WBASNY
WOMEN'S BAR ASSOCIATION
of the STATE OF NEW YORK

Presents

Your Firm's Online Presence; Increase Your Business

March 18, 2025
1:00 pm - 2:00 pm

Presenter: Ashley Robinson
Moderator: Michele S. Mirman, Esq.

Ashley Robinson - CEO & Founder

Green Cardigan Marketing

The Marketing Solution For

Your Law Firm

300 SW 1 Ave, Suite #155

Fort Lauderdale, FL 33301

Ashley Robinson is the founder and CEO of **Green Cardigan Marketing**, a digital marketing agency that focuses on helping law firms grow and achieve their financial goals through marketing strategies that work.

Ashley's journey to starting Green Cardigan Marketing first began with her love for golf; literally (keep reading and you will understand why)! Ashley played collegiate golf at Jacksonville State University where she earned her degree in Public Relations. After college Ashley began her career in marketing where she worked in account management in the automotive and cabinet industries.

In 2019 the opportunity presented itself for Ashley to begin her career in legal marketing. When she began working for lawyers as a side hustle, Ashley quickly realized the need for honest digital marketing services for law firms. As the side hustle grew, Ashley soon realized her passion and love for helping law firms grow through digital marketing. As the business grew, brainstorming began for what to call the business. Drawing inspiration from her love for golf and the rich history and level of excellence behind the term "The Green Jacket", the name "Green Cardigan" was born!

Since its inception, Green Cardigan Marketing has been hyper focused on helping law firm owners achieve their goals all while providing out of this world customer service. To date, Ashley and her team have worked with over 150 law firms across 37 states.

Michele S. Mirman, Esq.
Mirman, Markovits & Landau, P.C.
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New York, New York 10007
212-227-4000 | Mirman@MirmanLawyers.com

Biography

Michele S. Mirman, Esq., has been a practicing trial attorney for 47 years and is the founder and head of her own seven-attorney plaintiff's medical malpractice, personal injury and construction firm, Mirman, Markovits & Landau, P.C., which she established in 1991. She has represented over 10,000 New Yorkers in all manner of cases, including bullying, failure to protect from assaults and rapes, road design, subway, bus and car accidents, and general liability cases.

Ms. Mirman is a former President of the Brooklyn Women's Bar Association and the New York State Trial Lawyers Association and is the current President of the Brooklyn Women's Bar Association Foundation, which she helped found. She has lectured on trial tactics, running a firm, prosecuting personal injury cases, and women's medical malpractice cases.

Ms. Mirman has helped create scholarships for law school students through the Brooklyn Women's Bar Association Foundation and for college students through the Mirman Family Foundation. As a member of *AllinBklyn*, a Brooklyn women's giving circle, Ms. Mirman supports Brooklyn charities that provide training and jobs for Brooklynites, and for the past ten years, Ms. Mirman has been a trustee of the Lower East Side Tenement Museum, which celebrates the achievements and contributions that immigrants have made to our country. She is also the President of Bear Givers, Org., a non-profit that seeks to empower disabled children through art shows that they contribute to and through kindness programs that they participate in.

She is admitted to the bars of New York, New Jersey, California, Connecticut, Florida, Washington D.C., and the Federal Court of New Jersey, the Eastern and Southern Districts of New York, and the Supreme Court of the State of New York.

MATERIALS

ATTACHED MATERIAL:

"DIY Marketing Tips to Increase Your Firm's Online Presence"

"Law Firm Marketing That Works: How to Build a Strategy That Drives Real Growth"

New York State Unified Court System – Rules of Professional Conduct
Rule 1.1 Competence
Rule 8.4 (c)(e) and (h) Misconduct
Rule 7. Advertising

New York City Bar
Formal Opinion 2003-01: Lawyers' and Law Firms' Selection and Advertising of Internet Domain Names

The Association of The Bar of the City of New York – Committee on Professional Ethics
Formal Opinion 2015-7: Application of Attorney Advertising Rules to LinkedIn

New York City Bar
Commentary on New York's Ethics Rules Governing Lawyer Advertising and Solicitation

WEBINARS:

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DIY Marketing Tips to Increase Your Firm's Online Presence

Ashley Robinson – Green Cardigan Marketing

Green Cardigan Marketing.com

Outline

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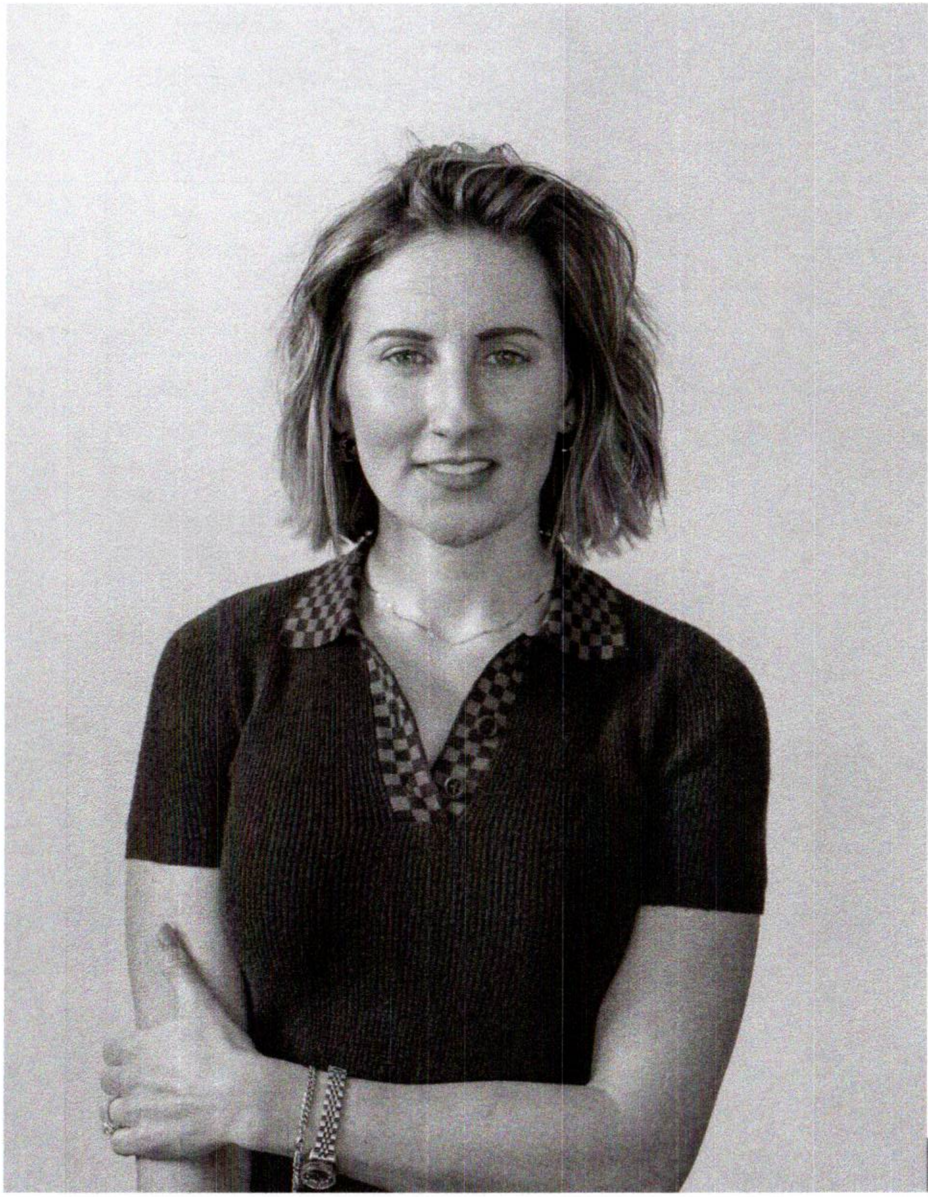
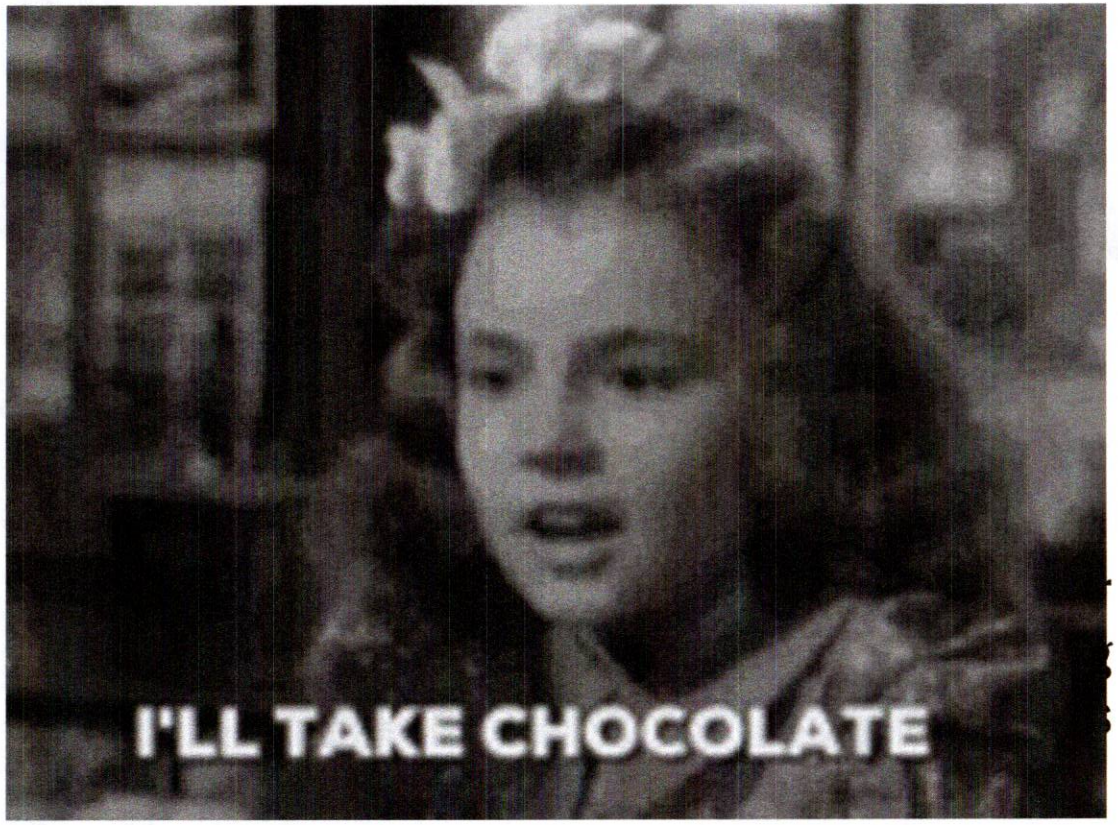
- Google Business Profile:
  - What is it & how to 'claim it'?
  - How to make it work for you?
    - 4 quick wins with your Google Business Profile
- Law Firm Website:
  - 3 features every law firm website must have:
    - SEO optimization
    - Mobile friendly
    - Strong & Unique Language




I'LL TAKE CHOCOLATE

Sweet Results!

