

Courts Propose New Curbs on Lawyer Advertising

BY LAZAR EMANUEL

The four Presiding Justices of the Appellate Division have approved for public comment extensive revisions to those provisions of the New York Code dealing with lawyer advertising and the solicitation of clients. The comment period will end on September 15, 2006. Comments should be addressed to Michael Colodner, Esq., Office of Court Administration, 25 Beaver Street, New York, New York 10004. The proposed rules may be found at www.nycourts.gov/rules/proposedamendments.shtml. Comments should also be addressed to Bernice K. Leber, Esq., chair of the NYSBA Task Force on Lawyer Advertising, Arent Fox, 1675 Broadway, New York, NY 100195820.

The changes proposed by the Courts would apply to DR 1105, DR 2101, DR 2102, DR 2103 and DR 2105, and they would also create a new DR 7111. The numbers designating these rules will ultimately be changed if the recommendations of COSAC and the State Bar to adopt the ABA's Model Rules format are adopted by the Courts.

In addition to the Rule changes, the Courts have inserted three new definitions to 22 NYCRR Section 1200.1 (Definitions):

(k) "Advertisement" means any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services.

(l) "Solicitation" means any advertisement or other communication directed to or targeted at a specific recipient or a group of recipients, including a prospective client or a family member or legal representative of a prospective client, concerning the availability for professional employment of a lawyer or law firm.

(m) "Computer accessed communication" means any advertisement or solicitation that is disseminated through the use of a computer or other electronic device, including, but not limited to, web sites or pages, search engines, electronic mail, banner advertisements, popup advertisements, chat rooms, list servers, instant messaging, domain names, or internet presences, and any attachments or links related thereto.

Read together, these definitions would extend the new Rules to any communication constituting either an advertisement or a solicitation that is directed to an individual, a group of individuals, or the general public, whether in print, through broadcast, or by means of a computer.

Basic Changes

The most significant changes to existing rules are incorporated in DR 2101, which has been renamed from "Publicity and Advertising" to "Advertising and Solicitation."

DR 2101 begins:

(A) The content of advertising and solicitation shall be predominately informational and shall be designed to increase public awareness of situations in which the need for legal services might arise and shall be presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm to supply such services.

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

- (1) contains statements or claims that are false, deceptive or misleading; or
- (2) violates a disciplinary rule.

Subject to these restrictions, an advertisement or solicitation may include the following (DR 2101(C)):

1. personal references: education; degrees; year of admission; "areas of the law in which the lawyer practices"; public offices and teaching positions; bar association affiliations and committees; foreign language fluency.
2. clients: subject to the clients' prior written consent, the names of clients represented.
3. other references: bank references; credit arrangements accepted; prepaid legal service programs in which the lawyer participates; nonlegal services provided; contractual relationships with non-legal professional firms, and the extent of services available through these contractual relationships.
4. fees and charges: initial consultation fee; contingent fee rates in civil matters (must be accompanied by a statement advising that the client remains liable for costs, disbursements and expenses and whether the contingent fee rate will be computed before or after these costs); range of fees for legal and nonlegal services (lawyer must make available a written statement describing the scope of each service); hourly rates; and fixed fees for specified services.

Restrictions and Prohibitions

But an advertisement or solicitation may not include, depict, utilize or contain any of the following (DR 2-101(D)(1)(8)):

- an endorsement or testimonial from a current client
- a paid endorsement or testimonial
- the voice or image of a nonattorney "spokesperson" that is recognizable to the public (unless the spokesperson is a former client and the ad is accompanied by the following 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.")

- the portrayal of a judge, or of a lawyer by a nonlawyer, or of a law firm as a fictitious entity, or a fictitious name to refer to lawyers not associated in a law firm, or the implication that lawyers are associated in a law firm if that is not the case
- use of a courtroom or courthouse
- portrayal of a client by a non client, or the reenactment of scenes, or pictures or persons that are not actual or authentic
- reproductions of legal documents
- a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter
- Also prohibited are the following: (DR 2101(F)):
 - statements reasonably likely to create an expectation about results the lawyer can achieve
 - statements that compare a lawyer's services with the services of other lawyers
 - testimonials or endorsement of former clients
 - statements describing or characterizing the quality of a lawyer's services

However, as in the case of testimonials by former clients who are "spokespersons" and whose voice or image is recognizable to the public (*supra*), the statements or testimonials listed under DR 2101(F) are permitted if:

1. they comply with the requirements of DR 2101(A) and (B) (*supra*)
2. they have been objectively verified by the lawyer or law firm as of the date on which they are first disseminated
3. They are accompanied by the following disclaimer (spoken in radio and television ads and written in television ads, other communications, or computer accessed communications): "Prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained."

