

NEW YORK COUNTY LAWYERS' ASSOCIATION

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New York County Lawyers' Association Committee on Professional Ethics Interim Comments on the Preliminary Report of the New York State Bar Association Task Force on Attorney Advertising

These Comments were produced by the Committee on Professional Ethics and do not necessarily reflect the views of the Association or its Board of Directors.

OVERVIEW

The New York State Bar Association (the "NYS Bar") Task Force on Attorney Advertising (the "Task Force") released its preliminary report containing recommendations for revisions to the rules governing attorney advertising in November 2005.

The Task Force identified several issues concerning the status of attorney advertising in New York, including:

1. False or misleading advertisements in print, broadcast media and the Internet;
2. Lack of enforcement of the current rules;
3. The role to be played by the NYS Bar and local bar associations in addressing advertising that does not meet current requirements; and
4. The need to educate attorneys and the public about attorney advertising.

The Task Force examined the current New York laws and rules governing attorney advertising, other states' initiatives and examples of current attorney advertising in various media. It has issued recommendations tracking the Proposed New York Rules of Professional

Conduct (the “Proposed Rules”), Rules 7.1-7.5, as developed by the Committee on Standards of Attorney Conduct (“COSAC”). Recommendations of the Task Force include, *inter alia*:

1. Amending the Proposed Rules governing attorney advertising and solicitation to provide greater guidance and clarity to practitioners;
2. Proposing outlines of educational programs to educate attorneys about the rules governing appropriate advertising and solicitation and to educate the public on choosing a lawyer and understanding what types of advertising and solicitation are improper;
3. Amending Proposed Rule 7.1 to require the retention of all attorney advertisements for four years, mirroring the requirements applicable to MCLE records and coinciding with the attorney biennial registration cycle. Attorneys would be asked to complete information about compliance with the advertising rules and requirements to facilitate the enforcement of the rules and requirements;
4. Amending Proposed Rule 7.1 to permit all attorney advertisements to be retained in electronic form and filed in accordance with court rules in a central depository;
5. Amending Proposed Rule 7.1 to require that the words “Attorney Advertisement” be visible on certain documents and envelopes;
6. Adopting the Monroe County Bar Association’s guidelines regarding lawyer advertising; and
7. Amending Rule 7.1 to establish a 15-day “blackout period” prohibiting attorneys from mailing solicitations to victims or their families following a personal injury or wrongful death.

COMMITTEE INTERIM COMMENTS

The Committee has had a relatively short period of time in which to review the Task Force’s recommendations, however, we offer the following interim comments:

1. The Committee is supportive of the Task Force’s general mission to revise the

Proposed Rules where needed to provide greater clarity and guidance to practitioners.

2. The Committee is supportive of the Task Force's proposals for educational programs to educate attorneys about the rules governing appropriate advertising and solicitation and to educate the public on choosing a lawyer and understanding what types of advertising and solicitation are improper.
3. The Committee is supportive of the concept of a central repository for the retention of electronic versions of attorney advertisements, provided the rules applicable to such a repository are not burdensome on small firms and solo practitioners.
4. Rule 7.1(a)(b)(1): The Committee is concerned that the proposed requirement that lawyer advertising be retained for a four-year period by the lawyer or law firm is excessive and unnecessary. Such a requirement would likely have a disproportionate impact on solo practitioners and small law firms who may not have the time or resources to handle the administrative aspects of the requirement. The Committee notes that COSAC originally proposed a one-year advertising retention requirement, but has no objection to the current Task Force proposal. The Committee suggests giving the one-year lawyer advertising retention requirement further consideration.
5. Rule 7.1(a)(b)(6): The Task Force recommends that the words "Attorney Advertisement" appear on "direct mail, electronic mail or similar advertisement," but, in conjunction with such recommendation, also proposes a very broad definition of the terms "advertising" and "advertisement." Under the proposed definition, the requirement could conceivably encompass written communications with former and present clients and fellow counsel, where the attorney, by informing them of a development that may be closely related to the work done for them, might have to include in such written communication the "Attorney Advertisement" moniker if it is pointed out that the lawyer or law firm has experience in the area. We suggest that the Task Force definition of "advertising" and "advertisement" take into account permissible and commonplace solicitations of new business and exclude such activities from the definition.
6. Rule 7.1(a)(b)(7): The Task Force recommends the establishment of a 15-day

“blackout period” prohibiting attorneys from mailing solicitations to victims or their families following a personal injury or wrongful death. COSAC did not recommend any “blackout period” under the Proposed Rules and commented that victims and their families have a strong interest in hiring a lawyer soon after the incident causing the damage because (i) of the possibility that evidence will be lost, (ii) no similar restriction applies to insurance adjusters, and (iii) the possibility of meeting short filing deadlines. COSAC also pointed to certain ambiguities in determining whether the proposed blackout period encompasses direct advertising to a victim or whether it also applies to public advertising, which may raise issues of constitutionality. The Committee believes that these COSAC recommendations are valid and should be given serious consideration.

7. Commentary to Rule 7.1[4A]: The Task Force recommends requiring attorneys to certify on their biennial registration statements that they have complied with the advertising rules and regulations under the penalty of perjury. Such a proposal may be problematic as applied to some attorneys, such as associate attorneys at law firms who may not have any role in the firm’s advertising but are then asked to certify that they have complied with the rules. A similar issue exists for lawyers and law firms who may not have conducted any advertising during the biennial period. The Committee suggests that consideration be given to an opt-out provision to the certification for such attorneys or elimination of this provision in its entirety.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL ETHICS

By: Martin Minkowitz, Chair

January 6, 2006