✅ More leads

✅ Better Quality

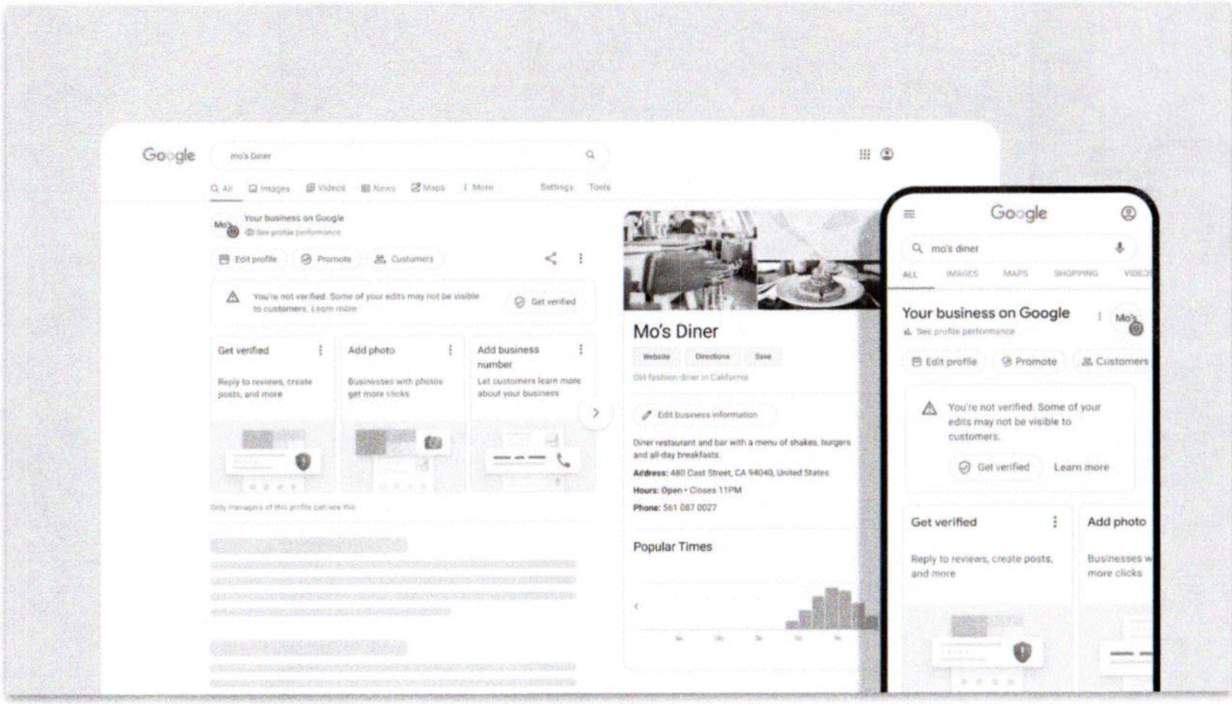
✅ Growth

Today's Focus:

- Tips and tricks to optimize your **Google Business Profile**
- **Top three** must-have features your law firm website needs to stand out

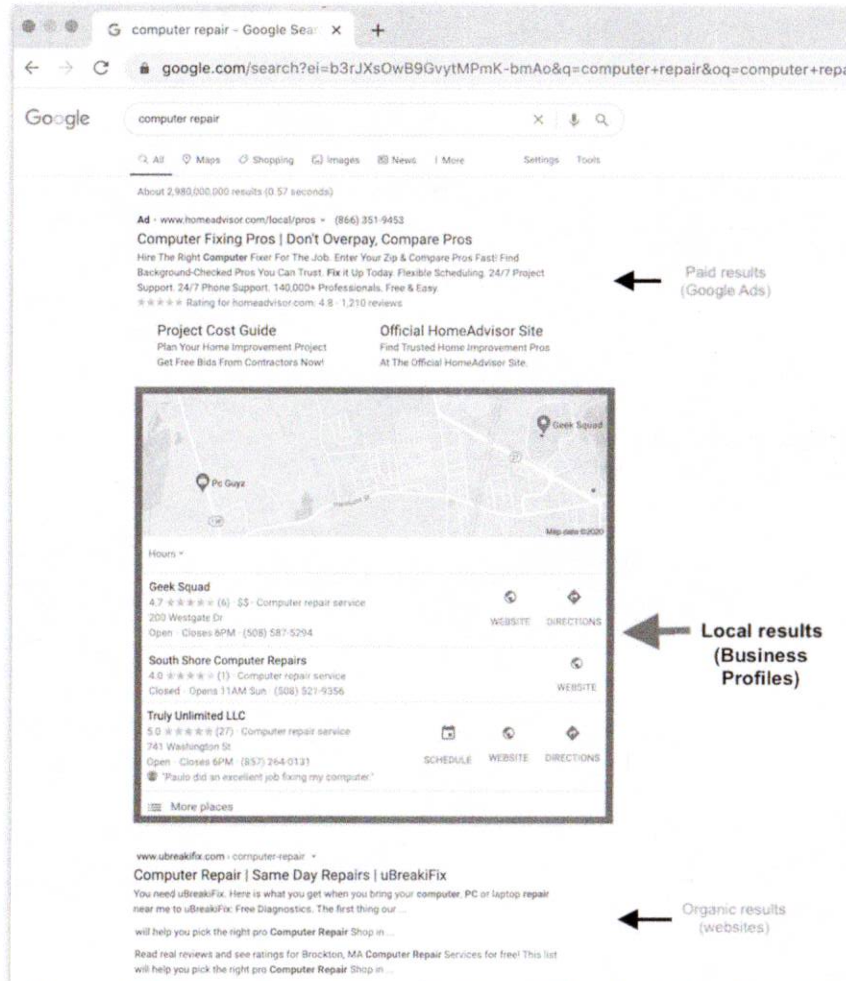
Google Business Profile

- What is it?



Google Business Profile

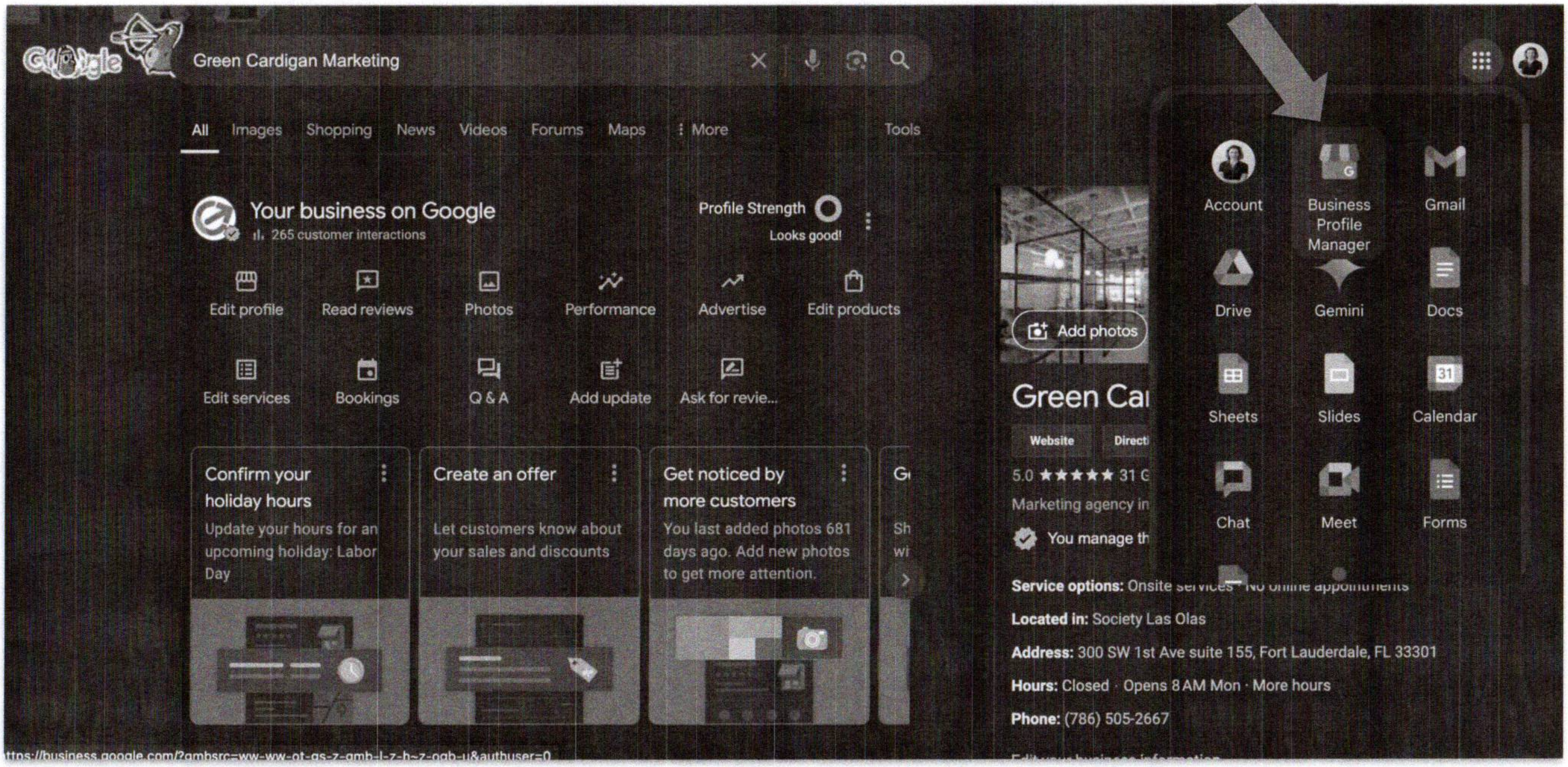
- ## What is it?
  - A **FREE** tool that helps businesses manage their online presence on Google Search and Maps.
    - Business name, Location, Contact details, Website, Opening hours, description, Email address, Physical address, Phone number, and Photos and videos.



Google Business Profile

- Do you need it?
- How do you claim or check to see if you have?

Google Business Profile



Tips and tricks to optimize your **Google Business Profile**

- Reviews! (Text links)
- Create posts
- Add social profiles
- Update on your phone (Google Maps app)

LINK

Google Business Profile

- Why is it important?
  - Local SEO
    - An up to date GBP is 2.7x more likely to be considered more reputable.
    - Gets 7x more clicks.
    - Is 70% more likely to attract location visits.
    - Is 50% more likely to lead to a purchase.

Google Business Profile Playlist

Your Firm's Website

Top three
must-have
features your law
firms website
needs to stand out

1. Your website should be **SEO optimized** (Search Engine Optimization)

- **What is SEO?** Process of optimizing a website to help it rank higher in search engines
- **Why does it matter?** Without it, your website cannot be found
- We must play Google's game!

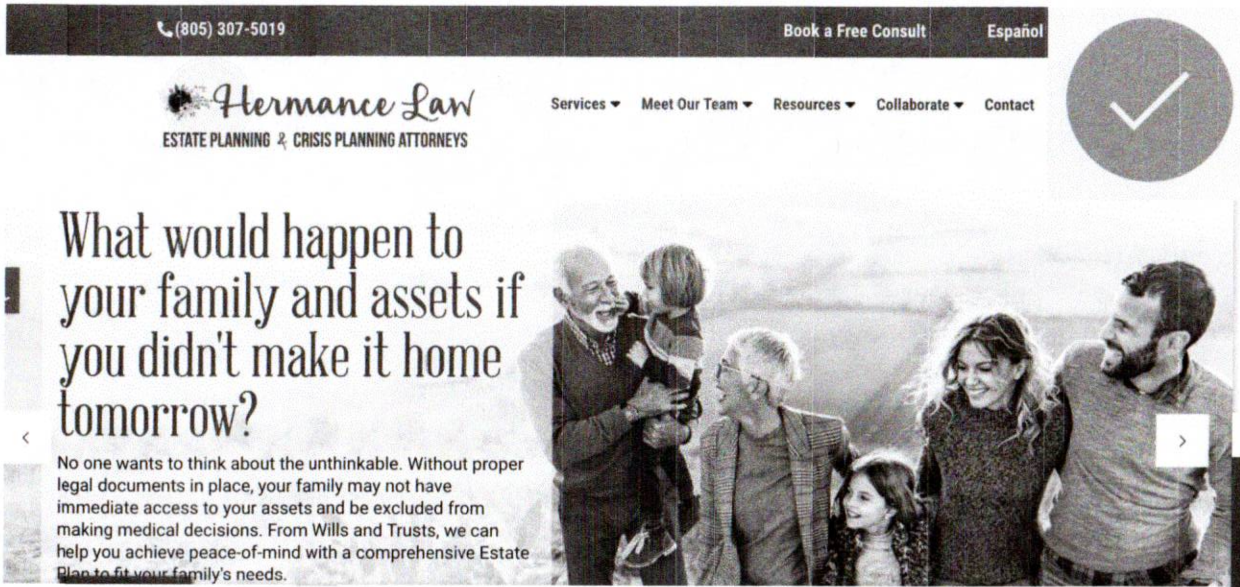
- Your practice area will determine how 'much' you need.
- You can audit your site using online tools to see how you rank in your market & against your competitors.
- Marathon NOT a Sprint
- Even if you are not trying to scale, you need it to maintain, pick the better of the leads, sale

2. Mobile first website

- **Why?** It is the only format Google considers.
  - Look at your website on your phone.
    - Does it look correct?
    - Do buttons work?
    - Are all text & images visible?

3. Strong & Unique language

- Speak to your clients (Direct Response)
  - 80% client focus / 20% your firm
- Why:
  - Increase conversions
  - Stand out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What would happen to your family and assets if you didn't make it home tomorrow?
No one wants to think about the unthinkable. Without proper legal documents in place, your family may not have immediate access to your assets and be excluded from making medical decisions. From Wills and Trusts, we can help you achieve peace-of-mind with a comprehensive Estate Plan to fit your family's needs.


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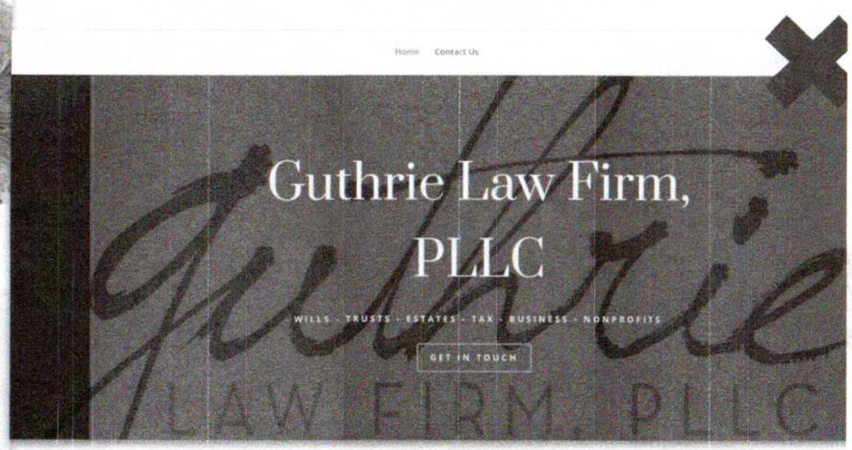
My goal is to use my extensive legal experience gained throughout many years of practicing law to provide honest and fair legal services. The success of RENIER HOTOPP LAW is built on my responsiveness to my clients and providing personalized legal services as though each client were a member of my family or a personal friend.
Reach out today
lindsay@therhlawoffice.com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FINAL THOUGHT

Marketing can be overwhelming. Take it one marketing channel and a time & ONLY if it will help grow your ideal client.

