



## FAQ

### The New Attorney Advertising Rules in New York

#### A Framework for Approaching the Rules and Your Firm's Compliance

The following 81 Frequently Asked Questions (FAQ) were drawn from the 123 questions posed by attendees of the Legal Marketing Association Metropolitan New York Chapter (NYLMA) Webinar on the amendments to the attorney advertising rules in New York held on February 8, 2007. The questions and answers have been categorized by subject matter (e.g., Web sites, email, brochures).

There are a few points you should consider as you read the questions and answers that follow. Your first step in analyzing how the rules apply to any specific marketing tactic should be to determine whether the activity satisfies the threshold question: Is it subject to the rules?

This requires a two-part inquiry: Does the marketing tactic meet the definition of advertising and/or solicitation and/or electronic communication? If so, is it subject to a clear exemption?

#### The Definition of Advertising

The first inquiry is not as easy as it may seem. Under the revised rules, advertising is defined 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 obvious factual question arises from the “primary purpose” language. This is clearly an area where reasonable minds may differ.

#### The Definition of Solicitation

As for solicitation, its definition is derivative of the definition of advertising. The applicable rule defines solicitation as “. . . 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 and law firm, and a significant motive for which is pecuniary gain.”

So a solicitation, which first must meet the definition of advertising, ups the ante by adding the ideas of specific targeting, such as at accident victims, and a “significant motive” of “pecuniary gain.” This higher threshold, if met, then triggers the more onerous filing, retention and other requirements that cover solicitations.

#### The Definition of Electronic Communication

Finally, electronic communication is defined simply as “. . . 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 . . .” Note that there is no reference to the definition of advertisement in this definition, which apparently renders this a more generally applicable element of the revised rules.



### Exemptions to the Rules

Assuming you determine that what you plan to do -- send out a brochure, use a matter list in a pitch, email an invitation to an event -- meets the definition of advertising, your next inquiry is whether the specific tactic in question is subject to one of the rules' exemptions. These include, but are not limited to, the following:

- A limited exemption, from the general requirement that advertising be labeled with the words "Attorney Advertising," for certain advertisements that appear in designated media: radio, television, directories, newspapers, magazines or other periodicals (and related Web sites).
- A blanket exemption from the advertising rules for communications to existing clients or other lawyers.
- A blanket exemption, from the solicitation rules, for solicitations to close friends, relatives, or former/existing clients.
- An exemption from the solicitation rules of a "proposal or other writing prepared and delivered in response to a specific request of a prospective client," which would seem to exempt most RFPs and certain other pitches.

### Consult with Your Firm's Ethics Counsel

As you review the rules, as well as the FAQ to follow, it is useful to keep the above-noted framework in mind. Given the many grey areas in the rules and the sundry factual determinations that must be made when applying them to specific situations, it is advisable to involve ethics counsel before undertaking any questionable activities.

### Disclaimer

This FAQ is for informational purposes only. It is not intended to serve as legal advice. While every care has been taken in its preparation, the Legal Marketing Association New York Metropolitan Chapter does not accept responsibility for reliance on its content. We strongly encourage anyone with questions about the rules and their applicability to a particular set of facts to consult counsel before taking action.

The rules may be found at [http://www.nycourts.gov/rules/attorney\\_ads\\_amendments.shtml](http://www.nycourts.gov/rules/attorney_ads_amendments.shtml).

### About the Legal Marketing Association Metropolitan New York Chapter (NYLMA)

The Legal Marketing Association Metropolitan New York Chapter (NYLMA) is a network that provides resources and community to help legal marketing, business development and communications professionals, attorneys and related service providers excel in their workplaces and in their careers. Established in 1992, NYLMA serves nearly 400 members in the New York City metro area. For more information, please visit [www.nylma.org](http://www.nylma.org)



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## 1 Definitions

- 1.1 *How does the reference to “legal representatives” in the definition of “solicitation” square with the exclusion of communications directed to “other lawyers” from “advertisements” (and thus “solicitations”)?*

The definition of advertisement expressly exempts lawyers from the rules regarding such communications with other lawyers. However, all lawyers are included in the prohibitions regarding solicitation. In its use of the term “legal representatives”, DR 2-103 b) expressly includes lawyers in the rules regarding solicitation. The reference to “legal representatives” in the definition of “solicitation” does not square with the exclusion of communications directed to “other lawyers” from “advertisements” because these definitions address different kinds of marketing and encompass different universes of communicators and audiences.

