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New Ethical Considerations On Advertising and Solicitation

BY ROY SIMON

With much advance fanfare, the Appellate Divisions significantly amended the Disciplinary rules governing lawyer advertising, effective February 1, 2007. The amended DRs are lengthy, complex, and confusing. Moreover, like all rules drafted by the courts, they were promulgated without any explanatory Ethical Considerations. (Ethical Considerations are written and adopted only by the New York State Bar Association, not by the courts.)

Soon after February 1st, a subcommittee of the State Bar's Committee on Standards of Attorney Conduct ("COSAC") began drafting new ECs to explain the amended advertising rules and provide guidance to practicing attorneys. In August, in consultation with the State Bar's Task Force on Lawyer Advertising chaired by Bernice Leber, COSAC reviewed and revised the work of its subcommittee and circulated a set of draft ECs for public comment. Thoughtful comments were submitted by the New York State Bar Association Committee on Professional Ethics, the New York City Bar, and the New York County Lawyers Association. After reviewing the comments, COSAC revised the draft ECs and submitted the final proposed ECs to the State Bar for its approval.

On November 3, 2007, the State Bar 's House of Delegates unanimously adopted the new ECs. Because ECs are not adopted by the courts, the new ECs do not require court approval and are now officially part of the New York Lawyer's Code of Professional Responsibility. The State Bar has posted the amended Code of Professional Responsibility (including the new ECs) at **www.nysba.org** , and will soon publish an updated printed version of the full Code. This article points out some of the highlights of the new ECs.

A few preliminary points

Before I address substance, I want to make a few important preliminary points about the numbering, scope, style, and general approach of the new ECs.

Numbering. There are twenty-three new ECs, all in Canon 2, numbered ECs 2-1 through 2-23. Former ECs 2-1 through 2-14 have been deleted. The text of former ECs 2-15 through 2-38 has been retained unchanged, but these have been renumbered as ECs 2-24 through 2-47. The amended version of the full Code hopes to stave off confusion about the numbering by listing both the new and the former number for each EC –for example, "EC 2-47 (former EC 2-38)."

Scope. The new ECs do not address Dr 2-101(C)(1), (3), (5), and (7), and DR 2-101(g)(1), which were struck down as unconstitutional in *Alexander v. Cahill,* 2007 WL 2120024 (N.D.N.Y., July 23, 2007) (Scullin, J.). As part of its August draft, COSAC circulated "conditional" ECs designed to take effect if the Second Circuit reversed Judge Scullin's decision, but to avoid confusion, COSAC decided not to present these to the House of Delegates until the appeal of *Alexander* is decided.

Style. Unlike most of the existing ECs in the Code, the new ECs have numbered paragraphs, provide concrete examples of permitted and prohibited conduct, and sometimes explicitly cross-reference the DRs that they explain. (The only prior EC with subparagraphs was EC 2-25, regarding pro bono work, which was amended in 2005. The only ECs that cross-reference to DRs are those written or amended since 1999, and the only prior EC with concrete examples was EC 2-14.) COSAC hopes that the paragraph numbers, examples, and cross-references will make the ECs easier to understand and apply.

General approach. COSAC's general approach was to be faithful to the text of the amended DRs governing advertising and solicitation, but to construe that text according to common sense and to reflect realities of law practice. The ECs do not (and could not) contradict the express text of the amended DRs, but they resolve ambiguities based on a rule of reason.

What is "misleading"?

Since the New York Code of Professional responsibility first permitted lawyers to advertise shortly after *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), DR 2-101(A) has prohibited advertising that is "false, deceptive, or misleading." That standard remains in place today. The new ECs for the first time explain the term "misleading." Specifically, ECs 2-3(c) and (d) provide as follows:

> c) … A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading.
>
> d) A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer 's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state "I have never lost a case" but that statement would be misleading if the lawyer settled virtually all cases that he or she handled.

Clarifying the definition of "advertisement"

Among the changes effective on February 1, 2007, the Appellate Divisions added an expansive new definition of "Advertising," which provides:

> "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.

The new ECs clarify this broad definition in a way that reflects realism about advertising and advertising techniques. Consider, for example, ECs 2-6, 2-7, and 2-8. The definition does not expressly exempt former clients, because a client who once used a lawyer for, say, a house closing should not forevermore be stripped of the protections that the advertising DRs afford members of the general public. On the other hand, lawyers often have trouble distinguishing between "existing" clients and "former" clients, and former clients generally benefit when lawyers update them on developments in the law. Accordingly, EC 2-6(b) sensibly states: "Communications to former clients that are germane to the earlier representation are not considered to be advertising." This formulation resembles New York's pre-1999 version of DR 2-104(A) and (B), which provided that a lawyer who had given unsolicited advice to an individual to obtain counsel or take legal action generally could not accept employment resulting from that advice, but could

accept employment by a client, close friend, relative, or "former client (if the advice is germane to the former employment) …."

EC 2-6(d) fills another gap in the literal language of the Code definition of "advertising" by stating:

> 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 response to a prospective client who has asked the lawyer to outline his or her qualifications to undertake a proposed retention or the terms of a potential retention.