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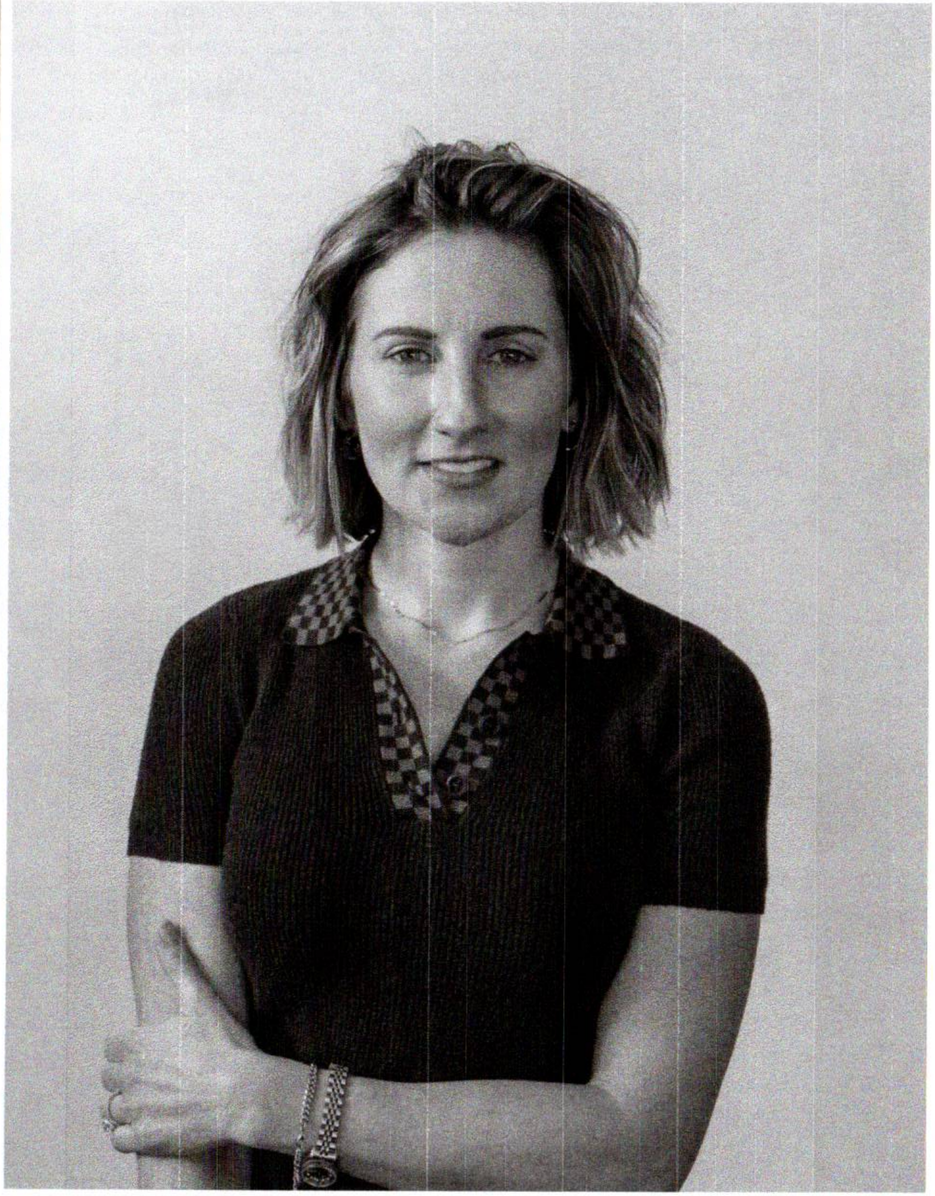
The Marketing Solution For Your Law Firm



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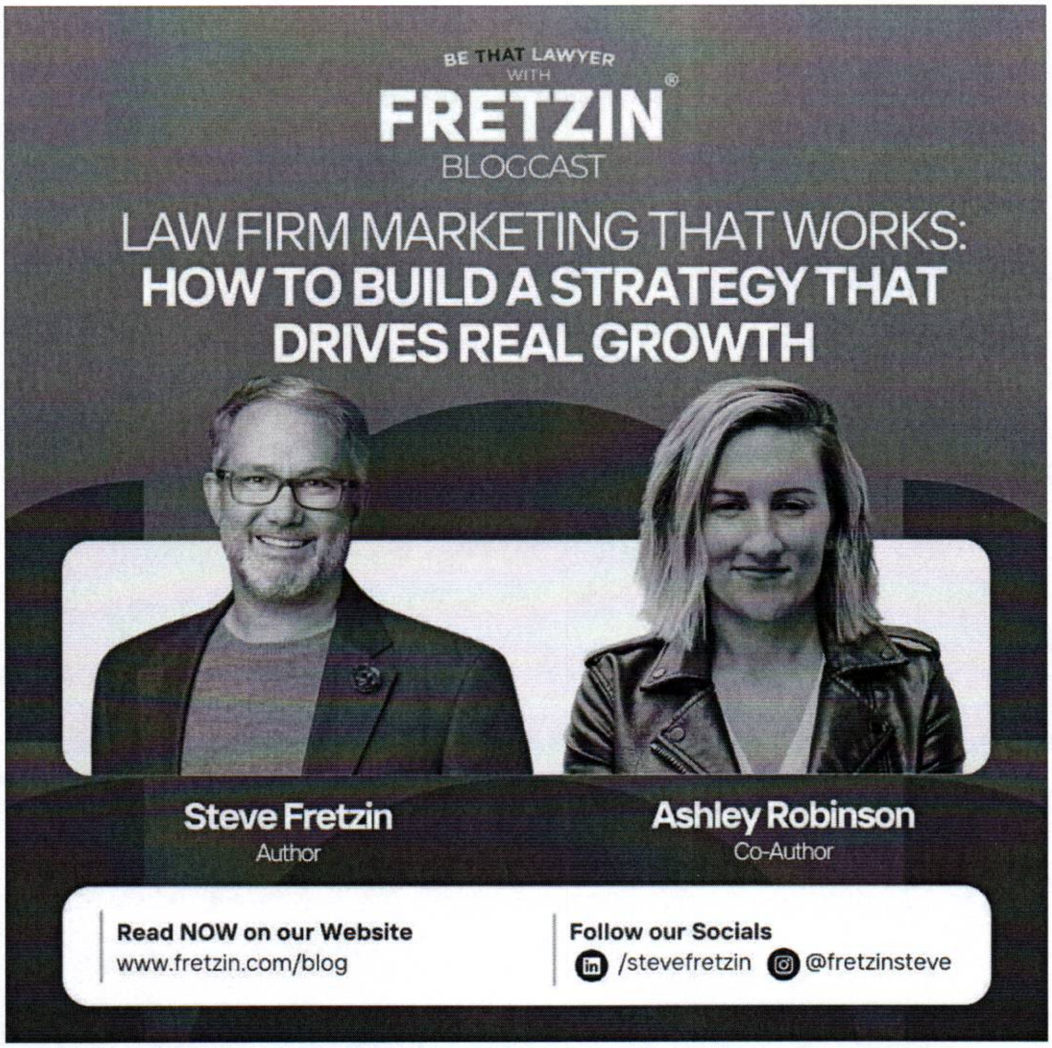
The Marketing Solution For Your Law Firm

Law Firm Marketing That Works: How to Build a Strategy That Drives Real Growth



By Steve Fretzin & Ashley Robinson

Law Firm Marketing That Works: How to Build a Strategy That Drives Real Growth

Marketing can feel like an overwhelming puzzle for many law firms. With so many options and voices claiming to have the right answers, it's easy to get lost in the chaos of "random acts of marketing," as Ashley Robinson, owner of Green Cardigan Marketing, aptly described it in our recent conversation. Ashley is a two-time guest on my podcast, and for good reason—her no-nonsense approach to marketing speaks directly to the challenges law firms face today.

Our conversation started with something that hits close to home for many lawyers: the struggle of trying to do everything without a clear strategy. Lawyers often invest in random marketing tactics—a blog post here, a paid ad there—without knowing if those actions actually lead to meaningful results. Ashley and I both agree that this lack of focus is where law firms waste time, money, and, ultimately, opportunities. Instead of approaching marketing with a well-thought-out strategy, many are simply reacting to trends, advice from peers, or the latest digital marketing fad.

One of the reasons Ashley's approach works so well is because it's rooted in intentionality. As she mentioned, the key to success in both life and business is living and working with purpose. Her motto, "Intentional days create a life on purpose," is one that I think resonates deeply, especially in the legal industry where time is a precious commodity. When you're intentional about your calendar, your goals, and your marketing efforts, you not only avoid burnout, but you also start to see real, measurable progress.

I've always believed that a successful business strategy starts with understanding your goals, and Ashley reinforced this. During her time in marketing, especially when she shifted from the automotive industry to law firm marketing, she recognized that most law firms simply don't have a marketing plan. They've been so focused on their legal work that the business side—especially marketing—gets neglected. They're brilliant attorneys, but running and growing a business requires a completely different set of skills, and that's where experts like Ashley come in.

What stood out during our discussion was how critical it is to tailor a law firm's marketing strategy to its specific needs and goals. Ashley's process begins with what she calls a "blueprint." This isn't just a metaphor—her team spends hours analyzing a firm's website, competition, and market position before ever recommending a single tactic. This kind of thoughtful approach is what separates successful marketing from the noise of random acts. As Ashley shared, it's not about doing everything; it's about doing the right things for your specific firm.

For example, one firm may benefit from local SEO optimization, while another might need to focus on targeted email marketing or social media engagement. The solution isn't one-size-fits-all. Ashley emphasized the importance of asking tough questions before diving into any marketing initiatives. What are your revenue goals? What does your ideal client look like? What's your average case value? These are critical details that should drive any marketing strategy, yet many law firms don't take the time to address them before spending thousands of dollars on advertising that doesn't convert.

Another key point from our conversation was the importance of tracking and measuring results. Too often, law firms invest in marketing but have no idea whether their efforts are paying off. That's where frustration sets in, and many lawyers give up, thinking "marketing doesn't work." But, as Ashley pointed out, marketing can be tracked and measured just like business development. Whether it's tracking how many calls come in from a particular ad campaign or monitoring conversions on a website, the data is there—you just need to use it. And, just like I coach my clients to track their business development success through metrics, marketing works the same way. Without data, you're flying blind.

We also touched on the importance of speaking directly to your clients' pain points. Too often, law firm websites focus solely on the lawyer—highlighting accolades, credentials, and awards. While that can be important, what really converts visitors into clients is a website that speaks to their fears, concerns, and needs. Are they worried about losing custody of their children? Are they unsure about the financial impact of a divorce? Addressing these specific concerns on your website is what compels potential clients to take action. It's not enough to say you're a great lawyer—you need to show clients that you understand their problems and have the solutions.

By the end of our conversation, it was clear that marketing done right is a game-changer for law firms. It's not about doing everything; it's about doing the right things in the right way. Whether it's revamping your website, refining your SEO, or investing in targeted ads, the first step is creating a strategic plan that aligns with your goals. And that starts with understanding your firm, your market, and your clients at a deeper level.

If you're a law firm looking to grow, the key takeaway here is simple: don't rely on random acts of marketing. Build a thoughtful, data-driven strategy that fits your firm's unique needs and goals. By doing so, you can avoid the frustrations of wasted time and money and focus on what really matters—growing your business and helping your clients.

For more information about taking your law practice to the next level, please email me directly at steve@fretzin.com.

Steve Fretzin, an expert at legal business development, is the author of four books regarding the topic and is the host of the Be That Lawyer podcast. He has helped hundreds of attorneys across the world dramatically grow their book of business while living a well-balanced life. He can be reached at steve@fretzin.com.