- 1.2 *For existing clients can you define “existing business relationship” with respect to time?*

The solicitation rules do not make use of the phrase “existing business relationship.” They do not address the issue raised in this question in any fashion. That said, the definitional issue of what is an “existing client” is an important one that your firm’s ethics counsel will have to consider. Some lawyers or law firms seek to create a link between a previous relationship with a client and the client’s belief that the lawyer and the client have an ongoing relationship despite the lack of an active matter. However, the lawyer or law firm may, depending on the circumstances, use the lack of an active matter to deny the existence of a client relationship and act in an adversarial role in a matter. Law firms need to make a determination as to what is an “existing client.”

- 1.3 *Please clarify the definition of solicitation, in particular “directed to or targeted at, a specific recipient or group of recipients.” Does this include existing mailing lists?*

Any communication not requested by the recipient is a solicitation. It can be reasonably argued that recipients on an existing mailing list are not being solicited because they have asked to be placed on the mailing list and receive communications from the law firm.

- 1.4 *Are business cards considered advertising?*

According to DR 2-102 a) 1), standard business cards are not advertising.

- 1.5 *My law firm sends out new attorney announcements by mail that includes a biography and some language about the firm’s practice areas. Is this considered advertising and does the “Attorney Advertising” label have to be included on the announcement?*

The rules do not specifically address this scenario. Once again, it is a question of motive that your firm’s ethics counsel will have to interpret. Is the primary purpose of the announcement “the retention of the lawyer or law firm” or is the communication informational?

- 1.6 *Is contact with an affiliate of a current client considered advertising, if the affiliate is not a client?*

The rules do not specifically address this scenario. Generally an affiliate company is a separate entity and thus the company would be a prospect. The next question is with whom are you communicating at the affiliate company? Is he or she a lawyer? If so, the advertising rules do not apply.

- 1.7 *Scope of "primary purpose" -- are educational materials that are sent to current clients and potential clients that describe a legal development, but at the end have contact material or link to Web site description, solicitations (or advertising)?*

Once again, this is a question that your firm's ethics counsel will have to interpret. Is the primary purpose of the communication "the retention of the lawyer or law firm"? Is "pecuniary gain" a significant motive? If your firm answers one of these questions affirmatively, it should follow the related rules. If your firm decides that the primary purpose informational, the advertising and solicitation rules do not apply.

- 1.8 *Was a carve-out for sophisticated consumers that are not lawyers ever contemplated?*

Various firms and bars asked the courts to carve out an exception for firm communications aimed at corporate clients, but the courts did not adopt an exclusion.

- 1.9 *Do brochures for New York-based firms distributed in foreign countries need to contain the "Attorney Advertising" label?*

The rules regarding advertising do not address the location of the recipient. The advertising rules are to be followed by New York lawyers regardless of the location of the recipient. However, DR 2-103 c) expressly applies to lawyers admitted elsewhere who "solicit retention by residents of this State."

- 1.10 *For solicitation purposes, are alumni considered "close friends"?*

The rules do not define "close friend." Until the courts weigh in or a definitional norm is established over time, this is a definitional matter that your firm's ethics counsel will have to interpret. Alumni are generally lawyers.

- 1.11 *Is a marketing brochure a solicitation? Are you suggesting that it might be necessary to file a copy of every marketing brochure with the state?*

A marketing brochure is an ad and may also be a solicitation. DR 2-103 c) 1) states that, for recipients from New York, the solicitation must be filed with the Disciplinary Committee and available for public inspection. The lawyer or law firm must report how it learned of the recipient and the recipient's need for legal services.

- 1.12 *You mentioned communications to other lawyers are excluded. Are in-house/general counsel considered "other lawyers"?*

Yes. In-house or general counsel are "other lawyers."

