

# A Thumbnail Guide to the Amended Advertising Rules

BY ROY SIMON

On January 4, 2007, the courts announced extensive amendments to the rules governing lawyer advertising in New York. This article briefly summarizes the new rules, which are effective as of February 1, 2007.

## Three New Definitions

The courts have added a definition of “Advertisement,” which provides as follows:

(K) “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.

This definition of “Advertisement” narrows the overly broad June 2006 proposal, which covered virtually any public statement about any lawyer regardless of its purpose. Under the final definition, only communications intended to encourage prospective clients to retain the law firm are considered “advertisements.” Moreover, even those communications are not considered advertisements if directed to other lawyers or to a law firm’s “existing clients.” And since amended DR 2-103 permits even in-person communications to “a close friend, relative, former client or existing client” (emphasis added), communications to former clients should also fall outside the definition.

The courts also added the following definition:

(L) “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.

The courts also have defined the term “solicitation,” but only for purposes of DR 2-103, so I will reserve discussion of that definition until I reach DR 2-103.

## DR 2-101: Basic Restrictions on Lawyer Advertising

DR 2-101(A) continues to state the core principle that a lawyer must not use or disseminate an advertisement containing statements or claims that are “false, deceptive or misleading.” New York gives content to “false, deceptive or misleading” in a long series of provisions stating exactly what an advertisement may or may not say. For example, DR 2-101(B)(1) has added that a lawyer may advertise “bona fide professional ratings.” Will this include Super Lawyer or Best Lawyers? That remains a complex, case-by-case, issue, which Lazar Emanuel covers elsewhere in this issue.

DR 2-101(C) has been amended to set forth seven specific “shall not’s,” which are set forth below in bold. The first one is that 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 that is still pending;

In the original June 2006 proposals, testimonials were prohibited from any “current client.” The aim then, I believe, was (1) to avoid pressuring clients into endorsing the lawyer out of fear that refusing to give a testimonial would anger the lawyer; and (2) to avoid testimonials by clients who could not accurately assess the lawyer’s skill, especially before a matter ended. But comments pointed out that good lawyers often keep their transactional clients and corporate litigation clients for a long time, so that most satisfied clients may never cease to be current clients – thus barring lawyers from obtaining testimonials from their most satisfied clients. The final language seeks to resolve this problem by allowing lawyers to obtain testimonials from current clients as long as the testimonial does not relate to a pending matter.

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

The June 2006 proposals flatly prohibited paid testimonials. The final rules recognize that the public is smart enough to evaluate paid testimonials for lawyers just as they do for Nike sneakers, Dux beds, and eye surgeons. The provision allows lawyers to pay clients as well as celebrities, as long as they disclose that the law firm is paying for the endorsement.

(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;

DR 2-101(C)(3) is unchanged from the June proposals. It augments the prohibition in DR 2-102(C) that a lawyer “shall not hold himself or herself out as having a partnership with ...other lawyers unless they are in fact partners.”

(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;

The June proposal completely banned advertisements that “include a portrayal of a client by a non-client or the reenactment of any events or scenes or pictures or persons that are not actual or authentic.” The final rule on testimonials, like the final rule on actors and fictionalized events, imposes a duty of disclosure rather than a complete prohibition.

(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;

DR 2-101(C)(5), which had no equivalent in the June proposals, imposes limits on the client testimonials, paid endorsements, and fictionalized events that lawyers may use (with disclosure) under DR 2-101(C)(1)-(4). Enforcing this rule will be a case-by-case effort, but the standard is high enough ("clear and intentional lack of relevance") that it should not deter lawyers who believe they are conveying relevant information.

(6) be made to resemble legal documents; or

DR 2-101(C)(6) is the same as the June proposal, and prohibits a technique that is inherently misleading.

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

DR 2-101(C)(7) is also the same as the June proposal and will remain controversial. Rumors are that it is aimed at "monikers" like "The Dream Team," "The Heavy Hitters," and "The Hammer," but it could reach much further. Could a law firm say, "We rely on hard work, not good luck"? Or "You can count on us"? Because of the subjective nature of any decisions interpreting this rule, I doubt that disciplinary authorities will charge many lawyers with violating it, but it will probably deter many lawyers from using nicknames, monikers, or mottos of any kind. (I have heard that some lawyers plan to file a lawsuit on February 1, 2007 challenging the constitutionality of this rule.)