Ready to grow?

rest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.1:
COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4:
MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5:
DISCIPLINARY AUTHORITY AND CHOICE OF LAW

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

RULE 7.1:
ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

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

(c) An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own web site or other internet presence; or

(2) meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

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

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

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

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

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

RULE 7.2:
PAYMENT FOR REFERRALS

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and

other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

RULE 7.3:

Solicitation and Recommendation of Professional Employment

(a) A lawyer shall not engage in solicitation:

(1) 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 existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated 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.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4:
IDENTIFICATION OF PRACTICE AND SPECIALTY

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law;"

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

RULE 7.5:

PROFESSIONAL NOTICES, LETTERHEADS AND SIGNS

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1:
CANDOR IN THE BAR ADMISSION PROCESS

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2:
JUDICIAL OFFICERS AND CANDIDATES

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3:
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6;

NEW YORK
CITY BAR

COMMITTEE REPORTS

Formal Opinion 2003-01: Lawyers' and Law Firms' Selection and Advertising of Internet Domain Names

Date
October 20, 2010

TOPIC: Lawyers' and law firms' selection and advertising of internet domain names.

DIGEST: A lawyer or law firm may use a domain name that does not include or embody the firm's name or that of any individual lawyer, under certain conditions: the web site bearing the domain name must clearly and conspicuously identify the actual law firm name; the domain name must not be false, deceptive or misleading; the name must not imply any special expertise or competence, or suggest a particular result; and, it must not be used in advertising as a substitute identifier of the firm.

CODE: DR 2-102(B); DR 2-101

QUESTIONS:

In choosing a domain name, is a lawyer obligated to follow the rules applicable to the selection of law firm names, thus requiring the domain name to comprise some variation of the law firm's name? If a domain name may under certain circumstances not include the law firm name, may the law firm ethically advertise its services by reference to its domain name rather than its firm name?

OPINION:

The Committee has received an inquiry regarding the selection of Internet domain names for lawyers and law firms, and the corresponding use of such domain names in advertising the services offered by such lawyers and firms. This inquiry raises two questions of general significance to the bar: First, in choosing a domain name, is a lawyer obligated to follow the rules applicable to the selection of law firm names, thus requiring the domain name to comprise some variation of the law firm's name? Second, if a domain name may under certain circumstances not include the law firm name, may the law firm ethically advertise its services by reference to its domain name rather than its firm name?

The Committee addresses these areas in the following factual context: A law firm primarily engages in the representation of personal injury plaintiffs. The law firm's name consists of the names of three of its partners and complies with the requirements of DR 2-102(B) relating to law firm names. However, in considering its advertising and marketing activities, the firm believes that it can achieve better results if it is able to establish a web site using as its domain name a generic name or phrase that contains the word "attorney" or "lawyer." (Examples of such an identifier might include phrases such as "Dial-a-lawyer" or "New York Lawyer"). The firm has, accordingly, set up a web site that does not include its lawyers' names as part of the domain name, but instead includes the generic name or phrase followed by ".com." The firm also wishes to advertise on television and radio using the domain name as its primary identifier and to include client testimonials alluding to the domain name rather than the name of the firm or any of its lawyers.

1. Law Firm or Attorney Domain Names

New York forbids a law firm or legal clinic from practicing under a trade name or other name that does not convey the identity of one or more of the lawyers practicing. DR 2-102(B) states in pertinent part:

> "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one of more of the lawyers in the firm ..." 1

Similarly, EC 2-11 states that "The name under which a lawyer practices may be a factor in the [lawyer] selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder."

Numerous opinions from New York have prohibited a law firm from identifying itself by a trade name because of the likelihood of confusion as to the identity and composition of the firm. SeeN.Y. City 95-8 (prohibiting trade name based on firm's location; "the Code on its face prohibits all forms of trade names, and opinions construing the Code have applied that prohibition to locational trade names as well as other types of trade names."); N.Y. City 82-44 (improper to engage in a law practice under the name "The 777 Lawyers Group"); N.Y. State Bar Op. 709 (operating proposed law practice under trade name "The Trademark Store" is impermissible);In re Shephard, 459 N.Y.S.2d 632, 633 (3rd Dep't1983) (finding "The Peoples Law Firm" was a prohibited trade name); In re Shapiro, 455 N.Y.S. 2d 604, 605 (1st Dep't 1982) (finding "Peoples Legal Clinic, Inc." was a prohibited trade name).

The threshold issue presented here is whether a law firm otherwise compliant with the rules of DR 2-102(B) can establish a domain name that does not include the names of one or more lawyers, but instead uses a "trade name" or other terminology. There are no reported New York ethics opinions on this subject.

Two states, Arizona and Ohio, have issued opinions stating that domain names are not subject to the same regulation or scrutiny as a firm name and are permissible unless they are false or misleading. See Ohio 99-4; Arizona 97-04. In the Ohio opinion, the ethics panel concluded that domain names were governed by the general rules for lawyer advertising and, while it was preferable to use the firm name as a domain name, it is "not improper for an attorney to use letters, words or numbers provided that the domain name is not a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement." Nor can the domain name be permitted to "imply special competence or experience." The Arizona State Bar opinion agreed that domain names were subject to the general advertising rules against false or misleading communications, and concluded that: (1) a law firm's use of "countybar.com" was misleading because it falsely implied an affiliation with the county bar association; and (2) the designation "arizonalawyer.org" was misleading because the top level domain name ".org" falsely indicated that the firm was a non-profit organization.

The Committee notes that many New York lawyers and law firms have established domain names that closely track the firm name. We also note the risk that permitting domain names that do not include any reference to the name under which the firm practices might in some cases cause some initial confusion among visitors to a web site. However, the Committee believes that the mere designation of a domain name does not mean that the firm or lawyer is "practicing" law under that name; accordingly, DR 2-102(B)'s strictures on law firm names should not apply and, instead, the selection of a domain name is more appropriately governed by the ethical rules and considerations affecting legal advertising and publicity. See DR 2-101. In so concluding, we specifically do not address the First Amendment and other legal issues that may affect attorney advertising, solicitation of business and professional designations because these issues are beyond the scope of this Committee's jurisdiction.

As a matter of legal ethics, we conclude that a lawyer or firm may employ a domain name that does not include the names of lawyers under the following conditions:

(1) The web site clearly and conspicuously includes the actual name of the law firm and the law firm in no way attempts to engage in the practice of law using the domain name. At a minimum, the web site must clearly present information including the law firm's name, office address and the telephone number of the attorney or law firm (DR 2-101(K));

(2) The domain name complies with DR 2-101(A), which forbids "any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading."

(3) The domain name does not imply any special expertise or competence, or suggest a particular result. In this regard, we note the abundance of existing law firm domain names accessible on the Internet that would appear to violate this requirement, e.g., "bigverdict.com" and "bigjudgment.com." In addition, although New York's Code includes no specific prohibition on puffery or statements that cannot be objectively verified, we believe names that seek to promote the lawyer's skill or talent may be considered misleading,e.g., "bestlawyer.com," "greatattorney.com," and "personalinjuryexpert.com."

2. Use of Domain Names in Advertising

Having concluded that it is permissible under certain circumstances for a law firm or lawyer to employ a domain name that does not embody the name of the firm or its lawyers, we believe this domain name may be publicized in advertising so long as the domain name is used to identify a web site rather than as a substitute identifier for the firm. Thus, assuming the law firm was authorized to use the "NewYorklawyer.com" domain name, it would be permissible to refer to that domain name for the purpose of directing readers or listeners to the firm's web site, but it would not be permissible to refer to the services offered by "NewYork lawyer" or otherwise to replace the law firm's name with its domain name in describing itself, its services or its personnel.

Similarly, a lawyer or law firm may use bonafide, non-misleading client testimonials in advertising provided the clients do not use the domain name as a sobriquet or substitute for the firm's name. It would presumably be ethical for the client to identify the domain name as a means to learn more about the firm.

Conclusion

As set forth above, we conclude that it is ethical under certain circumstances for a lawyer or law firm to employ a domain name that does not include or embody the firm's name or that of any individual lawyer. However, we caution that domain names may not be used as a substitute identifier for the law firm and must comply with the strictures of DR 2-101 as applied to legal advertisements generally.

Issued: May, 2003

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2015-7: APPLICATION OF ATTORNEY ADVERTISING RULES TO LINKEDIN

TOPIC: Attorney Advertising and LinkedIn

DIGEST: An attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the *primary* purpose of attracting paying clients. For example, including a list of "Skills," a description of one's practice areas, or displaying "Endorsements" or "Recommendations," without more, does not constitute attorney advertising.

If an attorney's individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

RULES: 1.0(a), 7.1, 7.4, 7.5, 8.4(c)

QUESTIONS:

1. Under what circumstances does an attorney's LinkedIn profile or other content constitute an attorney advertising?

2. If an attorney's LinkedIn profile or other content on LinkedIn constitutes an attorney advertisement, what obligations do the Rules of Professional Conduct impose on the lawyer?

OPINION:

I. Introduction

As social networking sites grow in popularity, lawyers have struggled to apply the regulations that govern attorney conduct to the realm of social media. Rules that were created in the analog age defy easy extension to the digital world and, in particular, to social media content. Ethics committees tasked with providing guidance on these issues find themselves straining to force fit the proverbial square peg of social media into the round hole of legal ethics – with varying degrees of success. In addition, due to the pace of technological change, bar regulators may be reluctant to amend ethics rules to incorporate social media use, out of a legitimate concern that any such rules may become obsolete as social media platforms develop and change.

These challenges are particularly acute when trying to apply the attorney advertising rules to social media use. Before the advent of the Internet, attorneys who advertised their legal services were limited to fairly traditional forms of advertising, such as newspaper or yellow pages ads, television commercials, and billboards. Some attorneys and law firms eschewed these forms of advertising, preferring to rely instead on professional networking, reputation building, and word-of-mouth to develop business. Today, however, the Internet has expanded the opportunities for lawyers to grow their professional networks and to promote themselves to a broader group of potential clients and referral sources. Even attorneys who never considered using traditional advertising platforms are exploring Internet-based marketing options. The most basic form of Internet-based marketing is, of course, the traditional law firm website – a relatively static form of online communication. But attorneys and law firms are also turning to more dynamic and interactive platforms, such as blogs, Twitter accounts, or Facebook pages. But, by far the most popular online networking and marketing tool for individual attorneys over the past few years has been LinkedIn. According to the ABA's 2014 Legal Technology Survey Report, of the lawyers and law firms that responded, 99% of large firms, 97% of mid-sized firms, 94% of small firms and 93% of solos have a LinkedIn profile. LinkedIn was the most downloaded general business app among lawyers in 2014 and 2015, according to the ABA Legal Technology Survey Reports for both years.

The growing popularity of LinkedIn and other social media platforms has raised many questions about the ethical implications of using these platforms as networking, marketing and advertising tools. These questions can be divided into two general categories. First, what type of social media content constitutes attorney advertising? Second, if certain social media content constitutes attorney advertising, what must attorneys do to comply with the advertising regulations concerning such content? This Opinion attempts to answer these questions with respect to LinkedIn profiles and other LinkedIn content.[1]

[1] Although this Opinion focuses on LinkedIn, many of the principles may be applicable to other social networking sites.

II. <u>The Rules Governing Attorney Advertising</u>

A. What Is – and Is Not – Attorney Advertising?

Rule 1.0(a) of the New York Rules of Professional Conduct (the "Rules" or the "New York Rules") defines an "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The definition of advertisement contains an explicit exclusion: "It does not include communications to existing clients or other lawyers."

The comments to Rule 7.1 (the main rule that governs attorney advertising) provide more specific guidance regarding the scope of the term "advertisement." For example, Comment [6] makes clear that '[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising." For a communication to fall within the definition of "advertisement," its "primary purpose" must be for "retention of the lawyer or law firm for pecuniary gain." R. 7.1, Cmt. [6]. Thus, the fact that a communication contains certain information that might also appear in an advertisement does not necessarily make that communication an advertisement. *See also* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated*, 1734 (2015 ed.) (explaining that a law firm's right under Rule 7.4(a) to "publicly identify" its "practice areas" applies not only to "advertisements" but to "statements that fall outside Rule 1.0(a)'s definition of 'advertisement'"). In other words, the content of a communication, alone, does not necessarily make it an "advertisement." One must also consider the attorney's primary purpose in making the communication, as well as its intended recipients.

The definition of an "advertisement" has certain limitations and exclusions. As noted above, it excludes communications with other lawyers and existing clients. For the purposes of the advertising rules, the term "existing client" is "interpreted more broadly" than the term "current client" in the context of the conflict of interest rules. R. 7.1, Cmt. [6]. In addition, although not specified in the Rules, "[c]ommunications to former clients that are germane to the earlier representation are not considered to be advertising." R. 7.1, Cmt. [7]. Further, communications with a potential client "who has expressed interest in, and requested information about, a lawyer's services, are not advertising." *Id.* Thus, the restrictions on advertising do "not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention." *Id.*

In this era of content marketing, the application of the attorney advertising rules to public speaking, blogging and other educational or publishing endeavors is particularly relevant. Rule 7.1(r) provides that: "without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice." Further, a "lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services." Rule 7.1(q). Comment [7] explains that "[t]opical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising." Further, 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." R. 7.1, Cmt. [9].