- 1.13 *Regarding the exclusion of communications to lawyers from advertising, what if you either suspect or know that the receiving lawyer will pass it on to non-attorneys?*

The rules do not address this scenario. It is reasonable to expect that the sender cannot control to whom else the brochure might be distributed and thus would not be responsible for the brochure being passed from a lawyer recipient to a non-lawyer recipient.

- 1.14 *Is an advertisement in a program for a charity dinner where the law firm has made a contribution included in the scope of the rules?*

Once again, it is a question of motive. Is “pecuniary gain” a significant motive, or are your firm’s motives more educational or informational or philanthropic? Your firm’s ethics counsel must make a judgment about this scenario and apply the rules accordingly.

## **2 Content**

- 2.1 *“Prior results do not guarantee a similar outcome.” Don’t you need that on the home page of your firm’s Web site if you reference matters?*

DR 2-101 contains a laundry list of what advertisements may contain, though these permissible activities are subject to various conditions. For example, content in ads, including Web sites, must be factually supported by the lawyer or law firm as of the date it’s published/disseminated, and it must be properly labeled and accompanied by the disclaimer: “Prior results do not guarantee a similar outcome.” The rules do not state where the disclaimer must appear.

- 2.2 *Does listing representative experience constitute “results”?*

The practice of listing representative experience falls under DR 2-101 d) allowing (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; and (2) statements that compare the lawyer’s services with the services of other lawyers” as long as they are “accompanied by the disclaimer: ‘Prior results do not guarantee a similar outcome.’ ” The rules do not state where the disclaimer must appear.

- 2.3 *If a case has gone to the Appeals Court, but we have the original case listed as a victory in the District Court on our Web site, are we required to include a disclaimer on the case status?*

DR 2-101 c) states 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.” The rules do not allow mention of a pending matter in marketing materials with a disclaimer. They prohibit such mention while it is pending.

- 2.4 *Law firms can make statements characterizing the quality of services provided such statements are “objectively verifiable.” What does this do to statements like “X Firm provides high-quality legal services” that are simply not subject to factual verification. To put it another way, are “subjective” statements now forbidden?*

The rules do not state that “statements describing or characterizing the quality of the lawyer’s or law firm’s services” be “objectively verifiable.” DR 2-101 e) 2) states that such statements must be must be “factually supported.”

- 2.5 *Do stock photography images have to be removed or can a line be added saying something like, “images are for design purposes only with actors appearing in some pictures”?*

DR 2-101 c) 4) states that “An advertisement shall not...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.” DR 2-101 does not state where or how the disclosure of the use of actors must appear.

- 2.6 *Do you read the prohibition on endorsements regarding current matters to also prohibit endorsements from a client regarding a closed matter, if you still have other matters with the same client?*

DR 2-101 c) 1) states 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.” The rule says nothing about a testimonial about a closed matter by a current client. Therefore it could be interpreted that such a testimonial is permissible.

### **3 Labeling**

- 3.1 *If you have “old” materials, can you simply add a sticker that says “Attorney Advertising” or do you need to reprint new materials?*

The answer depends on to whom you are distributing the brochure. If the recipient is a client or a lawyer, you do not need to label your marketing materials. For non-attorney prospects, DR 2-101 f) requires the use of the phrase “Attorney Advertising” on materials deemed as advertising. However, the rules do not state that previously printed materials are unusable or that the phrase must appear via offset printing.

- 3.2 *Are there rules where you put “Attorney Advertising” on the firm brochure? Front page? Back page?*

DR 2-101 f) states that “Every advertisement other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical shall be labeled “Attorney Advertising” **on the first page...**”

The rules do not dictate where on the page the label must be placed. DR 2-101 i) states that the phrase must be clearly legible.

