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New York's Final Lawyer Advertising Rules on Web Sites and Email: Much Improved, But Some Issues Remain

By Joshua Stein

Last summer, the New York Office of Court Administration proposed some rules on lawyer advertising that could have dramatically interfered with how New York lawyers use Web sites and email. Many lawyers and bar associations filed objections to the proposed rules. In response, OCA trimmed back its initial proposal substantially, releasing a final version in January 2007. In this article, real estate attorney Joshua Stein, who submitted 20 pages of objections to OCA's original proposed rules, argues that although the Final Rules are much improved, they still fall short of perfect. Read this article to find out why. Even if you don't practice in New York, this article may enable you to take proactive steps in your jurisdiction. This article contains 2,626 words.

INTRODUCTION

Last summer, New York's Office of Court Administration (OCA) provoked a well-earned firestorm when it proposed some rules to limit lawyer advertising in New York (the "Draft Rules").

In response to many comments received in response to the Draft Rules, OCA issued new rules (the "Final Rules") in January. The final Rules became effective February 1. You can find them online.

In this article, I will review the Final Rules and how they differ from the Draft Rules, at least as they relate to Web sites and email. In that comparison, I'll start from the objections to the Draft Rules I submitted to OCA in July 2006 (the "July Submission").

In my July Submission, I said the Draft Rules painted with much too broad a brush, and would dramatically and unnecessarily burden New York lawyers who use Web sites and email in their ordinary work and business development activities. You can see my July Submission now retitled "What Was Wrong With OCA's Draft Lawyer Advertising Rules?" here.

OCA's Final Rules solve most of the problems I identified in my July Submission.

DEFINITIONS OF ADVERTISEMENT AND SOLICITATION

As their starting point, the Draft Rules defined "advertisement" and "solicitation" broadly enough to cover any communication by any lawyer to anyone about any lawyer or law firm — an extraordinarily broad scope.

Last summer, New York's OCA provoked a well-earned firestorm when it proposed some rules to limit lawyer advertising.

Advertisement

Under the Final Rules, an "advertisement" now limits itself to communications that: (a) a lawyer or law firm makes; (b) about that lawyer or law firm's services; and (c) "the primary purpose of which is for the retention of the lawyer or law firm." Final Rules Section 1200.1(k). The definition expressly excludes "communications to existing clients or other lawyers."

This change substantially narrows the rules, thus reducing the risk that they will burden a wide array of routine communications that one would normally not consider advertising.

What if a lawyer sends out information, such as copies of articles, to recipients other than the sender's existing clients and other lawyers? Would those be deemed "advertisements"? One wouldn't

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think so, because the "primary purpose" of these distributions would seem to consist of communicating information and perhaps building the sender's reputation. These distributions don't relate — at least directly — to the lawyer's services, and their "primary purpose" is not to have the recipient engage the sender.

A recent New York Supreme Court case may suggest a less tolerant approach to "informational" communications, though. Soon after OCA issued the Draft Rules, New York Supreme Court Justice Jane Solomon ruled that when an attorney faxed out monthly unsolicited "informational" newsletters in his area of practice, these were indirectly advertisements, at least for purposes of the federal prohibition on "junk faxes." Justice Solomon reasoned, in essence, that the sender wasn't sending the newsletters out of altruism, but to promote his business. (See Stern v. Bluestone, Decision and Order, August __, 2006, available online.)

Of course, any analysis of the "primary purpose" of a communication still requires some degree of mind-reading.

The definition of "advertisement" that Justice Solomon interpreted was, however, broader than the definition in the Final Rules, because it included no "primary purpose" test. For purposes of the "junk fax" rules, an "advertisement" simply means in relevant part "any material advertising the commercial availability or quality of any ... services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. Section 227(a)(b) (2006). So even if an "informational" communication constitutes an "advertisement" for junk fax purposes, that doesn't necessarily make it one under the Final Rules.

If the Final Rules really mean "primary purpose" when they say "primary purpose," then the Final Rules should not capture ordinary "informational" communications — regardless of their secondary or indirect goals — and should limit themselves only to communications that the rest of the world would perceive as "advertisements."

Of course, any analysis of the "primary purpose" of a communication still requires some degree of mind-reading. Hence it adds uncertainty into how the Final Rules' definition of "advertisement" will ultimately be interpreted. Until that uncertainty has been resolved, lawyers (and ethics committees of law firms) may take a conservative approach. They may assume that even "informational" distributions will be deemed to relate to the sender's services and to have as their "primary purpose" persuading the recipient to hire the sender, thus perhaps constituting "advertisements" under the Final Rules. This result would be quite unfortunate.

Solicitation

The Final Rules impose additional requirements for any communication that constitutes a "solicitation" — another term that the Draft Rules defined very broadly. The term "solicitation" now means an "advertisement" (see above): (a) that is "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives"; and (b) "a significant motive for which is pecuniary gain."