### **DR 2-101(D): Expressly Permitted Information**

Almost unchanged from the June proposals, DR 2-101(D) permits lawyers to advertise the following information as long as the advertisement complies with DR 2-101(E):

- (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 subdivision (C)(1) of this section, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer's or law firm's services.

The only provision that differs significantly from the June proposals is DR 2-101(D)(3). The June proposal permitted testimonials or endorsements only by former clients. The final rule incorporates the amendments to DR 2-101(C)(1)-(2) permitting testimonials or endorsements by current clients as long as they do not relate to a pending matter.

However, all of the information in DR 2-101(D) is subject to the following limitations set forth in DR 2-101(E):

- (1) its dissemination does not violate subdivision (A) of this section;
- (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."

DR 2-101(E)(1) is the same as the June proposal and simply incorporates the overarching prohibition against statements or claims that are "false, deceptive or misleading." DR 2-101(E) (2) has been toned

down since June. The June proposal required that any claim “has been objectively verified” by the advertising lawyer, but the final rule requires only that a claim “can be factually supported,” a much milder test. The disclaimer in DR 2-101(E)(3) has been trimmed back the most. The June proposal required an elaborate 30-word disclaimer (“Prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained”). This took about 10 seconds to read, thus effectively increasing the cost of TV and radio advertising by requiring lawyers to buy longer ads. The final rule slices the disclaimer down to 8 words that can be said clearly in 3 seconds. Jumping ahead, DR 2-101(I) deters trickery and speed-reading by requiring that “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.” Also, the final rules have abandoned the requirement proposed in June that every TV spot and radio ad be preceded or followed by a spoken statement that it contains “an advertisement for legal services.”

### **DR 2-101(F)-(P): Miscellaneous Requirements and Restrictions**

DR 2-101(F) through (P) contain miscellaneous restrictions and requirements that will regulate but not obliterate lawyer advertising. Only a few of these are worth mentioning.

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

The June proposals were similar but required the words “Attorney Advertising” to appear on the envelope “in red ink.” The courts must have realized that most attorneys do not own color printers (which are expensive to buy and operate), and that hand stamping individual envelopes in red would also be very costly. The final rule, which allows black ink, mirrors language adopted in many other jurisdictions.

DR 2-101(G) attempts to grapple with advertising on the Internet by prohibiting lawyers from using the following:

- (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 a disciplinary rule.

Since most lawyers are unlikely to know how to use these techniques themselves, the key here is to instruct advertising agencies and information technology people associated with a law firm that these techniques are unethical and are not to be used. See DR 1-104(C) (requiring law firms to supervise the work of non-lawyers to make sure their conduct obeys the Disciplinary Rules).

Finally, expanding the requirement in the prior version of DR 2-101(F), new DR 2-101(H) mandates that all advertisements (not just broadcast advertisements) “shall be pre-approved by the lawyer or law firm,” and that a copy of every advertisement “shall be retained for a period of not less than three years following its initial dissemination” (as opposed to one year under the old rule), though a copy of a “computer- accessed communication” (see Definitions above) need be retained for only one year. The

rest of the rule, however, imposes potentially onerous new requirements regarding web site advertisements:

... A copy of the contents of any web site covered by this section 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.

The June proposal, which was far more burdensome, would have required lawyers to keep “a printed copy of each page” of a web site for at least “one year from its first publication or modification.” (Emphasis added.) Lawyers pointed out that such a rule would require law firms to copy and store mountains of paper that no regulator would be likely to read. The final rule scales back the copying requirements, but the net result will be to discourage law firms from developing elaborate web sites, since every new page and every significant change will require a new copying effort. Firms without a full-time computer person will find the requirement perplexing and maybe prohibitive.

Fortunately, the final rules dropped another onerous series of requirements from the June proposals that would have made lawyers file with the disciplinary authorities a copy of every advertisement “in the form in which it was disseminated, e.g., videotape, video disc, audiotape, computer-accessed communication (other than an internet web site or page) or photograph or accurate depiction of publicly displayed advertising.” For radio and TV ads, the June proposals mandated filing of “a transcript of the audio portion of the tape and a listing of all media outlets in which the advertisement will appear, the frequency of its use, and the time period during which the advertisement will be used,” as well as “an accurate English-language translation” of every ad not in English. The courts correctly realized that these requirements would have been highly burdensome on lawyers and disciplinary committees. The final rules either deleted these requirements or restricted them to “solicitations” (i.e., targeted advertisements) – see DR 2-103(C)(1) below.