- 3.3 *When an attorney brings a brochure to a potential client (one he or she has never met before), is that a solicitation? And therefore, does “Attorney Advertising” have to be on the brochure? Does the brochure have to be imprinted or with a label?*

To determine if the meeting is a solicitation, it must be determined if meeting meets the definition of solicitation. Is “the primary purpose of the meeting the retention of the lawyer and law firm, and a significant motive for which is pecuniary gain”? Or is the meeting informational in nature? If you are giving the brochure to a non-attorney prospect, the brochure must be labeled “Attorney Advertising.” Either an imprint or a label is acceptable. Advertising directed at clients and other lawyers are exempt from the rules.

- 3.4 *Regarding email communications such as firm news and law updates, if a client or potential client voluntarily signs up for our firm mailing list, do we still need to include ATTORNEY ADVERTISING in the subject line?*

Emails to these recipients would not require “ATTORNEY ADVERTISING” in the subject line. Email communications that conform to the definition of advertisement to non-attorney prospects require the use of “ATTORNEY ADVERTISING” in the subject line as stated in DR 2-101 f).

- 3.5 *Is there a labeling requirement for print ads appearing in magazines or newspapers?*

Per DR 2-101 h), advertisements appearing in periodicals require inclusion of your firm’s name, principal office address, and telephone number. Firms without a designated headquarters will have to agree on one for the purposes of the rules. The rules do not require use of the phrase “Attorney Advertising” in print ads appearing in magazines or newspapers.

- 3.6 *What methods are legal marketers using to remind attorneys who request marketing materials for prospective clients to comply with the new rules on solicitations?*

Many law firms have distributed memoranda to their attorneys or held in-house CLE programs on the new advertising rules and the firm’s interpretation of them.

#### **4 Filing/Retention**

- 4.1 *Do we submit advertisements for approval?*

Advertisements do not need to be submitted for approval. DR 2-101 k) states 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 by the lawyer for a period of not less than one year.”

## 5 Enforcement/Litigation

- 5.1 *What liability will be assumed by Internet marketing firms that rely on their law firm clients for approval of marketing implementations (such as meta tags, alt tags, keyword optimization, banner ads, Internet ads, pay per click ads, etc.)?*

Non-attorneys face no liability regarding these rules. The New York Unified Court System holds lawyers and law firms responsible for all of their marketing and advertising communications.

- 5.2 *How would meta tags be investigated?*

This question is in reference to DR 2-101 g) 2) which states that “A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate a disciplinary rule.” Investigations normally stem from a complaint or complaints by fellow members of the Bar or consumers. The rules do not provide information on how a complaint on this particular rule might be investigated.

## 6 Jurisdiction

- 6.1 *How do the rules apply to law firms that do not have an office in New York, but may have a client or potential client in New York?*

The advertising rules only apply to New York lawyers and law firms. However, the rules on solicitation expressly apply to lawyers admitted elsewhere who “solicit retention by residents of this State.”

- 6.2 *If a New York attorney sends an advertisement to non-New York prospects, we assume the rules apply. If a non-New York attorney sends ads to prospects in New York, do the rules apply?*

The answer to both questions is “Yes” with the added note that in the first scenario, if the prospect is a lawyer, the advertising rules do not apply. The answer to the second question is that the solicitation rules apply if the ad is also a solicitation.

- 6.3 *How do the rules apply for print advertising in nationally distributed publications (e.g., Corporate Counsel magazine) where the ads will be seen in New York, but aren't being placed by law firms with their primary office in New York?*

Ads placed by law firms outside of New York will not face any liability. The draft regulations proposed language that would have extended New York disciplinary authority to out-of-state lawyers who seek business in New York. This language was removed from the final rules.

- 6.4 *If a London-based firm includes a lawyer that also practices in New York, does that firm have to follow these rules?*

All of the lawyers in the London-based firm need to follow the solicitation rules for communicating with prospects based in New York. The lawyers in the firm's New York office and the lawyers admitted to practice in New York that are resident in an office outside of New York need to follow the advertising rules. The firm will need to make decisions on compliance issues such as whether or not to place the label "Attorney Advertising" on its home page. Some law firms that have headquarters outside of New York and also have a New York office have added the label to their firm's Web site home page. Other firms have chosen not to do so.