On the other hand, an educational "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." *Id.* Likewise, "a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising." R. 7.1, Cmt. [7]. Moreover, the "circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising *if the lawyer's primary purpose is to obtain retentions*." R. 7.1, Cmt. [8] (emphasis added). The comments also make clear that communications to other lawyers in "bar association publications and other publications targeted primarily at lawyers" are not attorney advertising, "even if their purpose is the retention of the lawyer or law firm." R. 7.1, Cmt. [7]. This is because, as noted above, communications with lawyers are expressly excluded from the definition of "advertisement."

The line between attorney advertising and general marketing or branding is also discussed in the comments. Comment [8] explains that "[s]ome communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact information printed on them do not constitute 'advertisements' within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter." *See also* Rule 7.1, Cmt. [10] (law firm sponsoring not-for-profit event may disseminate name of the law firm, contact information, brief description of areas of practice and the fact of sponsorship of the event); NYSBA Ethics Op. 848 (2010) ("As with general marketing materials (such as pencils, pads, and T-shirts), stating the firm's name, logo and contact information does not change attorney communications into advertising under the Rules "if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular matter.") (quoting Rule 7.1, Cmt. [8]).

B. Regulations That Apply to Attorney Advertising

Assuming a communication falls within the definition of an "advertisement," it is subject to numerous regulations. These regulations fall into three general categories: content-based regulations, legibility requirements, and procedural requirements. Although it would be impossible to discuss all of these categories in detail in one opinion, we have attempted to provide a helpful summary.

1. Content-Based Regulations:

The content-based regulations can be divided into four subcategories: (1) prohibited content (information that *must not* be included in the advertisement); (2) permitted content (information that *may* be included); (3) conditional content (information that *may* be included, provided it meets certain conditions and/or is accompanied by certain disclaimers); and (4) mandatory content (information that *must* be included in some or all advertisements). Below are some examples from each of these categories. These examples are not exhaustive, and attorneys should review Rules 7.1, 7.4 and 7.5 to familiarize themselves with the different types of content-based regulations.

a. Prohibited Content:

The cornerstone of New York's attorney advertising rules is the prohibition against statements that are "false, deceptive or misleading." R. 7.1(a)(1). In fact, some have argued that it is the only advertising rule we need. *See* APRL, *2015 Report of the Regulation of Lawyer Advertising Committee* (June 22, 2015), available at https://aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf (proposing to replace all existing advertising rules with a single rule prohibiting lawyers from making "false or misleading communications about the lawyer or the lawyer's services"). All of the other advertising rules are ostensibly in service of this paramount policy goal of ensuring that attorney advertisements are free from misrepresentations.[2] Other prohibited content includes:

- Content that would violate any New York Rule of Professional Conduct (R. 7.1(a)(2));[3]
- Portrayals of fictitious law firms, the use of fictitious names to refer to lawyers not associated in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case (R. 7.1(c)(2));
- Advertisements that "resemble legal documents" (R. 7.1(c)(4));
- Use of "meta-tags or other hidden computer codes that, if displayed, would violate [the] Rules" (R. 7.1(g)); and
- The use of a law firm name that is either a "trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm," except for "deceased or retired members of the firm or of a predecessor firm" (R. 7.5(b)).[4]

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[2] For example, the requirement to include "Attorney Advertising" on certain types of advertisements is intended to ensure the public is not misled, particularly when it is not clear from the format of the communication that it is an advertisement. *See* R. 7.1, Cmt. [5] ("The 'Attorney Advertising' label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers.").

[3] This includes content that would be considered a prohibited solicitation in violation of Rule 7.3. While this Opinion addresses LinkedIn content in the context of attorney advertising, we are not opining on whether any LinkedIn content also constitutes solicitation under Rule 7.3. Attorneys should review Rule 7.3 and its Comments to ensure that their communications on LinkedIn also comply with the solicitation rules.

[4] It should be noted that Rule 7.5 (which governs "professional notices, letterheads, and signs") is not exclusively an advertising rule. It applies to all such forms of communication by lawyers, whether or not they fall within Rule 1.0(a)'s definition of an "advertisement."

b. Permitted Content:

The advertising rules identify certain content that lawyers are permitted to include in their advertisements. The list of permitted content is extensive, but by no means exhaustive. Lawyers may include other information in their advertisements that is *not* expressly identified as permitted content, provided of course that the information is neither misleading nor otherwise violates a Rule. Perhaps the most important category of permitted content is the listing of practice areas, which is permitted by Rules 7.1(b)(1) and 7.4(a). Rule 7.1(b)(1) (which governs the listing of practice areas in "advertisements,") provides, *inter alia*, that "an advertisement may include information as to . . . areas of law in which the lawyer or law firm practices, as authorized by these Rules." Rule 7.4(a) (which governs the listing of practice areas in *any* public communication – not just advertisements) states that:

> A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).[5]

Other information expressly permitted, but not required, by the advertising rules includes, but is not limited to:

- Legal and nonlegal education, degrees and scholastic distinctions (R. 7.1(b)(1));
- Dates of admission to any bar (*id.*);
- Public offices or teaching positions (*id.*);
- Lists of law-related publications authored by the lawyer (*id.*);
- Memberships in bar associations or other professional associations, including committees (*id.*);
- Foreign language fluency (id.);
- Bona fide professional ratings (*id.*);
- Names of clients regularly represented, provided the client gives prior written consent (R. 7.1(b)(2));

[5] This opinion will not discuss in detail the limitations on the use of the term "specialist" or "specializes" except for the following observations. First, those limitations apply regardless of whether the communication constitutes an "advertisement." Thus, New York attorneys should avoid using those terms in their LinkedIn profiles or elsewhere except as permitted by Rule 7.4(c). Second, we agree with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading "Skills" or "Experience" does not "constitute a claim to be a specialist under Rule 7.4." We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that "a lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included." NYSBA 2015 Social Media Guidelines, at 7-8.

- Financial and credit information, such as bank references, credit arrangements accepted, prepaid or group legal services programs in which the lawyer participates (R. 7.1(b)(3));
- Nonlegal services provided (*id.*);
- The existence of contractual relationships between the lawyer and any nonlegal service providers (*id.*).

c. Conditional Content:

There are a number of statements that attorneys may include in their advertisements, provided they comply with certain conditions. The conditions vary, depending on the type of statement or information at issue. Several of these conditional statements are expressly identified in Rules 7.1(d) and (e). Rule 7.1(d) permits lawyers to make certain types of comparative and qualitative statements in their advertisements, provided they comply with the conditions set forth in Rule 7.1(e). These permitted statements include:

- Statements that are reasonably likely to create an expectation about the results the lawyer can achieve;
- Statements that compare the lawyer's services to other lawyers' services;
- Testimonials or endorsements of current or former clients; and
- Statements describing or characterizing the quality of the lawyer's or law firm's services.

Under Rule 7.1(e), the following conditions must be met before the statements listed above may be included in an advertisement:

- The statements are neither misleading nor violate any other Rule;
- The statements can be factually supported on the date the advertisement is disseminated;
- The statements are accompanied by the disclaimer: "Prior results do not guarantee a similar outcome" in a manner that is "clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud." R. 7.1(i); and
- The client gives written informed consent to any testimonial or endorsement.

Other permissible conditional statements are not expressly identified in the Rules and require the lawyer to cross-reference different Rules or subsections. For example, Rule 7.1(b)(4) permits lawyers to advertise various types of fee arrangements. However, several other subsections of Rule 7.1 place numerous conditions on such advertisements. *See, e.g.*, Rules 7.1(j) (conditions on advertising fixed fee arrangements); 7.1(l) (conditions on advertising a range of fees, hourly rates for services, or fixed fees); 7.1(m) & (n) (requirement to be bound by advertised fee for period of time); 7.1(p) (requirement to comply with N.Y. Jud. Law 488(3)).

d. Mandatory Content:

Certain information must be included in some or all attorney advertisements. All advertisements, for example, must "include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered."[6] R. 7.1(h). Some, but not all, advertisements must "be labeled 'Attorney Advertising' on the first page, or on the home page in the case of a website" [R. 7.1(f)], in a manner that is "clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud." R. 7.1(i).

2. Legibility Requirements:

Several rules are designed to ensure that required disclaimers and labels are intelligible to the public. For example, Rule 7.1(i) states that "[a]ny words or statements required by [Rule 7.1] to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud." Further, "[i]n the case of a website, the required words or statements [must] appear on the home page." Thus, the disclaimer required by Rule 7.1(e) and the label "Attorney Advertising" required by Rule 7.1(f) must comply with these formatting requirements.

Similarly, Rule 7.4(c)(2) provides that the following required disclaimer language must be "prominently made" when an attorney states that she is "certified as a specialist" in another jurisdiction: "This certification is not granted by any governmental authority within the State of New York." Rule 7.4(c)(3), which became effective in 2014, explains that "prominently made" means that the advertisement (if in writing) must be "clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification" and (if spoken aloud) must be "intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification."

3. Procedural Requirements:

Lawyer advertisements are also subject to certain procedural requirements. For example:

- All advertisements must be "pre-approved by the lawyer or law firm" (R. 7.1(k));
- A copy of all advertisements must be retained for at least three years following initial dissemination, except for "computer-accessed communications" (*id.*);
- Computer-accessed communications must be retained for at least one year (*id.*);
- The contents of any website that qualifies as an "advertisement" must be "preserved upon the initial publication of the website, any major website redesign,

[6] For lawyers who operate "virtual" law practices, the street address of a shared office space or even a website address may fulfill the "principal law office address" requirement. *See* NYCBA Formal Op. 2014-2 (2014) (permitting lawyers to use the street address of a shared "virtual" office space); N.Y. State Op. 1025 (2014) (permitting lawyers to use a website address as their "principal law office address").

or a meaningful and extensive content change, but in no event less frequently than once every 90 days" (*id.*); and

- A lawyer is not permitted to "compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item" (R. 7.1(o)).[7]

III. <u>Description of LinkedIn</u>

A. LinkedIn Profiles

LinkedIn is an on-line professional networking platform, which allows users to register for a free account, upload a photograph, and set up a professional profile.[8] LinkedIn profiles are organized into "sections," which users can customize in a variety of ways by adding, removing, editing and reordering the sections on their profiles. Some of the most commonly used sections are "Summary," "Experience," "Education," and "Skills & Endorsements," but other optional sections include "Honors & Awards," "Volunteering Experience," "Posts," "Publications," "Recommendations," and more. Even the most basic LinkedIn profiles generally include the attorney's current employment information, at least some recent employment history, and educational background.

The "Summary" section is the most versatile section of the profile, because it is a basic text box that the user can fill with as much detail as she wants. Many attorneys use this section to describe their practice areas, important professional affiliations, such as committee memberships or chairmanships, professional successes or representative cases, and other information similar to that which might be included on a law firm website.

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[7] Of course, a lawyer may pay "for advertising and communications permitted by [the] Rules" and "may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, marketing personnel and web site designers." R. 7.2, Cmt. [1].

[8] This Opinion contains a description of LinkedIn and its main features as of the publication date. This Opinion addresses only *individual* LinkedIn profiles and not LinkedIn pages created for a company. As with any social media platform, LinkedIn's features and terminology can change at any time. In addition to the free version, LinkedIn offers a paid "premium" version, but most individual attorneys do not use this option. LinkedIn also offers additional features, such as job listings, paid advertising and marketing solutions, and online courses, and will likely continue to add and remove features as the platform develops. This opinion does not specifically address the premium version or these additional features, except to note that merely paying for additional features, including advertising and marketing solutions, does not, by itself, convert a communication on LinkedIn into an "advertisement." The communication must still meet the definition of an "advertisement" under the Rules.

B. LinkedIn "Connections" and "Groups"

Once the user has set up her profile, she can connect with other existing LinkedIn users or invite her personal or professional contacts to join LinkedIn and connect with her. These individuals are referred to as "Connections" on LinkedIn. There are several tools that assist users to find potential Connections on LinkedIn. For example, LinkedIn has an algorithm that allows it to identify and suggest people the user may know on LinkedIn. LinkedIn users can run searches for people they know on LinkedIn, using either the basic search box or an "advanced" search function. They can send individual connection requests to the email addresses of their contacts, or import their contact lists into LinkedIn and send bulk requests. This latter function should be used with extreme caution, to ensure the user does not inadvertently send connection requests to their entire contact list.

LinkedIn users can also join "Groups" that are organized around a range of affiliations, including educational institutions, professional organizations or associations, and personal or professional interests. For example, an Intellectual Property attorney may choose to join three different LinkedIn Groups comprised of law school alumnae, members of a national copyright society, and lawyers interested in combating international human rights abuses. LinkedIn users can join existing Groups or they can start and manage their own Groups.