#### **DR 2-102: Domain Names and Firm Phone Numbers**

New DR 2-102(E), which attempts to regulate Internet domain names, provides as follows:

(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 a disciplinary rule.

Thus, a law firm may nearly always use the names of its lawyers as its Internet domain name. But if the firm uses some other domain name – say, “TaxLawyer.com” – then DR 2-102(E) requires that (1) the actual firm name be on every page of the site; (2) the firm not practice law under the name “TaxLawyer.com”; (3) the firm not use a name like “ReduceYourTaxes.com” or “BeattheIRS.com” that implies the firm’s ability to obtain “results”; and (4) the domain name must comply with the rest of the Disciplinary Rules.

Phone numbers are treated similarly in a new DR 2-101(F), which had no equivalent in the June proposals:

**A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate a disciplinary rule.**

Thus, the courts realized that phone numbers such as “1-800- INJURED” and “1-888-DIVORCE,” which are a lot easier to remember than strings of pure numbers, help ensure that people have ready access to lawyers when they need them. But a phrase that could not be used as a domain name under DR 2-102(E) (e.g., “WIN-CASH”) cannot be used as a telephone number under DR 2-102(F).

### **DR 2-103: Solicitation**

The changes to DR 2-103 are significant. DR 2-103(A) continues the blanket prohibition on in-person or telephone solicitation, but updates the rule by adding prohibitions on “real-time or interactive computer-accessed communication.” Thus, lawyers may solicit prospective clients by email, and probably by automated recorded telephone calls (assuming the recipient is not on the national do-not-call list), but not in chat rooms, via instant messages, or by other electronic means that seek an immediate response. As in the old rule, however, the prohibitions of DR 2-103(A) do not apply if the recipient is “a close friend, relative, former client or existing client.”

DR 2-103(B) adds a brand new definition of “solicitation” that was not in the June proposals in any form. The new definition provides as follows:

For purposes of this section “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.

This is an expansive and explosive definition. Until now, DR 2-103 had widely been thought to regulate only targeted mail (including email) and pre-recorded phone calls. The new definition, however, is broad enough to reach newspaper ads, TV ads, radio spots, and any other form of advertisement seeking clients based on a specific event, such as a plane crash, apartment fire, or toxic gas leak.

One might argue that the word “recipient” rules out radio, TV, and newspaper ads because no one speaks of the “recipient” of a television commercial or newspaper ad, but new filing requirements in DR 2-103(C) indicate that the courts intend the term “solicitation” to cover broadcast ads seeking clients who have been harmed by a specific event.

Most of DR 2-103(C) simply imports filing requirements moved here from old DR 2-101(F), which required every “mailed” advertisement for legal services to be filed with the disciplinary authorities “at the time of its initial mailing,” and required lawyers to retain the address list for three years if the ads were “directed to a predetermined addressee.” In the amended rules, DR 2-103(C)(1) expands the old rule by requiring lawyers to file two additional items:

- (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.

The reference to a “radio or television solicitation” proves that the courts intend the reach of the term “solicitation” to extend beyond targeted mail. The translation requirement reflects the 2005 conclusion of the State Bar’s Task Force on Lawyer Advertising that lawyer ads in foreign languages, which are difficult and costly to police without an English translation, often contain flagrant abuses of the lawyer advertising rules.

The final version of DR 2-103 also imposes three new requirements on targeted communications that are unlikely to prove burdensome or confusing.

(H) 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.

(I) 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.

(J) 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.

New DR 2-103(H) and (I) appeared in the June proposals in essentially the same form. To comply with DR 2-103(H), a lawyer merely needs to say something like, “My law firm obtained your name from newspaper accounts of the accident,” or “We got your name from publicly available police reports.” Compliance with DR 2-103(I), which also appeared in the June proposals, needs no explanation.

DR 2-103(J), which appeared in similar form in DR 2-101(J) of the June proposals, is intended to ensure that clients can tell where the soliciting law firm has its main office. An advertisement with a lawyer’s name and “800” phone number alone will not comply with this rule.