This is consistent with DR 2-103(B)'s definition of "solicitation," which adds that solicitation "does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client."

Finally, EC 2-6(f) tempers the literal reach of the definition of "advertising" by providing:

> Some 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 if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

What about educational events for the public, and sponsor- ship of non-law events by a law firm? EC 2 7(a) recognizes that we should encourage lawyers to participate in educational and public relations programs concerning our legal system, and EC 2-7(b) provides that lawyer 's participation in an educational program "is ordinarily not considered to be advertising because its primary purpose is to educate and in- form rather than to attract clients." However, such a program might be considered "advertising" (and thus trigger various requirements in the new DRs "if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." Similarly, EC 2-8 recognizes that lawyers sometimes sponsor cultural, sporting, or charitable 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," EC 2-8 says, "the communication is not considered advertising." (Think about this next time you listen to WNYC.)

Claims about results, services, and quality

If advertisements can be "factually supported" and they contain a specified disclaimer ("Prior results do not guarantee a similar outcome"), amended DR 2-101(D) permits "(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;" and "(4) statements describing or characterizing the quality of the lawyer's or law firm's services." ECs 2-9 and 2-10 illustrate what is permitted and prohibited under Dr 2-101(D). EC 2-9 provides:

a) … [I]f true and accompanied by the disclaimer, a lawyer or law firm could advertise “our firm won 10 jury verdicts over $1,000,000 in the last 5 years” or “We have more Patent Lawyers than any other firm in X County” or “I have been practicing in the area of divorce law for more than 10 years.”

b) Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by 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. Likewise, advertising truthfully reciting judgment amounts would be misleading if the law firm failed to disclose that the judgments described were overturned on appeal or were obtained by default.

EC 2-10 provides:

a) Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible, even though they cannot be factually supported. … Accordingly, a lawyer or law firm could advertise that it is “Hard Working” or “Dedicated” or “Compassionate” without the necessity to provide factual support for such subjective claims.

b) on the other hand, descriptions of characteristics of the lawyer or law firm that compare the services of a lawyer or law firm with those of other lawyers or law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer or law firm may not advertise that it is the “Best” or “most experienced” or “Hardest Working.” Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a lawyer or law firm may not advertise that it will obtain “Big $$$” or “most money” or “We Win Big.”

“Super” lawyers and “best” lawyers?

A surprise in the new advertising rules was a new clause in DR 2-101(B) that permits lawyers to advertise “bona fide professional ratings.” The DR does not explain what that means, but EC 2-11 provides detailed guidance:

… [A] rating is not “bona fide” unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Both “Super Lawyers” and “Best Lawyers” claim to comply with these requirements. Lawyer or law firm that its average jury verdict for a “Solicitation” DR 2-103(B) defines and governs a special category of advertisements called “solicitation.” Specifically, DR 2-103(B) provides:

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.

EC 2-17 points out that solicitations "are subject to all of the rules and restrictions governing advertising and are also subject to additional rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and … an accurate English Language translation)." To help lawyers understand what triggers these cumbersome additional requirements, EC 2-18 elaborates on the definition in DR 2-103(B), explaining that 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 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.

Any advertisement that meets all four of these criteria, EC 2-18 says, is a solicitation, and is therefore governed "not only by the rules that govern all advertisements but also by special rules governing solicitation."

The most difficult of the four criteria to understand is the last one – "directed to or targeted at a specific recipient or group of recipients." EC 2-19 explores the meaning of "directed to or targeted at" in detail. EC 2-19(a) notes that an advertisement may be "directed to or targeted at a specific recipient" in either of two different ways. First, EC 2-19(b) says that an advertisement is considered "directed to, or targeted at" a specific recipient or recipients "if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages)." Second, EC 2-19(c) says that an advertisement in a "public medium" (such as newspapers, television, billboards, and web sites) is a solicitation if it refers to a specific person or group "whose legal needs arise out of a 'specific incident' to which the advertisement explicitly refers."

"Specific incidents" and the 30 day rule

The scope of the term "specific incident" is crucial for plain- tiffs' personal injury lawyers because lawyers may not solicit potential personal injury or wrongful death claims relating to a "specific incident" until 30 days after the incident (or some- times 15 days). DR 2-103(g) 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 …." (An exception is made if a filing "must be made within 30 days of the incident as a legal prerequisite to the particular claim," as in no-fault cases. In that case, the blackout period is only 15 days.)

As EC 2-19(b) points out, this 30 day restriction applies even if the recipient is a close friend, relative, or former client (though not if the recipient is an existing client). EC 2-20(b) attempts to define the term “specific incident” as follows:

> 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. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building col- lapses, and the like.

On the other hand, EC 2-20(c) makes clear that solicitations directed to “potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident” and are therefore not subject to the special 30 day rule. Similarly, EC 2-20(d) states that an advertisement in the public media that “makes no express reference to a specific incident” is not subject to the 30 day rule solely because a specific incident has occurred within the last 30 days. Thus, a law firm that advertises on television or in newspapers that it can “help injured people explore their legal rights” is not violating the 30 day rule “even though a mass disaster injured many people within hours or days before the advertisement appeared.”