C. "Skills and Endorsements" and "Recommendations"

Two significant features of LinkedIn for the purposes of this Opinion are "Skills and Endorsements" and "Recommendations." The "Skills and Endorsements" feature allows LinkedIn users to endorse each other for up to fifty Skills, through a quick, one-click process. LinkedIn has a function that displays suggestions for endorsing other users for particular Skills. Since it is easy to click the endorsement button without much thought, this feature can result in users being endorsed for Skills in which they have little or no experience. LinkedIn users can opt out of being suggested for Endorsements, by selecting that option on their LinkedIn profile. LinkedIn users can customize their list of Skills by adding those that more accurately reflect their practice areas and experience or deleting those that are irrelevant or misleading. Users can also "hide" Endorsements if they feel they do not accurately reflect their skill sets or the endorsers do not have a factual basis to make the endorsement. Users can opt out of "Skills and Endorsements" completely by selecting that option under their LinkedIn profiles.

"Recommendations" is a feature that allows LinkedIn users to write comments or reviews about other LinkedIn members. Recommendations can be displayed on the user's profile or can be hidden. A Recommendation can be withdrawn or edited by the writer at any time. Users can ask for Recommendations by sending a request to other LinkedIn members.

D. Interacting on LinkedIn

LinkedIn users may share information and interact with each other in a variety of ways, including:

- Inviting LinkedIn members to connect, provided you have their email address;

- Sending a private message to one of your LinkedIn Connections (similar to email or instant message);
- Requesting that one of your LinkedIn Connections introduce you to one of their Connections;
- Posting a status update or photograph to the timeline;
- Liking, sharing, or commenting on another user's status update;
- Publishing articles or blog posts using LinkedIn's publishing feature (currently called "Pulse");
- Posting messages, links or information in a LinkedIn Group and interacting with other members of the Group;
- Endorsing the Skills of other LinkedIn users; and
- Writing or requesting "Recommendations" from other LinkedIn users.

E. Privacy Controls on LinkedIn

LinkedIn has multiple privacy and notification settings, which can be customized in a variety of ways. Although it would be impossible for this Opinion to cover all of these, the following is a list of the most relevant privacy options:

- Visibility of LinkedIn profile: Users can choose whether to display their LinkedIn profile – or particular sections and elements of their profile – to members of the public or limit visibility of their profile to other members of LinkedIn;
- Visibility of connections: Users can select whether their list of Connections is visible to other connections;
- Visibility of activity feed: Users can choose whether the actions they perform on LinkedIn can be seen by all LinkedIn users or only Connections;
- Visibility of profile views: Users can choose what someone sees when viewing their profiles;
- Following updates: Users can select whether their status updates can be followed by all LinkedIn users or only Connections; and
- Blocking: Users can block other LinkedIn members from viewing their profiles.

IV. <u>Applying the Definition of Attorney Advertising to LinkedIn</u>

For an attorney's LinkedIn profile or other content to be subject to the advertising regulations, it must fit within the definition of an "Advertisement" and it must not be subject to any exceptions or exclusions from that definition. Accordingly, to constitute advertising, the LinkedIn content must meet all five of the following criteria: (a) it must be made by or on behalf of the lawyer; (b) its primary purpose must be for the retention of the lawyer by new clients for pecuniary gain; (b) the LinkedIn content must relate to the legal services offered by the lawyer; (c) its intended audience must be potential new clients; and (d) the LinkedIn content must not fall within a recognized exception or exclusion to the definition of attorney advertising. We discuss each of these criteria in turn.

A. Is the LinkedIn Communication Made "By or on Behalf of the Lawyer"?

Most LinkedIn content clearly meets this criteria, because it is usually created and posted by the lawyer herself. Even if the content is created and posted by a third party, such as a marketing consultant or assistant, it is still being done "on behalf of the lawyer."

There are, however, two categories of LinkedIn content that are arguably generated by third parties: Endorsements and Recommendations. Although the lawyer has the power to add particular Skills, which are then displayed to third parties to select as Endorsements, the act of endorsing is done by someone other than the lawyer. Likewise, although a lawyer may request a Recommendation, the third party is free to decline or accede to the request. The NYSBA Ethics Committee recently opined that a "client's freely given review or rating [on Avvo] is not an 'advertisement' within the definition in Rule 1.0(a) because the review is not made 'by or on behalf' of the lawyer." NYSBA Ethics Op. 1052 (2015) (concluding that a lawyer may offer clients a financial incentive to rate and review the lawyer on Avvo).

Unlike Avvo, however, LinkedIn does not have an option to give a negative rating, only an "Endorsement," which is equivalent to a positive rating. In other words, as on Facebook, there is only a "thumbs up" option, but not "thumbs down" option. Further, LinkedIn does not invite objective "reviews" but "Recommendations," which have an inherent positive connotation. More to the point, LinkedIn gives the attorney power to hide Recommendations, making it highly unlikely that a LinkedIn profile will contain a negative or even a neutral review. The Committee's conclusion in Opinion 1052 – that ratings and reviews are not made "by or on behalf of the lawyer" – was based on the fact that the client was free to give a negative, positive, or neutral rating or review, which is not the case for LinkedIn Endorsements and Recommendations. On that basis, we distinguish Opinion 1052, and conclude that LinkedIn Endorsements and Recommendations constitute communications made "by or on behalf of the lawyer."

B. What Is the "Primary Purpose" of the Lawyer's LinkedIn Profile or Content?

For a communication to constitute attorney advertising, it must have as its *primary* purpose the retention of the lawyer for pecuniary gain. *See* NYSBA Ethics Op. 1009 (2014) (noting that each communication must "be assessed in light of the circumstances of its circulation" to determine whether "its primary purpose is to obtain clients") (citing NYSBA Ethics Op. 873 (2011)). This definition recognizes that a communication may have multiple purposes, one of which may be to attract new clients. As Professor Simon notes in his treatise on the New York Rules, "a communication can have several significant or substantial purposes but only one 'primary' purpose." Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated,* 25 (2015 ed.); *see also* NYSBA Ethics Op. 1039 (2014) (observing that for a communication to constitute an "advertisement," retention of the lawyer by a client must be "*the* primary purpose," not merely "*a* primary purpose") (emphasis in original).

Yet, before we can determine the "primary purpose" of a communication, we must first understand whose "purpose" or intent we are considering. It is not immediately apparent whether the drafters of Rule 1.0(a) intended to articulate a purely subjective standard (i.e. did the attorney *believe* the primary purpose of her communication was to attract clients?), an objective standard (i.e. would a *reasonable person* believe the primary purpose of the communication was to attract clients, regardless of the attorney's subjective intent?), or a hybrid subjective-objective standard (i.e. did the attorney *reasonably* believe her primary purpose was to attract clients?). The comments to Rule 1.0 offer no guidance on this issue.

Ethics opinions interpreting the term "primary purpose" tend to gloss over this threshold question, referring to the "purpose" or "intent" of the communication itself, rather than the intent of the individual making the communication. *See, e.g.*, NYSBA Ethics Op. 848 (2011) (discussing the "intent of the communication" as one of the relevant factors). Nevertheless, these opinions suggest that "intent" refers to the intent of the lawyer making the communication, although that subjective intent may be inferred from the circumstances and the content of the communication. *See, e.g.*, NYSBA Op. 1009 (2014) ("It seems clear *from the nature of the press releases and the tweets that their primary purpose* is to secure clients.") (emphasis added); NYSBA Ethics Op. 967 (2013) ("Since the inquirer's blog will not discuss legal matters and *it appears that the inquirer does not intend to solicit clients for a law practice*, the blog will not be considered an advertisement even though its name indicates that the author is an attorney.") (emphasis added).

In NYSBA Ethics Op. 873, for example, the Committee addressed whether an attorney was ethically permitted to offer a prize for people to join his online social network. For the prize offer to be considered an "advertisement," the Committee explained, "the communication offering the prize must be for the 'primary purpose' of the inquirer's retention." NYSBA Ethics Op. 873. "The fact that business development *might be the inquirer's ultimate goal* in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to *expand the inquirer's personal social circle, with the aim of meeting potential new clients*." *Id.* (emphasis added).

This language suggests that the Committee was focused on identifying the lawyer's *subjective* goals in offering the prize, and attempting to determine which of those goals was his "primary purpose" (i.e. his subjective interest in widening his social network versus his more attenuated – though still subjective – goal of attracting new clients down the line).[9] Nevertheless,

[9] At first glance, NYSBA Ethics Op. 1039 (2014) suggests that the attorney's subjective opinion may not be the decisive factor in determining her primary purpose in making a particular communication. There, the inquiring lawyer published a blog that provided legal and publishing information to authors. She stated in her inquiry that her blog "is labeled an 'attorney advertisement' because *a* primary purpose of the blog is to advertise her services." NYSBA Ethics Op. 1039 (emphasis in original). The Committee noted that the definition of "advertisement" requires that "*the* primary purpose must be the retention of the lawyer or law firm." *Id.* (emphasis in original). The Committee concluded that the attorney's precautionary approach to labeling her blog "attorney advertisement" was "not dispositive" as to whether the blog was, in fact, an "advertisement" under the definition in Rule 1.0(a). *Id.* Upon closer

in evaluating whether the prize offer was an advertisement, the Committee looked to the *content* of the communication as evidence of the lawyer's subjective intent, and drew a distinction between a prize offer that expressly mentioned the lawyer's services and one that did not. Thus, the Committee explained:

> If the prize offer is merely posted on the [lawyer's] own social networking sites and people gain a chance to win the prize simply by connecting with the [lawyer] – not for retaining the [lawyer] – it is not likely to be an "advertisement" even if the site elsewhere identifies the inquirer as an attorney. *If, however, the prize offer itself describes the [lawyer] as an attorney or describes the [lawyer's] legal services or law firm (or both), the prize offer would be an "advertisement"* subject to all of the strictures of Rule 7.1, such as the mandatory use of the label "Attorney Advertising." (emphasis added).

We conclude that the "primary purpose" standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.

It should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the *primary* purpose of attracting paying clients. Whether that is her primary purpose depends on how she uses LinkedIn, who her Connections are, and what type of information she posts. We also cannot ignore the relevance of the type of platform LinkedIn is and its effectiveness as an advertising tool. Social networking websites are – if used for business development at all – primarily a form of indirect marketing. In light of this objective reality, it is likely that many attorneys who use LinkedIn have purposes that are not primarily about attracting paying clients. A lawyer's objectives in using LinkedIn may include, among other things:

- Networking with college and law school classmates, former co-workers, other colleagues;
- Networking with current or former clients;
- Networking with people who have similar interests;
- Tracking the career developments of friends and colleagues;
- Sharing the lawyer's own career developments with LinkedIn Connections;
- Keeping up-to-date on developments in the lawyer's practice areas or other areas of interest;

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analysis, however, it appears that the Committee's conclusion was based, not on a rejection of the attorney's own subjective view of her primary purpose, but on the Committee's uncertainty as to whether the attorney had correctly applied the definition of the term "advertisement" to her blog.

- Publishing and sharing articles, blog posts, or other content relating to the lawyer's practice areas or interests;
- Maintaining a dynamic online "resume";
- Job searching;
- Having a digital substitute for a traditional business card;
- Enhancing the lawyer's "brand" or reputation; and
- Publicizing the lawyer's expertise and availability for speaking engagements, press interviews, articles, and other opportunities to expand her reputation as an expert on a particular subject matter.

Given LinkedIn's many possible uses, there should be clear evidence that a lawyer's *primary* purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an "advertisement." In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer's Association ("NYCLA"), which concluded that "if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney *must treat his or her LinkedIn profile as attorney advertising* and include appropriate disclaimers pursuant to Rule 7.1." NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the *content* of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an "advertisement," such as the primary purpose of the communication and the intended audience. Including a list of "Skills" or a description of one's practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer's LinkedIn profile an "advertisement."

C. Does the Lawyer's LinkedIn Profile or Other Content Relate to the Legal Services Offered by the Lawyer?

For many lawyers, their individual LinkedIn profiles consist of their current employment, some recent employment history, contact information, and educational background. In our view, this information, alone, merely constitutes biographical and employment information, and does not relate to the legal services offered by the lawyer.

Certain other types of LinkedIn content also do not meet this criteria. For example, status updates, blog posts, or articles about legal developments or other topics, which a lawyer posts or shares on LinkedIn, do not relate to her legal services. *See* NYSBA Ethics Op. 1062 (2015) ("Materials may not be considered advertising as defined in Rule 1.0(a) if they are 'topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law'"); N.Y. State 967 (2013) (blog written by an attorney is not an "advertisement" if the primary purpose of the blog is not retention of the attorney). Thus, if an attorney links to an article or blog post or directly publishes content through LinkedIn's "Pulse" feature, those activities would not be communications related to the lawyer's services. Likewise, online discussions with other LinkedIn members, including postings to a LinkedIn Group, are not related to the lawyer's legal services, even if the subject matter relates to one of her practice areas. *See* NYSBA Ethics Op. 899 (2011) (responding to legal questions on the Internet is not an advertisement, unless the response expressly encourages the reader to retain the lawyer's services.).