- 6.5 *I am preparing a firm brochure for distribution at a seminar outside the U.S. Our attorney speakers are not admitted in New York, but our firm has a New York office. Do the rules, specifically, the need to place "Attorney Advertising" on the brochure, apply in this instance? My understanding is that the rules attach to the New York admitted lawyers, not to the firm overall.*

Your understanding is correct.

- 6.6 *We are a law firm based in New York. Do brochures that we distribute in foreign countries need to contain the "Attorney Advertising" label?*

The rules regarding advertising do not address the location of the recipient. The advertising rules are to be followed by New York lawyers regardless of the location of the recipient. However, the rules on solicitation expressly apply to lawyers admitted elsewhere who "solicit retention by residents of this State."

- 6.7 *We're a litigation boutique with one office in San Francisco, but a national practice. We have two attorneys licensed in New York and currently our firm is representing two clients in New York. How far do the rules reach?*

The advertising rules are to be followed by lawyers licensed in the state of New York. Your firm's New York licensed lawyers will need to examine their advertising and solicitation practices. However, it can be argued that your law firm does not need to add the label "Attorney Advertising" to its Web site. The rules on solicitation expressly apply to lawyers admitted elsewhere who "solicit retention by residents of this State."

- 6.8 *Do the rules apply to New York licensed lawyers who are resident in an office outside of the state of New York?*

Yes.

- 6.9 *While our firm has an office in New York, it maintains its principal office in San Francisco. When we send newsletters or e-mail alerts, that may or may not pertain to our New York attorneys but that may reach specific residents in New York are we suppose to file copies with the Disciplinary Committee in New York?*

When it comes to mailings and related communications, compliance becomes a question of motive: Is “pecuniary gain” a “significant motive”, or are your firm’s motives more educational or informational? Your firm’s ethics counsel must make judgments regarding specific forms of communications and your firm’s tolerance for risk.

If your firm’s ethics counsel determines that “pecuniary gain” is “a significant motive,” the solicitation rules apply. These rules apply to lawyers admitted elsewhere who “solicit retention by residents of this State.” The solicitation rules state that, for recipients from New York, the solicitation must be filed with the Disciplinary Committee and available for public inspection. Further the rules state that the lawyer or law firm must state how it learned of the recipient and the recipient’s need for legal services.

## **7 Web Sites, Blogs & Online Ads**

- 7.1 *“Prior results do not guarantee a similar outcome.” Don’t you need that on the home page of your firm’s Web site if you reference matters?*

DR 2-101 contains a laundry list of what advertisements “may contain,” though these permissible activities are subject to various conditions. For example, content in ads, including Web sites, must be factually supportable by the lawyer or law firm as of the date it’s published/disseminated, and it must be properly labeled and accompanied by the disclaimer: “Prior results do not guarantee a similar outcome.” The rules do not state where the disclaimer must appear.

- 7.2 *Regarding the requirement to publish “Attorney Advertising” on the Web site home page, please specify the typeface, font size and placement on the page. In short, can this be buried on the bottom in an 8 point font?*

The only requirements are that the label be on the home page and that it be legible. There are no requirements regarding typeface, font size or placement.

- 7.3 *What is considered a “major” Web site re-design? Does this apply to content only or graphic design?*

The rules are vague. Once again, the rules do not define what a “major Web site re-design” is. This is another of many areas of the rules where lawyers and law firm marketers will have to make a judgment call after consultation with counsel.

- 7.4 *Do attorney blogs need to be labeled “Attorney Advertising”? Can the label be buried in a linked Web page called “Disclaimers”?*

Attorney blogs must be labeled as “Attorney Advertising.” Like law firm Web sites, the label should appear on the home page of the blog.

7.5 *What about banner advertising?*

Banner advertising is included in the definition of computer-accessed communications [1200.1 l)] and thus is subject to the advertising rules regarding content and labeling.

7.6 *How do the rules apply to a Web site, to which potential clients are directed via mass email, with several different possible intake screens, where none of the Web pages lists the names of any of the law firms for which the intake is performed?*

This Web site would appear to be in violation of DR 2-101 (e) which states 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 actual name of the lawyer or law firm.”