Public media and the 30 day rule

In the landmark decision in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), by a 5-4 vote, the Supreme Court rejected a First Amendment challenge to Florida’s Rule 4.7-4(b)(1). That rule prohibited a lawyer from sending a “written communication” to a prospective client for the purpose of obtaining professional employment if the communication concerned “an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.” Florida’s 30 day blackout rule thus did not govern advertisements in the public media.

New York’s DR 2-103 goes much further, sweeping public media ads into the realm of the 30 day rule. In *Alexander v. Catalano, supra,* Judge Scullin refused to strike down DR 2-103(G) on that ground, but EC 2-19(d) makes clear that the application to ads in the public media is narrow. Under EC 2-19(d), unless an advertisement “refers to a specific group of people whose legal needs arise out of a ‘specific incident’ to which the advertisement explicitly refers,” an advertisement in a public medium (such as newspapers, television, billboards, or web sites) “is presumed not to be directed to or targeted at a specific recipient or recipients,” and is thus not a solicitation and not subject to the 30 day blackout period. For example, EC 2-19(c) continues:

> [A]n advertisement in a public medium is not directed to or targeted at “a specific recipient or group of recipients” simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared towards inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or workers compensation law.

> The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into a solicitation.

Another important EC regarding solicitation is EC 2-22(c), which makes it clear that ordinary email to prospective clients is not a prohibited solicitation because it "is not considered to be real time or interactive communication." However, "instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real time or interactive communication," and thus are generally prohibited if the communications meet the other criteria for a solicitation.

In sum, under ECs 2-19 and 2-20, an advertisement in the public media is not a "solicitation" – and is therefore not subject to the 30 day blackout period – unless it "explicitly refers to a specific incident." An email advertisement that does not concern a specific incident is likewise not a solicitation even though email is always directed to a specific recipient or group. But if a lawyer "directs or targets an advertisement to the addresses of those killed or injured in a specific incident" (e.g., by mail, email, overnight express, or otherwise), then the advertisement becomes a solicitation and is subject to the 30 day blackout rule even though it makes no reference to a specific incident.

Level playing field?

If strictly enforced, Dr 2-103 should control lawyers admitted to practice in New York – but what about out-of-state lawyers? Will they now have an advantage over New York lawyers? May out-of-state across the border to potential personal injury clients less than 30 days after an accident? No. DR 2-103(K) provides that DR 2-103 "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." EC 2-21 explains that "[a]ll of the special solicitation rules … apply to solicitations directed to recipients in New York, whether made by a lawyer admitted in New York or a lawyer admitted in any another jurisdiction."

Another level playing field issue concerns plaintiffs' lawyers versus defense lawyers. Plaintiffs' lawyers cannot solicit personal injury victims within 30 days after an accident. May defense lawyers freely approach the injured plaintiffs with settlement offers during the 30 days? No. DR 7-111(A), which totally overlaps DR 2-103(g), prohibits unsolicited communications to accident victims for 30 days after the accident. DR 7-111(B), one of the most innovative features in the new ad rules, provides: "This provision limiting contact with an injured individual … applies as well to lawyers or law firms… who represent actual or potential defendants or entities that may defend and/or indemnify said defendants." A new second paragraph in EC 7-18 explains DR 7-111(B) as follows:

> Where DR 7-111(A) imposes a 30 day (or 15 day) restriction on solicitations directed to potential claimants relating to a specific incident involving potential claims for personal injury or wrongful death, *the 30 day (or 15 day) restriction also applies to any communication with potential claimants by lawyers or law firms who represent actual or potential defendants or entities that may defend or indemnify those defendants.* Although defense counsel is not soliciting employment from potential claimants for personal injury or wrongful death, it is improper under DR 7-111(B) for defense counsel to contact such claimants during the period of time when potential plaintiff's lawyers are barred from doing so. [Emphasis added.]

If potential claimants are represented by counsel, however, EC 7-18 makes clear that defense counsel may ethically communicate with claimant's counsel "even during the 30 day (or 15 day) period." Moreover, EC 7-18 explains that DR 7-111(B) "does not bar defense lawyers from communicating with potential defendants even within the 30 day (or 15 day) period …."

Conclusion: Now it's up to the courts and disciplinary authorities

The new ECs were written with substantial help from the Bar but without any feedback from the courts, which have a policy of not commenting on draft rules or ethical considerations. Therefore, the ECs represent merely COSAC's educated guess about how the new rules governing advertising and solicitation will be interpreted. The ECs provide clear guidance on a wide range of key issues arising under the new rules, but it remains to be seen whether the disciplinary authorities and the Appellate Divisions that employ them will follow that guidance. For the sake of the orderly administration of justice in New York and fairness to lawyers everywhere, I hope they do.

Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law, and is Vice Chair and Reporter for the Committee on Standards of Attorney Conduct ("COSAC"). However, the views expressed by him are solely his own.

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