronic filing system, which would be randomly sampled to determine whether advertisements comply with the applicable ethics rules. Although the City Bar agrees that the current enforcement of the advertising ethics rules should be improved, the City Bar does not agree that it is appropriate for the courts to adopt a central electronic filing system into which lawyers would be required to file all advertisements. The City Bar is concerned that under the Task Force's proposal, OCA would be required to expend a considerable amount of money and resources to establish and maintain this central electronic depository when a more cost-effective and efficient solution is available to achieve the goal of enhanced enforcement. Importantly, the cost and feasibility of such a central electronic depository is uncertain, and its feasibility has not been shown.

The City Bar understands that the primary reason for the proposed central repository is to facilitate random sampling. Preliminarily, the City Bar notes that it has questions about the wisdom of random sampling, because it raises issues of arbitrariness in enforcement – especially if only the most scrupulous attorneys retain or file their advertisements at all. The potential risk is that well-meaning attorneys may be charged with technical violations, while advertisements placed by more unscrupulous attorneys will not be reviewed at all. The City Bar recommends that careful thought be given to (i) ensuring that the "pool" of advertisements to be sampled is sufficiently complete and (ii) the means of selecting advertisements to be randomly sampled. A complaint-based system may ultimately be more fair and effective.

If the Task Force's proposal for random sampling were to be adopted, however, the City Bar believes that random sampling could be done without the establishment of a central repository, because lawyers would be required to retain their advertisements for a specified period in any event under the proposed ethics rules. As noted above, the Task Force's proposed Rule 7.1 would require lawyers to retain all advertisements for the specified period. Instead of requiring OCA to create and maintain a database (at potentially tremendous cost) that could be randomly sampled, the Grievance 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. Under this suggested procedure, the Grievance Committees would receive advertising from a random sampling of lawyers across the state that could thereafter be reviewed in accordance with the other procedures proposed by the Task Force in its Preliminary Report. Importantly, this random sampling of lawyer advertising could be achieved without requiring OCA to expend any money or resources to create and maintain a central electronic depository, and without requiring lawyers to send to this depository copies of advertisements that they are already required to retain.[9]

The City Bar believes that the suggested elimination of the central electronic depository from the Task Force's proposals does not undermine the goal of increased enforcement of the advertising ethics rules, and would at the same time save OCA (or whatever State entity that is charged with overseeing the proposed central electronic

[9] Indeed, the retention requirements and the central electronic depository under the Task Force's proposed rules are duplicative. There seems to be no reason to require lawyers to retain copies of all advertisements once they have filed them with a central depository, or to file advertisements if they are already required to retain them.

depository) money and resources. Even without a central electronic depository, the Grievance Committees would still receive a random sample of advertisements that could be reviewed to determine whether they comply with the applicable ethics rules. The only difference would be that OCA would not be able to retrieve these sample advertisements from a central depository, but would have to wait to receive them from the lawyers who would be required to retain them under the proposed ethics rules. This minor difference should not have any meaningful impact on the Grievance Committees' ability to enforce the advertising rules.[10] In addition, OCA (or whatever state entity that would be charged with overseeing the central depository) would be able to save time, money and resources as a result of not having to establish and maintain the central electronic depository. For these reasons, the City Bar recommends that the Task Force's proposed Rule 7.1 be modified to delete the requirement that courts adopt a central electronic depository.

3. The Principal Office Requirement

The current DRs require advertisements to include the lawyer's or law firm's name, address and telephone number. The Task Force further recommends that the address should be that of the lawyer or law firm's office as registered with OCA and all principal offices in New York. The City Bar disagrees with this proposal.

The City Bar understands that the Task Force is considering amending this aspect of its proposal in a few ways, for instance, by including a definition of office with reference to the Judiciary Law. The City Bar concurs, and offers the following comments. The City Bar recommends that proposed Rule 7.1 be modified to require that,

[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).

if a lawyer advertisement provides any contact information (other than the lawyer's web site address), it shall identify one or more offices (whether in New York or otherwise) where an attorney or legal services are actually available, but shall not identify any offices where attorneys or legal services are not available. The City Bar believes that this change would not prejudice consumers because they would primarily be interested in ascertaining whether the lawyer has a presence where they are located. Under the City Bar's proposal, if a lawyer had more than one office where legal services are available, the lawyer might choose to list the office in the geographical area in which the advertisement is placed but would not be required to list every such office in New York. This rule would allow the consumer to know whether the lawyer has a presence in their locale (other than a "drop box" office, which cannot be deemed an "office where attorneys or legal services are available"), which may be an important factor in deciding whether to retain the lawyer, and at the same time, the lawyer would not have to devote space to information in the advertisement that is not meaningful to the consumer (*i.e.*, whether the lawyer has other offices or a drop box office in New York). The City Bar also recommends that lawyers be permitted to use advertising containing *no* contact information (other than, potentially, a web address). Such advertising is increasingly common, often in publications with multi-state or nationwide distribution. In the City Bar's view, advertising that does not provide any contact information other than by reference to a website should not for this reason alone be deemed misleading or otherwise objectionable.