On the other hand, if the lawyer includes additional information, such as a description of her practice areas or a list of Skills that are relevant to her legal practice, that content would relate to the lawyer's legal services and would, thus, meet this third element of the definition of "advertisement." Displaying an Endorsement of a Skill that is relevant to a lawyer's legal practice would also meet this criteria. For example, if a lawyer displays an endorsement for "litigation" or "matrimonial" or "appeals," that is information that relates to her legal services. On the other hand, an endorsement for "writing" or "public speaking" or "technology" does not necessarily relate to her legal services and may not fulfill that element of the definition. Likewise, a Recommendation from a client or colleague that describes a positive experience working with the lawyer or touts her legal prowess would meet this criteria, because it relates to the lawyer's legal services. But a Recommendation that describes the lawyer's commitment to public service, social justice or volunteerism does not relate to the legal services offered by the lawyer to clients.

D. Who Is the Intended Audience for the Lawyer's LinkedIn Profile or Other Content?

An important factor in determining whether a lawyer's LinkedIn content is an "advertisement" is its intended audience. The following factors may be relevant to this assessment:

- *Who are the lawyer's LinkedIn Connections and how active is she in expanding her list of Connections?* Is the lawyer connected primarily to friends, family members, other lawyers, and/or current or former clients, or does she have a significant number of Connections who are potential new clients for her legal services? Does she actively seek out new Connections with individuals who may be potential clients and request introductions from her Connections to those types of individuals?

- *What types of LinkedIn Groups does the lawyer join and how active is she?* Does the lawyer belong to LinkedIn Groups that are likely to include a significant proportion of potential clients for her legal services, and does she interact regularly with other members of those Groups?

- *What elements of her LinkedIn profile are visible to the public?* Do the lawyer's privacy settings allow members of the public to view profile information that appears designed to attract new clients, such as detailed descriptions of her practice areas and Recommendations relating to her legal services, or are these features restricted to her Connections?

If the lawyer generally limits her Connections to other lawyers, friends, family, current clients or former clients, or if she is not particularly active in trying to expand her list of Connections, these may be indications that she does not use LinkedIn primarily as a tool to attract new business. Likewise, if she is not a member of any Groups that target her potential client base or she is not particularly active in such Groups, that may also suggest a lack of intent to advertise her services to potential clients. Although not dispositive, a lawyer's privacy settings may be an indication of whether she intends her profile to be found by potential clients who are searching for an attorney online.

E. Does the LinkedIn Profile or Other Content Fall Into a Recognized Exception to the Definition of "Advertisement"?

Assuming a lawyer's LinkedIn content meets all of the criteria discussed above – i.e. it is a communication that relates to the lawyer's services and is primarily for the purpose of attracting new clients for pecuniary gain – it constitutes attorney advertising, unless it falls within a recognized exception to the definition of an "advertisement." As discussed above, these exceptions are as follows:

- It is a communication with another lawyer or an existing client;
- It is a communication with a former client that is germane to the former representation;
- It is a communication in response to an inquiry from a potential client regarding the lawyer's services;
- It constitutes general marketing or branding, the purpose of which is to raise awareness about the lawyer's services, rather than retention of the lawyer for a particular matter; or
- It consists of topical or educational information, including information about legal developments in the lawyer's practice area, unless it expressly encourages retention of the lawyer.

V. What Are a Lawyer's Ethical Obligations With Respect to Advertisements on LinkedIn?

As discussed above, the advertising regulations fall generally into three categories: content-based regulations, legibility requirements, and procedural requirements. *Supra*, at II.B. Below, we discuss examples from each of these categories as they relate to advertising on LinkedIn. These are only some of the advertisement requirements; attorneys should review the rules to ensure that all of their advertisements, including those on LinkedIn and other social media platforms, comply with the advertising regulations.

A. The "Attorney Advertising" Label

Assuming a lawyer's LinkedIn profile or other content falls within the definition of an "advertisement," the lawyer must include the language "Attorney Advertising," as required by Rule 7.1(f). What is unclear from the Rule is where this language must appear on LinkedIn. The Rule specifies that, "in the case of a website," the language must appear "on the home page." But LinkedIn and other social networking sites are not like traditional websites, in that they are dynamic platforms and do not have a static "homepage."

In the absence of a specific rule, therefore, we conclude that the attorney should use reasonable judgment as to where to place the required language, provided it is "clearly legible and capable of being read by the average person." R. 7.1(i). One option is to include the language in the "Summary" section of the LinkedIn profile. Alternatively, if the communication that constitutes an "advertisement" is contained in a specific update, post or message (and not in the attorney's LinkedIn profile itself), the "Attorney Advertising" label may be placed in that update, post or message. The attorney is not required to post a general "Attorney Advertising" label on her LinkedIn profile in that situation.

B. Name, Principal Law Office Address, and Telephone Number

Any attorney advertisement must include the name, principal law office address, and telephone number of the lawyer. R. 7.1(h). It is not uncommon for LinkedIn profiles to contain this information already, and, since there is a designated section for "Contact Info," this is a relatively simple requirement to meet. Obviously, an attorney can include this information in a different section if she chooses, provided it meets the legibility requirements discussed above.

C. Pre-Approval of Advertising Content

All advertising content on LinkedIn must be "pre-approved" by the lawyer. R. 7.1(k). This is a good policy to follow, even if the LinkedIn content does not fall within the definition of an "advertisement." Lawyers should never rely on marketing professionals or other nonlawyers to approve advertising content without independently reviewing it to ensure that it complies with the advertising rules.

D. Preserving Advertising Content

According to Rule 7.1(k), a copy of all advertisements must be retained for at least three years following their initial dissemination, except for "computer-accessed communications," which must be retained for at least one year. A "computer-accessed communication" is one that is disseminated through "the use of a computer or related electronic device, including but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." R. 1.0(c). Based on this definition, we conclude that advertisements posted on LinkedIn are "computer-accessed communications" and need only be retained by the lawyer for one year from the date of initial publication. See NYSBA 2015 Social Media Guidelines, at 7 ("[S]ocial media posts that are deemed 'advertisements,' are 'computer-accessed communications, and their retention is required only for one year.'") (quoting NYSBA Ethics Op. 1009 (2014)).

Rule 7.1(k) also provides that the contents of any website that qualifies as an "advertisement" must be "preserved upon the initial publication of the website, any major website redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days." In our view, this requirement does not apply to individual profiles on LinkedIn, except in the rare circumstance where an attorney's entire profile constitutes an "advertisement." Provided any specific advertisements posted on LinkedIn are preserved for at least one year, as discussed above, there is no separate requirement to preserve the LinkedIn profile on a regular basis.

E. Avoiding False, Deceptive or Misleading Communications

A lawyer may not post any advertisement on LinkedIn that "contains statements or claims that are false, deceptive or misleading." R. 7.1(a). However, this requirement to avoid false, deceptive or misleading statements exists, regardless of whether the communication is an "advertisement." R. 8.4(c) (lawyers shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

Thus, all content that an attorney posts on LinkedIn – or any other social media platform – must be truthful and accurate. For example, attorneys should not list practice areas or skills in which they have little or no experience. *See, e.g.*, *In re Dickey*, 396 S.C. 500 (S.C. 2012). In addition, we concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.").

CONCLUSION:

An attorney's individual LinkedIn profile or other content constitutes attorney advertising if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous ways that lawyers use LinkedIn, it should not be presumed that the *primary* purpose an attorney's LinkedIn content is to attract new clients for pecuniary gain, unless it contains express language or other equally compelling evidence to support that conclusion.

If an attorney's LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

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NEW YORK CITY BAR

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

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

MARCH 2009

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

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

Commentary on New York's Ethics Rules
Governing Lawyer Advertising and Solicitation[1]

March 2009

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Certain instances of potentially false, deceptive or misleading advertisements in print and broadcast media and on the Internet.

- An apparent lack of enforcement of the existing ethics rules concerning lawyer advertising and solicitation.

- The potential role that the NYSBA and local bars could play in addressing advertising and solicitations that violate the ethics rules.

- The perceived need to educate lawyers about the ethics rules relating to advertising and solicitation and to educate potential consumers about these rules and the process of retaining lawyers generally.

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

- New York's current lawyer advertising and solicitation ethics rules should be amended. The Task Force concurred with COSAC's recommendation that the NYSBA, as well as the New York state courts, adopt the Model Rules format to replace the NY Code.

- The NYSBA should adopt guidelines concerning lawyer advertising and solicitation ethics rules that would be used to educate (i) the public about retaining a lawyer and the types of lawyer advertising and solicitation that may violate the ethics rules, and (ii) lawyers about the ethics rules on advertising and solicitation.

At the time of its presentation to the NYSBA House of Delegates in November 2005, the Task Force circulated the Preliminary Report for comment to interested sections and committees of the NYSBA and other bar associations, including the City Bar. The City Bar reviewed the Task Force's Preliminary Report and recommended certain changes and additions to the Task Force's proposals in its Preliminary Report. As a result of the City Bar's and others' comments, the Task Force made changes to its proposed lawyer advertising and solicitation ethics rules. The City Bar supported the Task Force's proposals (with some exceptions) that were ultimately approved by the NYSBA's House of Delegates on January 27, 2006. Neither the City Bar nor the NYSBA recommended regulating the content of lawyer advertising. The Task Force's final report and proposed ethics rules concerning lawyer advertising and solicitation are publicly available.[6]

B. Summary of the June 14, 2006 Draft Rules

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

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

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

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

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

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

8 Id.

9 Id.

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

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

- Out-of-state lawyers who advertised or solicited legal services in New York would be subject to professional disciplinary proceedings within New York if they violated the lawyer advertising and solicitation rules.

- All manner of electronic communications, including web sites, e-mails and other means of communicating with clients via the Internet, were covered by the draft rules.

- The draft rules recommended imposing expansive new content-based restrictions on lawyer advertising. For example, the draft rules provided that "the content of advertising and solicitation shall be predominantly informational, and shall be designed to increase public awareness of situations in which the need for legal services might arise . . . ." In addition, the draft rules proposed prohibiting lawyers from using current client testimonials, from portraying judges, from re-enacting courtroom or accident scenes and from using courthouses or courtrooms as props. The draft rules proposed that lawyers would be barred from using paid endorsements, and from using recognizable voices of a non-attorney celebrity to tout the lawyer's skills.

- The draft rules also proposed that lawyers would be required to verify objectively the claims made in advertisements, and to include a disclaimer making clear that their past results for other clients were not a guarantee of future success in other matters.

- The draft rules also included new retention and filing requirements for lawyer advertisements and solicitations. Most advertisements would have been required to have been retained by lawyers for three years. In addition, most advertisements and solicitations would have been required to have been filed with the Disciplinary Committees. Moreover, the draft rules would have required lawyers to retain copies of their web sites every time they changed, regardless of the nature of the change, and then subsequently file a copy of the web site with the Disciplinary Committees.

- The draft rules also proposed that every advertisement and solicitation would have to be labeled "Attorney Advertising" on the first page, and the packaging used to transmit the advertisement or solicitation would have to contain such a label in "red ink."

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

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

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[11] Caher, supra note 6, at 1.

[12] Id.

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

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

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

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

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

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

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

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

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

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

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

A. Rule 8.5 -- Disciplinary Authority and Choice of Law[18]

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

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

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

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

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

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

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

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

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

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

2. Solicitations Directed to Clients in New York

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

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

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

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

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

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

3. Law Firms with Offices in New York

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

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

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

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

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

Because it appears that the Presiding Justices intended to limit the jurisdictional reach of the advertising provisions of the Rules, it seems that the better interpretation of the Rules is that firm-wide advertising of national and international law firms with New York offices that is not disseminated in New York should not be governed by the Rules. For example, if an international law firm runs an international advertising campaign, the advertising that is disseminated outside New York should not have to comply with New York's advertising rules. However, if the international law firm (with the New York satellite office) were to run the advertisement directly in a New York-focused publication, such as The New York Post, the better argument is that the advertisement should comply with the New York rules.[22]

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

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

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

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

In order to provide some guidance to lawyers and law firms that have practices in multiple states, including New York, the City Bar believes that the better interpretation of the Rules is that a lawyer's or law firm's web site should comply with the Rules if the lawyer or law firm in question currently solicits or advertises (other than just in national publications) in New York (whether or not through the solicitation or advertisement is through a means other than the web site). Under these circumstances, it is fair to require lawyers and law firms to comply with the Rules' web site requirements because, even if they are not principally based in New York, they are soliciting or advertising in New York.

B. The Advertising Rules – What Is Advertising?

The initial draft of the advertising rules did not contain a definition of "advertising." Heeding comments from the Bar, one was added. The definition of advertising in the Rules is broad in scope, going far beyond newspaper and billboard ads, handbills, mass mailings, and radio and television commercials, all of which are also included. Rule 1.0(a) defines advertising as follows: "'Advertisement' means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." Rule 1.0(a).