Advertising Labels

Several of the Court's proposals deal with the labeling of advertisements and solicitations. DR 2101(G) requires that radio and television ads be preceded or followed by a spoken statement reciting that the ad contains "an advertisement for legal services." In television ads, the statement must also appear in writing on the screen. Under DR 2101(H), except for ads or solicitations on radio or TV, and for ads in a telephone directory, newspaper, magazine or other periodical, all written advertisements or solicitations, including computer accessed communications, must be labeled on the first page, in red ink, "Attorney Advertising." In the case of a self mailing brochure or pamphlet, the words "Attorney Advertising" must appear "in red ink on the address panel of the brochure or pamphlet." In the case of electronic mail, the same notation, in capital letters, must appear on the subject line.

Further, any word or statement required in any ad or solicitation must be clearly legible and capable of being "read by the average person." If spoken aloud, the word or statement must be intelligible. (DR 2101(L)). All ads or solicitations must include the name, office address and telephone number of the lawyer or law firm whose services are being offered. (DR 2101(J)).

Several proposals relate to ads and solicitations accessed through a computer. Lawyers are prohibited from using popup ads in connection with computer communications, and they may not use meta tags or other hidden computer codes that would violate a disciplinary rule if displayed. (DR 2101(I)). Also, all

computer accessed communications must disclose the lawyer's name, office address and telephone number, as well as all jurisdictions in which the lawyer is licensed to practice and all bona fide office locations of the lawyer or law firm. (DR 2101(J),(K)).

Filing and Record Keeping

The new rules proposed by the Courts would expand on the responsibilities of a lawyer or law firm to make and preserve a record of all ads and solicitations, as follows:

- All broadcast ads must be prerecorded or taped and approved by the lawyer, and a recording or videotape of the actual transmission must be retained by the lawyer for a period of three years (extended from one) following the transmission. (DR 2101(N)).
- A copy of all written ads and solicitations and of computer accessed communications must be retained for a period of at least three years, except that in the case of an internet web site, a printed copy of each page must be retained for at least one year. (DR 2101(N)).
- With respect to all ads or solicitations (other than in a telephone directory) used by a lawyer "seeking to be retained by a client", a copy of each must be filed with the attorney disciplinary committee of the appropriate judicial department. (DR 2101(O)(1)).
- The copies filed with the committee must consist of: (1) a copy of the ad in the form in which it was disseminated (e.g., videotape, audiotape, picture or "accurate depiction of publicly displayed advertising"), including computer accessed information other than an internet web site or page; (2) for radio and TV ads, a transcript of the audio portion of the tape and a listing of all media outlets in which the ad will appear, the frequency of its use, and the period during which it will be used; (3) for mailed or computer accessed communications, a copy of the document sent, with any enclosures and a sample of the envelope used, if any. (DR 2101(O)(1)(iii)).
- The lawyer must file an accurate English language translation of any other language utilized in the ad or solicitation (DR 2101(O)(1)(iv)).
- If a solicitation is directed to predetermined recipients, the lawyer must file a list containing the names and addresses of all recipients to whom the ad is being, or will be, disseminated. The list must be retained for three years.

Domain Names

One of the most significant of the Courts' proposals deals with domain names. (DR 2102(E),(F)). These proposals were added to the Rule relating to Professional Notices, Letterheads and Signs. The proposals read as follows:

(E) A lawyer or law firm may employ 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 website include the actual name of the lawyer or law firm in a type size as large as the largest type size used on the site;
- (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; and
- (3) the domain name otherwise complies with the disciplinary rules.

(F) A lawyer or law firm shall not use a name that violates section 1200.6(d)(8). (This new section prohibits use of a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.) (See, *supra*).

In my judgment, the language of subparagraph (E)(2) is too vague to be enforceable. How will anyone decide the meaning of the terms “attempts to”, or “engage in the practice of law”, or “using the domain name”? A better way, perhaps, would be to specify that the domain name should be used only in association with the name of the lawyer or law firm.

Solicitations After Specific Incident

Concerned about the response of some lawyers to such incidents as the Staten Island ferry crash in 2003 and the crash of American Airlines Flight 587 in 2001, the Courts have recommended adoption of a rule similar to Florida’s rule imposing a thirty day moratorium on the dissemination of any advertisement or solicitation following any “incident” involving potential claims for personal injury or wrongful death. The proposals are contained in DR 2103(E), (F), and (G). The Florida rule was upheld by the Supreme Court in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

The full text of the new Rules follows:

(E) No advertisement or 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 a 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, 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.

The Courts’ commitment to the thirty day moratorium is confirmed by its proposal to require a new Rule, DR 7111:

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

Out of State Lawyers

Under the Courts' proposals, DR 1105, dealing with choice of law issues relating to lawyer discipline, would subject an out of state lawyer who "provides or solicits any services in this state" to the disciplinary authority of New York. This change imports into New York the changes adopted by the ABA in 2002 in Model Rule 8.5.