There has also been a suggestion that all advertisements should include both the OCA registered address and all principal offices in New York to facilitate the ability of

the Grievance Committees in New York to determine whether they had jurisdiction over a potential disciplinary matter relating to advertising. The City Bar does not believe that its proposal would impede this determination. Under the City Bar's proposal, the lawyer or law firm would have to list one office where legal services are available, and it is clear that the Grievance Committee in the geographical area where that office was located would have jurisdiction over the lawyer or law firm if there was an issue as to whether advertising complied with the applicable rules. In addition, the Grievance Committee for the area to which the advertisement was directed would also have jurisdiction over any potential disciplinary matter relating to the advertisement. Finally, because the lawyer or law firm is required to list their name, the OCA registered address could be readily obtained from OCA, thus creating the possibility that the Grievance Committee for the area in which the registered office was located could take jurisdiction over any potential disciplinary matter relating to an advertisement run by that lawyer or law firm.

4. Certification Requirement

The Task Force has proposed that, in addition to increasing the retention period for advertisements to four years, the biennial attorney registration form promulgated by OCA be amended to require lawyers to certify, subject to penalty of perjury, that they have complied with the ethics rules concerning lawyer advertising. In contrast to the Task Force's position, the City Bar believes that proposed Rule 7.1 should only require those lawyers who personally prepared, approved or placed an advertisement to certify in their lawyer biennial registration form that they are in compliance with the advertising ethics rules, and that lawyers who were not personally involved in the creation, approval or placement of advertising should be permitted to make a certification to that effect

without having to individually certify that their firm (or other lawyers with whom they practice) are also in compliance with the advertising ethics rules. The City Bar believes that it is impractical and unnecessary to require all lawyers at law firms to certify compliance with the advertising rules. Many lawyers today practice in law firms with numerous lawyers, and sometimes multiple offices; as a result, most of those lawyers have no involvement in the creation, approval or placement of the law firm's advertisements. Given these circumstances, it is the City Bar's view that lawyers who were not involved in the creation, approval or placement of advertising by a law firm should not be required to make a certification about whether the law firm's advertisements complied with the ethics rules. The City Bar does not believe that this change would undermine the efficacy of the proposed ethics rules concerning advertising because the lawyers who did create, approve or use the advertising would be required to certify their compliance with these rules on their biennial registration form.

The City Bar understands that the Task Force is considering amending its proposal to recommend that the biennial registration form contain two checkboxes. The City Bar further understands that an attorney could check one box to indicate that he or she was "not personally involved in the design, approval, or placement of advertising" during the biennial period (or language to that effect). Alternatively, the attorney would check the other box to indicate that, "with respect to all advertisements in which [the attorney] was personally involved in design, approval, or placement," such advertisements complied with the applicable rules (or language to that effect). The City Bar concurs with this proposal.

5. The Other Proposals Concerning Rule 7.1

The City Bar agrees with the Task Force's other proposals concerning Rule 7.1.

B. **Rule 7.2: Payment For Referrals**

The City Bar agrees with the Task Force's proposals concerning Rule 7.2.

C. **Rule 7.3: Direct Contact With Prospective Clients**

The Task Force's proposed Rule 7.3 generally prohibits in-person and real-time electronic solicitation. The proposed rule contains exceptions for solicitations made to family or persons with whom the lawyer has a close personal or a professional relationship, or if the person contacted is a lawyer.

The City Bar recommends three changes to the Task Force's proposed Rule 7.3. First, the City Bar believes that this 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 dictionary definition of "solicitation" arguably supports this result, the City Bar nonetheless believes that the Task Force's proposed Rule 7.3 should be amended to 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.

Second, the City Bar believes that the Task Force's proposed exceptions to the general prohibition against in-person and real-time electronic solicitation should 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. Rule 7.3 is primarily designed to protect prospective legal clients from being placed in

situations where the lawyer may be able to unduly influence, intimidate or over-reach with that 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, 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 because it is unlikely that the lawyer will be able to place undue influence on 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 Rule 7.3.