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

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

[24] See Former EC 2-7(b) ("A lawyers' participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.")

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

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

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

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

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

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

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

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

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

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

Will communications with a prospective client's in-house counsel, where copies of the communications are simultaneously copied to business people, fall outside the lawyer-communications exception to the Rules? The City Bar believes that communications that are directed primarily to in-house counsel generally should not be considered advertising. In-house lawyers, who are representing the corporate client, are sophisticated consumers of legal services who can represent the interests of the corporation and the business people who also receive the lawyer communication. Communications, however, that are directed to business people will not fall into the lawyer communication exception even if a copy of the communication is sent simultaneously to in-house counsel.

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

Likewise, brochures created exclusively to recruit law students to join a law firm or legal department would not be a communication "primarily" intended to attract new business. Similarly, neither an invitation to a CLE event at which a lawyer is speaking nor the speech at the CLE event would be considered an advertisement, as long as the invitation or speech also does not describe in a more than summary fashion the firm's practice.[28] An article published in a legal publication would not be considered an advertisement.[29] However, if the article is no more than a description of the lawyer's practice or a recitation of how the lawyer was successful in handling the matter that is the subject of the article, the piece would likely cross the line and becoming advertising.[30] An update on legal developments mailed to clients, former clients and prospective clients also should not be considered advertising, again as long as it does not include a detailed discussion of the firm's practice or tout that the firm handled the particular matter being reported. See Former EC 2-6(d). A resume, if used to obtain new employment, would not be advertising, but if used as part of pitch materials for new business, could be.[31] An advertisement in a benefit journal that was the result of buying tickets to a charitable event would not be considered an advertisement, so long as the advertisement does not

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28 Indeed, former EC 2-7(b) specifically provided that "[a] lawyers' participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." Former EC 2-7(b) does, however, caution lawyers that educational programs could be considered attorney advertising in certain circumstances: "Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm."

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

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

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

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

C. The Labeling of Advertising

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

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

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

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

The Rules require advertisements that create an expectation about the results the lawyer may be able to achieve, compare the lawyer's services to those offered by other lawyers, include client testimonials or endorsements or describe or characterize the quality of the lawyer' services — i.e., most advertisements — be accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Rule 7.1(e)(3). The Rules do not indicate where the disclaimer should be located in the advertisement, except to state that the disclaimer should be "clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud." Rule 7.1(i). For brochures, appearance of the disclaimer <u>once</u> — either on the first page, the last page or the page where the information appears necessitating the disclaimer — should be sufficient. For web sites, it is has become common practice for the disclaimer to appear on the home page. If the disclaimer is on the home page, the disclaimer need not appear on other pages of the web site. As noted above, the disclaimer need only be legible; the lawyer's disclaimer should avoid any objection under the rule if it is at least in the same size type as the smallest text on the home page.

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

D. Substantive Limits on the Content of Advertising

The Rules place a number of substantive limits on the content of advertising which are discussed below. As noted above, on July 23, 2007, the United States District Court for the Northern District of New York held that certain of the Rules' content-based restrictions violate lawyers' Constitutional right to engage in commercial speech, and enjoined enforcement of those aspects of the Rules.[33] That decision is currently on appeal in the United States Court of Appeals for the Second Circuit. This report does not analyze whether or not the district court's decision was correct as a matter of constitutional law. Rather, it explains how lawyers should interpret and apply the Rules assuming they are ultimately found not to violate the New York or U.S. Constitutions.

1. Requirement of Evidence of Claims Made By Attorneys

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

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

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

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

However, the former ECs also made it clear that lawyers run the risk of violating the Rules if they make comparative statements that cannot be factually supported. Former EC 2-10(b) provided that "[o]n the other hand, descriptions of characteristics of the lawyer or law firm which compare the lawyer of law firm with other lawyers or law firms are not susceptible of being factually supported and could be misleading to potential clients." Consequently, "a lawyer or law firm may not advertise that it is the 'Best' or 'Most Experienced' or 'Hardest Working.' Similarly, some claims which involve results obtained are not susceptible to being factually supported and could be misleading to potential clients. Accordingly, a lawyer or law firm may not advertise that it will obtain 'Big $$$' or 'Most Money' or 'We Win Big.'" Id.[34] Thus, lawyers should avoid comparative subjective statements, because such statements will be hard to support with facts.

2. Ratings

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

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

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

Before lawyers advertise a professional rating they have received, they will need to determine whether the rating service evaluated the lawyers based on "objective criteria" or "legitimate peer review." Former EC 2-11 did not explain, however, what would qualify as "objective criteria" or "legitimate peer review." Despite the lack of guidance, there are a few observations that can be made about this particular aspect of EC 2-11.

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

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

Former EC 2-11 raised one additional issue that lawyers will need to consider before advertising a professional rating that they have received. Former EC 2-11 stated that "the rating service must fairly consider all lawyers within the pool of those who are purported to be covered, and that "a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group." Thus, it seems clear again that before a lawyer advertises a rating that he or she has received, the lawyer needs to determine whether the rating service has "fairly consider[ed] all lawyers within the pool of those who are purported to be covered." However, the City Bar believes that assuming the rating service publishes information concerning the pool of lawyers evaluated for the purposes of rating the lawyers, lawyers should be entitled to rely on the representations made by the rating service about whether it applied its criteria "to all lawyers within th[e] geographic area, practice area, or age group" that were evaluated (unless the lawyer is aware of information that undermined or contradicted the rating service's representations). Indeed, if the rule were otherwise, lawyers would almost never be able to advertise professional ratings they have received because it would be virtually impossible for any lawyer to verify independently whether the rating service applies its criteria to all the lawyers within the particular pool of lawyers covered by the rating service's evaluation.

3. Specialist/Experts

The Rules did not make any changes to DR 2-105 (now Rule 7.4), Identification of Practice and Specialty. The City Bar and others recommended to the Presiding Justices during the public comment period that lawyers should be able to identify areas of law in which the lawyer "specializes." It seems beyond serious dispute that lawyers can and do become specialists in particular areas of the law based on repeated experience. Indeed, most lawyers are no longer "general practitioners" providing every sort of legal service to their clients. Moreover, lawyers have a Constitutional right to convey to consumers facts about themselves as lawyers and the services they provide, so that consumers can make an informed decision about whom to retain. For these reasons, the City Bar and others recommended that the advertising rules should be amended to allow lawyers to inform the public that they specialize or are specialists in particular areas of law if it can be supported as a factual matter, even if based solely on the experience of the lawyer and the lawyer has not received any particular specialist certification. This recommendation was not adopted in the Rules. Thus, lawyers are limited to identifying the specialties set forth in Rule 7.4 with an appropriate disclaimer.

4. Actors, Judges, Fictional Characters, etc.

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

5. Use of Stock Photos

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

6. Use of Monikers

Even when a lawyer is allowed to describe his or her past successes under the Rules — accompanied, of course, by the appropriate disclaimer — a lawyer may not do so using "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." Rule 7.1(c)(7). The limitation on the use of mottos carries no exceptions. Therefore, if a lawyer wants to include a phrase in advertisements to capture the essence of his practice or firm, he should be descriptive of what he does and not how he thinks of himself or his firm.

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

7. Domain Name

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

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

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

Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Smith & Jones use the domain name www.divorcelawyers.com, the firm may not advertise that people contemplating divorces should "contact www.divorcelawyers.com" unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement.

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

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

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

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

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

8. Identification of Clients

Rule 7.1(b)(2) provides that an advertisement may include information as to the "names of clients regularly represented, provided that the client has given prior written consent." Thus, in their advertisements, lawyers may use the names of clients that they regularly represent or have regularly represented in the past, provided that a client whose name is used has given prior written consent after full disclosure of the manner in which the client's name will be used. The use of a client's name in a lawyer's advertisement is an implied endorsement of the lawyer's services.

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

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

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

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

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

9. Sensationalism

Rule 7.1(c)(5) states that an advertisement shall not "rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." This Rule has been declared unconstitutional in Alexander & Catalano v. Cahill.

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

10. Endorsements

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

11. Pop-Up Advertisements and Meta Tags

Rule 7.1(g)(1) and (2) respectively provides that a lawyer or law firm shall not use "a pop-up or pop-under advertisement in connection with computer-accessed communications[[36]], other than on the lawyer or law firm's own web site or other internet presence," and "meta tags or other hidden computer codes that, if displayed, would violate [the NY Rules]." See also Former EC 2-15. While the application of the rule is

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

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

12. Description of Fees

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

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

Rule 7.1(l) reads as follows:

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

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

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

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

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

Likewise, if lawyers or law firms advertise fixed fees for specified legal or nonlegal services, they must not charge more than the advertised fixed fees for the specified services. But clients who come to lawyers seeking the specified services sometimes need other legal or nonlegal services in addition to, or instead of, the services specified in the advertisement. If the client agrees in writing that the services to be performed are not the legal services referred to or implied in the advertisement, and agrees that a different fee arrangement will apply to the additional or different services, then the lawyer may charge more for the additional or different services than the fixed fee advertised for the other services.

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

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

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

E. Maintaining Copies of Advertisements

Rule 7.1(k) provides that:

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

Rule 7.1(k) is substantially less onerous than the filing requirements that were contained in the draft proposal (which would have required that most advertisements be filed with the Disciplinary Committee, and that almost every change to a web site, regardless of how insignificant, would have to be saved as well). Nonetheless, the Rules do impose a new burden: lawyers now must retain copies of advertisements for a period of three years if in print, and for one year if the advertisement is in a computer-accessed communication.[37] (The lawyer does not have to keep the recipient list for the advertisement unless the advertisement also is a solicitation.)

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

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

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

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[37] Notably, if an advertisement is sent by e-mail, that advertisement should probably always also be considered a solicitation because solicitation means "any advertisement initiated by or on behalf of a lawyer or law firm that is <u>directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives,</u> the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client." Rule 7.3(b) (emphasis added). Assuming all the other requirements of the solicitation definition are satisfied and one of the exceptions does not apply, an advertisement that is sent by e-mail should be considered a solicitation because it is "directed to, or targeted at, a specific recipient or group of recipients" given that it is always sent to specific e-mail addresses. An advertisement that also is a solicitation will have to comply with the solicitation rules, including the requirement to file it with the pertinent Disciplinary Committee. The solicitation rules are discussed in greater detail below.

F. Web Site Rules

1. Labeling

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

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

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

2. Maintaining Copies

Lawyers and law firms have to retain copies of their web sites which constitute advertisements under certain circumstances. Under Rule 7.1(k), a lawyer must retain a copy of the web site upon initial publication and no less frequently than every 90 days thereafter. In addition, if the web site undergoes a "major web site redesign" or "meaningful and extensive content change," the lawyer also will be required to retain a copy of that version of the web site regardless of whether the lawyer has been saving a copy of the web site every 90 days.

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

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

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

G. Solicitation Rules

1. Definition — What is covered?

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

> [A]ny advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive

> for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

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

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

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

As noted above, the New York rules regarding solicitation apply to all solicitations sent to someone in New York, whether or not that sender is admitted to practice in the state. Rule 7.3(i). Thus, if a pitch for business is narrowly targeted to specific New York recipients, the advertisements takes on a host of additional restrictions if it meets the definition of solicitation in New York.

2. Requirements Relating to Solicitations

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

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

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

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

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

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

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

4. Limits on the Form of Solicitations

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

Rule 7.3(a) expressly prohibits lawyers from engaging in "solicitation by: (1) in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former or existing client." Former EC 2-22 explained the rationale for this nearly absolute bar on certain forms of in-person solicitation as follows: "in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the attorney without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and these are regulated in the same manner." Former EC 2-22(a). But an in-person solicitation of a close friend, relative, or former or existing client is not barred because, as explained by the former EC, "[c]ommunications with these individuals does not pose the same dangers as solicitations to others." Former EC 2-22(b).

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

(b) Real-Time Electronic Communications

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

(c) Other Limitations

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

5. "Directed to or Targeted at"

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

First, an advertisement "is considered to be 'directed to, or targeted at' a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages)." Former EC 2-19(b).

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

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[38] Rule 7.3(b).

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

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

6. Exception for Certain Legal Services Organizations

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

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

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

The prohibition's primary purpose apparently is to provide a cooling-off period during which victims, their families and legal representatives can remain undisturbed by unseemly lawyer solicitations. While the Rule arguably benefits victims, their families and legal representatives by protecting them from aggressive lawyer solicitations during an emotionally vulnerable period, it also has the potential to harm the victims of accidents. For example, injured parties may not have existing counsel or knowledge of who to turn to for representation, and in such cases, solicitation may be the best way for the party to find a lawyer quickly enough to protect their rights. In addition, even though the Rule provides a 15-day limit in the case of necessary filings, this can still give the client very little time to retain a lawyer to ensure that the client's interests and rights are protected.

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

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

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

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

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

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

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

H. Certification Rules and Implications

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

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

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

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

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