**8 Email**

8.1 *For email advertisements does “Attorney Advertising” need to be in all caps?*

For emails, yes. And the rules state that the label must appear in the subject line of the email.

8.2 *Emails that are automatically generated as a reply to Web site sign-ups (e.g., email newsletter subscriptions and request for information) should these auto email replies be labeled with “ATTORNEY ADVERTISING”?*

Of course, the answer depends on the content of the email. However, it is likely that it could reasonably be argued that such automatically generated emails are informational in nature and simply confirm receipt of the sign-up or request for information.

8.3 *If an email communication is informational and does not refer to the firm’s capabilities and says at the end, “If you have any questions, please contact Partner A,” is the “ATTORNEY ADVERTISING” label required?*

For such communications, compliance becomes a question of motive: Is “the retention of the lawyer or the law firm the principal motive”, or are your firm’s motives more informational and therefore not advertising? Your firm’s ethics counsel must make a judgment. If you do decide that the communication is advertising, recall that the rules exempt clients and other lawyers from the rules.

An ethics expert, Stephen Gillers, a professor at New York University School of Law and a consultant to the New York State Bar Association on the new rules, has advised clients and colleagues that the new rules do not apply to client memos, which he believes are not commercial speech, which has limited protection under the First Amendment.

**9 Brochures**

9.1 *What methods are legal marketers using to remind attorneys who request marketing materials for prospective clients to comply with the new rules on solicitations?*

Many law firms have distributed memoranda to their attorneys or held in-house CLE programs on the new advertising rules and the firm’s interpretation of them.

- 9.2 *What should we do with existing printed materials? Do we need to add a sticker...throw them all out?*

Adding a clear label with the phrase "Attorney Advertising" in a font size that is clearly legible to the first page of the materials is a solution that many law firms have implemented.

## **10 Mailings**

- 10.1 *Is a newsletter considered an advertisement?*

For such communications, compliance becomes a question of motive: Is "the retention of the lawyer or the law firm" the principal motive for the communication, or are your firm's motives more informational and therefore not advertising? Your firm's ethics counsel must make a judgment. If you do decide that the communication is advertising, recall that the rules exempt clients and other lawyers from the rules.

- 10.2 *What about postcards and other printed materials?*

Please see answer for 10.1.

- 10.3 *When sending materials marked "Attorney Advertising" with a cover letter or memo, should the cover letter or memo also be marked "Attorney Advertising"?*

While the rules do not address this scenario specifically, if the enclosure is deemed advertising, it would be a reasonable interpretation of the rules to also use the label in the cover letter or memo.

## **11 RFPs and Pitches**

- 11.1 *Re Response to RFPs -- DR 2-103 b) excludes these from being considered a "solicitation." Therefore, what other aspects, if any, of the advertising rules apply to responses to RFPs.*

Advertising rules still apply to RFPs and pitches.

- 11.2 *While proposals have been specifically excluded from the solicitation rules of 1200.8, they still seem to be covered by the advertising rules of 1200.6. Do we need to include "Prior results do not guarantee a similar outcome" on pitch or proposal materials? Does it make a difference if we are responding to an RFP or simple request from a potential client?*

Yes. While responses to both RFPs and pitches are exempt from the solicitation rules, they are still covered by the advertising rules. However, keep in mind that responses to RFPs and pitch materials sent to clients and lawyers are exempt from the advertising rules.

The rules do not distinguish between an RFP and a pitch. DR 2-103 b) states that the solicitation rules do not include "a proposal or other writing prepared and delivered in response to a specific request of a prospective client."

## 12 Deal Lists / Lists of Representative Matters

- 12.1 *For communications that could arguably be purely informational: e.g., deal lists and client advisories, do they need to be labeled "Attorney Advertising"?*

For such communications, compliance becomes a question of motive: Is "the retention of the lawyer or the law firm" the principal motive for the communication, or are your firm's motives more informational and therefore not advertising? Your firm's ethics counsel must make a judgment. If you do decide that the communication is advertising, recall that the rules exempt clients and other lawyers from the rules.