Also, in a new DR 2-103(K) that did not appear in the June proposals, the courts assert jurisdiction over out-of-state lawyers who target potential clients in New York. DR 2-103(K) provides:

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

DR 2-101(K) is especially interesting because it draws upon the State Bar’s 2003 recommendation that the courts amend DR 1-105(A) to provide that a lawyer not admitted in New York is nevertheless “subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state.” DR 2-103(K) is narrower because it is limited to solicitation by out-of-state lawyers, but it will give Courts a powerful means to control non-New York lawyers whose advertisements are “directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives” in New York. Thus, out- of-state lawyers cannot use means of solicitation that are forbidden to New

York lawyers. Of course, New York has no authority to revoke or suspend an out-of-state lawyer's license, but courts may invoke DR 2-103(K) to enjoin out-of-state lawyers from improper solicitation in New York, and then use contempt powers to make an injunction stick.

### **30-Day Blackout Period**

The most significant change in the advertising rules, in my view, deserves its own heading. New York has now imposed a 30-day blackout period on solicitations directed to accident victims and their relatives. A new DR 2-103(G), which appeared in largely the same form in the June proposals, provides:

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.

This 30-day blackout period (or 15 days in no-fault cases and other situations where papers must be filed in less than 30 days) is repeated in even broader form in a new DR 7-111, which provides as follows:

(A) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30<sup>th</sup> 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 15<sup>th</sup> day after the date of the incident.

The main difference between DR 2-103(G) and DR 7-111(A) is that the latter expressly covers any "associate, agent, employee or other representative of a lawyer or law firm," and governs any "unsolicited communication ... seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident."

The 30-day blackout period is highly controversial, and no doubt lawyers will challenge its constitutionality, especially given that the new rules prohibit every form of "solicitation" (including not only targeted mail but also TV, radio, and newspaper ads) during the blackout period.

One criticism, however, will be muted. After the June proposals, many lawyers (especially plaintiffs' lawyers) objected that insurance companies and their agents remained free to approach accident victims to negotiate settlements without waiting 30 days. Thus, the 30-day blackout period proposed in June created an unlevel playing field between plaintiffs and defendants. The courts responded ingeniously to this concern by adopting the following new DR 7-111(B), which was not in the June proposals:

(B) This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

DR 7-111(B) effectively prevents insurance defense lawyers from making settlement offers to accident victims or their relatives during the first 30 days after an accident (or the first 15 days in no-fault situations). That is a radical change, and will prevent many “low-ball” settlement offers in the wake of accidents.

Finally, DR 7-111(B) is reinforced by an amendment to 22N.Y.C.R.R. § 130-1.1a (“Signing of papers”), which is a key part of New York’s main rule for sanctioning frivolous litigation conduct. The amended rule, which is unchanged from the June proposals, provides that by signing a paper to be filed in court, an attorney or party certifies, to the best of his or her knowledge, information and belief, formed after “an inquiry reasonable under the circumstances,” that (1) the presentation of the paper or the contentions therein are not “frivolous” and (this is the new part):

(2) where the paper is an initiating pleading ... the matter was not obtained in violation of 22 NYCRR1200.41-a [DR 7-111].

Thus, the signature of an attorney or party on a complaint or other “initiating pleading” certifies that the client was not solicited by the attorney within 30 days after an incident giving rise to potential claims for personal injury or wrongful death. If the party rather than an attorney will be signing the pleading, an attorney cannot advise a client to sign if the resulting certification of compliance with DR 7-111(B) would be false. The overall effect is to accelerate the time frame for enforcing DR 7-111(B). Rather than referring suspected violations to the disciplinary authorities for lengthy disciplinary proceedings, courts may now conduct their own investigations into improper solicitation and impose immediate sanctions (monetary and otherwise) on violators. Of course, DR 7-111(B) will have no direct effect on insurance adjusters or other non-lawyers who do not work for law firms, but the State Bar apparently intends to renew its request that the Insurance Department adopt regulations barring insurance companies and their adjusters from approaching accident victims and their relatives with settlement offers before lawyers would be permitted to do so. Until then, the courts have at least taken a long step toward leveling the playing field between plaintiffs and defendants in personal injury litigation.

### **Conclusion: The Process Is Also the Story**

The story of the new advertising rules lies not only in their content (which turned out to be far less drastic than the June 2006 proposals), but also in the process by which the rules were written. The courts circulated the proposed rules for five months of public comment and then proved remarkably receptive to the comments they received. The result is a much better set of rules that will benefit the courts and the bar alike.

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