Finally, the City Bar believes that proposed Rule 7.3 should provide a definition of "real-time electronic contact," so that lawyers know whether particular electronic communications are a solicitation under Rule 7.3. The proposed Rule 7.3 prohibits lawyers from soliciting prospective clients through a "real-time electronic contact," but the proposed rule does not provide a definition of "real-time electronic contact." The City Bar believes, however, that it is critical that the Task Force provide some definition or examples of "real-time electronic contact" because there is much uncertainty as to what type of electronic communication can be deemed a "real-time electronic contact." Although there is probably general agreement that "instant messaging" and "chat rooms" are "real-time electronic contacts," there is much debate as to whether e-mail or electronic bulletin boards are considered "real-time electronic contacts." (For the record, the City Bar believes that e-mail and electronic bulletin boards should not be considered "real-time electronic contacts.") Given this uncertainty, the City Bar believes it is

incumbent on the Task Force (and ultimately the courts) to provide guidance as to what types of electronic communications are "real-time electronic contacts." 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 Grievance Committees throughout the state will provide inconsistent guidance concerning this issue.

D. **Rule 7.4: Identification of Practice and Specialty**

COSAC's proposed Rule 7.4 would permit 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. In addition, COSAC's proposal would allow lawyers to state that they are certified as a specialist only if their certification was by an organization approved by the ABA and the name of the certifying organization was clearly identified in the disclosure.

The Task Force disagrees with COSAC's proposal. The Task Force concluded that lawyers should not be permitted to communicate to the public that they are specialists or specialize in a particular field of law because such words purportedly have a "heightened meaning" and "may be misleading to consumers of legal services." Accordingly, the Task Force's proposed rule allows lawyers to state they are specialists or specialize in a particular field of law only if the lawyer is certified by an organization approved for that purpose by the ABA or as permitted under the laws of another state.

The City Bar agrees with COSAC's proposal to allow lawyers 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. 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 Task Force, as well as the NYSBA's House of Delegates, to modify proposed Rule 7.4 to allow lawyers to identify themselves as specialists assuming the lawyers comply with all other pertinent ethics rules, including but not limited to Rule 7.1.

The City Bar agrees with the Task Force's remaining proposals concerning Rule 7.4.

E. **Rule 7.5: Firm Names and Letterheads**

The City Bar agrees with the Task Force's proposals concerning Rule 7.5.

IV. THE ADOPTION OF ADVERTISING AND SOLICITATION GUIDELINES

The Task Force has recommended that the NYSBA 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 concerning the ethics rules governing advertising and solicitation. The City Bar supports this proposal.

V. ENFORCEMENT OF ADVERTISING RULES

In its Preliminary Report, the Task Force concluded based on its review that enforcement of the current DRs relating to lawyer advertising and solicitation was ineffective. Accordingly, the Task Force recommended that the NYSBA's House of Delegates (and ultimately the New York state courts) adopt the following recommendations geared to improve the enforcement of the ethics rules relating to lawyer advertising and solicitation:

> All advertising be electronically filed in a central location designated by the state.
>
> The advertisements must be filed with an English translation and a certification stating that the advertisement is accurate, and that the advertisement is in compliance with the rules to the best of the attorney's knowledge.
>
> Random sampling of lawyer advertisements filed at the central location.
>
> Some entity, whose director shall be under the active supervision of the Administrative Board, shall review a random sample of advertisements, and the NYSBA shall be authorized to work with the courts and devise an appropriate and cost efficient plan to implement this recommendation.
>
> The entity identified immediately above shall refer advertisements to the appropriate disciplinary grievance committee if it concludes during the review of random sampling that the advertisement does not comply with the applicable ethics rules.
>
> The disciplinary referrals to the disciplinary grievance committees shall be expedited to the extent possible.

The City Bar agrees with the Task Force's general proposal that there be increased enforcement of any ethics rules concerning lawyer advertising and solicitation that are ultimately approved by the Court. Moreover, the City Bar generally agrees with the enhanced enforcement procedures recommended by the Task Force with three important caveats. First, as noted in Point III.A.2 above, the City Bar believes that

careful consideration should be given to whether a random sampling program will be fair and effective. Second, even if such a program is ultimately adopted, the City Bar does not believe that a central electronic depository should be created by the courts to store all advertisements by attorneys in New York. Lawyers should be required to retain all advertisements for a three-year period, and the appropriate enforcement agency can request lawyers, randomly selected throughout the state, to provide it with copies of advertisements for review.

Third, and most critically, the City Bar notes that increased enforcement must go hand-in-hand with increased clarity about what conduct is permitted or forbidden. The rules must be clear, practical and realistic in order to warrant increased enforcement.