- 12.2 *Does a list of representative matters require the disclaimer: "Prior results do not guarantee a future outcome."?*

If your firm's ethics counsel deems the list as advertising, your firm will need to follow the advertising rules. Content in advertising must be factually supported by the lawyer or law firm as of the date it's published/disseminated, and it must be properly labeled and accompanied by the disclaimer: "Prior results do not guarantee a similar outcome."

## 13 Articles / Article Reprints

- 13.1 *Would publishing an article in a trade or business publication be considered advertising?*

No. A general consensus has developed that the rules do not relate to public relations, articles or article reprints.

- 13.2 *A publisher asks for the right to reprint a client alert or newsletter, does this need "Attorney Advertising" label?*

The publisher is not an attorney and therefore is not subject to these rules.

## 14 Advertisements

- 14.1 *Our firm has a custom magazine published by an external vendor. How do these rules apply to it?*

The rules of advertising and solicitation apply to this publication in the same manner as they would to other communications.

- 14.2 *Is there a labeling requirement for print ads appearing in magazines or newspapers?*

Advertisements appearing in periodicals require inclusion of your firm's name, principal office address, and telephone number. Firms without a designated headquarters will have to agree on one for the purposes of the rules. The rules do not require use of the phrase "Attorney Advertising" in print ads appearing in magazines or newspapers.

- 14.3 *Regarding the inclusion of an address on all advertisements, how does a multi-office firm comply? Does a firm outside of New York need to comply if it runs an ad in a publication like the Wall Street Journal?*

Firms without a designated headquarters will have to agree on one for the purposes of the rules. The rules regarding advertising do not address the location of the recipient. The advertising rules are to be followed by New York lawyers regardless of the location of the recipient. If your firm does not have an office in New York and runs an ad in the Wall Street Journal, it does not need to comply with the advertising rules.

- 14.4 *Do firms need to include "Attorney Advertising" in congratulatory ads placed in trade journals say when we promote new partners?*

Once again, it is a question of motive. Is "pecuniary gain" a significant motive, or are your firm's motives more informational? Your firm's ethics counsel must make a judgment about "tombstone ads" and apply the rules accordingly.

- 14.5 *If you are running your ad campaign solely in trade publications specifically for in-house counsel, do these rules apply?*

A liberal interpretation of the rules would suggest that the answer to the question is "No." A conservative interpretation of the rules might be that the audience is wider and includes non-attorneys and therefore, it is best to follow the advertising rules as they apply to non-attorney prospects.

## **15 Directories**

- 15.1 *What is considered a "bona fide" professional rating?*

According to DR 2-101 b) 1), law firms are allowed to use content related to "bona fide professional ratings," which raises the question of whether a particular directory is "bona fide"? Some authorities have argued that certain relatively uncontroversial ranking systems are probably safe, while less-established ratings may face questions from lawyers and law firms as to their practices and procedures. This is one of many areas of the rules where lawyers and law firm marketers will have to make some judgment calls after consultation with counsel.

- 15.2 *Does this apply to the use of a directory's logo within a Web site, especially on an attorney bio page?*

According to DR 2-101 b) 1), it appears that the use of a directory's logo on an attorney's bio page at a law firm Web site is content that is permitted under the rules.

- 15.3 *Does this mean that "bona fide" directories are not "advertising," or not "solicitation?"*

The rules state only that "bona fide" professional ratings are acceptable content in advertisements.

- 15.4 *Can we include reference to an attorney as a Super Lawyer who is not licensed in New York, such as in a biography if sending collateral materials to a New York client?*

The rules are unclear. DR 2-101 b) 1) states that “bona fide” professional ratings are acceptable content in advertisements. However, the rules do not define “bona fide.” This is an issue that your firm’s ethics counsel will have to interpret.

## **16 Public Relations**

- 16.1 *Based on the definition of advertisement as provided by the lawyer advertising rules, would a press release be considered an advertisement or a form of solicitation?*

The rules do not address press releases. At this point, the accepted consensus is that press releases are not governed by the rules. It can be argued that the motive for press releases is to influence various audiences, but not primarily to win the “retention of the lawyer or law firm.”

- 16.2 *How do the rules apply to press releases that are distributed to the media, posted on web sites, broadly issued via news distribution service? Are they considered advertisements?*

Please see answer in 16.1.

- 16.3 *Obviously reporters are not clients. Is reaching out to reporters on behalf of a lawyer or law firm to announce professional moves, case victories, etc. in violation of the lawyer advertising rules?*

Please see answer in 16.1.

- 16.4 *If a reporter is looking for expert commentary on breaking news, would that be in violation of the lawyer advertising rules? Also, are published bylined articles written by a lawyer or law firm does that violate the lawyer advertising rules?*

Please see answer in 16.1.

## **17 Events**

- 17.1 *Where do invitations for events, seminars and dinners fall under these definitions and what needs to be done with those to comply?*

One of the most important elements of the definition of advertisement is the exemption of clients and lawyers. For corporate law firms, the exemption makes legal marketing under these new rules much easier.

Is the primary purpose of the announcement “the retention of the lawyer or law firm”. This would qualify the materials as an advertisement. Is “pecuniary gain” a significant motive? This would qualify the communication as a solicitation. Or are your firm’s motives more educational or informational?

Regarding invites for events, seminars and dinners at your firm you may want to consult their firm’s ethics counsel in making judgments regarding specific rules and their firm’s tolerance for risk.

- 17.2 *If an attorney is a speaker for a program, hosted by an organization other than the attorney's law firm, must the organization's advertisement of the program carry the "Attorney Advertising" footnote or disclaimer?*

The rules only apply to advertisements and solicitations by lawyers or their law firms.

- 17.3 *What if the program has been sponsored by or otherwise funded by the law firm (a "pay to speak" situation, so to speak)? Should the organization's advertising carry the "Attorney Advertising" verbiage?*

The question is who is paying for and producing the ad? If the ad is not a product of a law firm or lawyer, the rules do not apply.

- 17.4 *If a law firm does a joint seminar with a non-law firm (e.g., accounting firm) do these rules apply on the invitation?*

If the advertisement is sponsored by a lawyer or a law firm, the rules may apply. This is an issue that your firm's ethics counsel will have to interpret.

- 17.5 *Do the rules apply to seminar handout materials and PowerPoint presentations for CLE programs or seminars on legal topics? The materials are meant to be informative to attendees, assuming they are non-clients. However, would the rules assume that a presentation is for pecuniary gain? What about client advisories sent to non-clients for their benefit? Is there an underlying message that the primary purpose is for retention of the lawyer?*

Once again, it is a question of motive. Is the primary purpose of the material "the retention of the lawyer or law firm." This would qualify the material as an advertisement. Is "pecuniary gain" a significant motive? This would qualify the communication as a solicitation. Or are your firm's motives more educational or informational? Your firm's ethics counsel must make a judgment about each of these scenarios and apply the rules accordingly.

- 17.6 *What about an invitation to the opening of a New York office?*

The rules do not specifically address this scenario. Once again, it is a question of motive that your firm's ethics counsel will have to interpret.

## **18 Other**

- 18.1 *Do the rules apply to promotional items given out by a law firm (e.g., golf balls, polo shirts and umbrellas)?*

At this point, the accepted consensus is that promotional materials are informational and therefore are not governed by the rules.

- 18.2 *There are likely to be a number of issues that arise as we move ahead. What process is going to be in place to seek authoritative interpretations of the new rules? Whom do we ask?*

Until the courts weigh in, or certain norms are established over time, legal marketers may want to consult their firm's ethics counsel in making judgments regarding specific rules and their firm's tolerance for risk.

As an additional resource, you may want to check with your firm's library regarding legal periodicals that provide guidance on the rules. Publications such as the ABA/BNA Lawyers' Manual on Professional Conduct may provide helpful information.

- 18.3 *Do you need a client's permission to list them as a representative client on your Web site or in a mailing?*

Yes. DR 2-102 b) 2) states that "an advertisement may include information as to names of clients regularly represented, provided that the client has given prior written consent."