The first test — whether the advertisement is "targeted" — could mean almost anything. No lawyer sends out an email or a direct mail piece without figuring out some addressees for it. Does that mean every email or direct mail "advertisement" is now "targeted" and hence perhaps a "solicitation"?

Presumably when the Final Rules refer to "targeted" advertisements, they mean something more than merely addressing the communication to some recipient(s). The reference probably means, for example, that the lawyer has identified a specific group of prospects who, for some external reason, look like unusually promising prospective clients. This might include, for example, all the victims of a plane crash or all the people at last year's shopping center convention.

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What if a lawyer sends an email or a paper mailing to her entire contact list? What if the lawyer limits the recipients to her contacts in the plastics industry? What if the lawyer sends a special update with information about a new law to 50 contacts the lawyer has identified as her 50 best prospects for future business? Would any of these mailings be deemed "targeted"? One hopes not, but can't be sure. The lawyer would probably be better advised to satisfy herself that the particular communication isn't even an "advertisement" (as defined above) in the first place. If it's not an "advertisement," then it can't be a "solicitation."

The second test for a "solicitation" asks whether a particular communication is motivated by "pecuniary gain." This apparently goes beyond the notion, already subsumed in defining "advertisement," that a regulated communication has a "primary purpose" relating to "retention of the lawyer or law firm." Apparently the prospect of seeking "pecuniary gain" introduces some further variable into the equation, something going beyond merely seeking to be retained by a client.

As odd as the distinction may sound, the reference to "pecuniary gain" does suggest that for an "advertisement" to become a "solicitation" it needs "something more" than the elements that make it just an advertisement. Perhaps an "advertisement" becomes a "solicitation" motivated by "pecuniary gain" if, for example, it advertises prices for the lawyer's services; exhorts a prospective client to "sign up now" for a specific type of engagement; refers to a particular mass tort; or in some other way looks like a crass and commercial sales pitch.

If one reads the "pecuniary gain" test and the "targeting" test together, one can reasonably conclude that OCA intends "solicitations" to capture only "advertisements" that try to persuade some defined group of prospective clients to sign up for particular services that the lawyer has some specific reason to believe the prospective clients will need on some kind of special, specific, or urgent basis (e.g., personal injury representation after a mass calamity).

Though this interpretation is consistent with common sense, the application of common sense is often not a reliable guide in interpreting the rules of legal ethics.

The definition of "solicitation" in the Final Rules does expressly exclude any "proposal or other writing prepared and delivered in response to a specific request of a prospective client." Final Rules Section 1200.8(b). That helps a bit.

The narrower definitions of "advertisement" and "solicitation" in the Final Rules mitigate many problems I identified in my July Submission. These definitions do, however, leave enough uncertainty that anyone who chooses to interpret them "conservatively" — i.e., a substantial chunk of the people who pay attention to these things — could still come up with some unfortunately broad readings of "advertisement" and "solicitation."

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POP-UP TECHNOLOGY

The Draft Rules banned lawyers from using any form of "pop-up" technology in their advertisements. Draft Rules Section 1200.6(i).
I argued in my July Submission that "pop-up" technology was a perfectly respectable programming technique, often used in perfectly respectable Web sites, such as OCA's very own Web site.

The Final Rules respond to arguments like these by allowing pop-up technology only "on the lawyer or law firm's own web site or other internet presence." Final Rules Section 1200.6(g)(1). This represents a reasonable response to my concerns. It still prohibits lawyers from advertising through gratuitous pop-up windows that jump out of the screen at a viewer who had no idea he or she was visiting

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a Web site with any connection to the lawyer who placed the pop-up advertisement. Though I find such a prohibition unobjectionable, I would still ask whether the entire area represents a legitimate — or constitutional — concern for the arbiters of legal ethics.

RETENTION REQUIREMENT

The Draft Rules required lawyers to keep a "printed copy" of any Web site that constituted an "advertisement." The retention period was a year after any publication or modification. Draft Rules Section 1200.6(n).

I argued that Web sites change all the time, and retention of a "printed" copy could be read to require keeping a paper printout every time someone changed a page.

The Final Rules eliminate the concept of a "printed" copy and narrow the retention requirement substantially.

The Final Rules eliminate the concept of a "printed" copy and narrow the retention requirement substantially. It now reads: "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." Final Rules Section 1200.6(k).

This requirement seems reasonable. By continuing to use the passive voice, though, OCA still fails to require any specific person to do anything in particular.

The trimmed-back retention requirement should not burden anyone who has (or hires) the technological competence to create and maintain a Web site. For example, I have already set up FTP backup software to save automatically a date-stamped copy of my entire Web site on my hard drive every 30 days. This supplements my daily backup of the entire current Web site, which overwrites the previous day's full backup.

FILING REQUIREMENT

The Draft Rules required lawyers to file with their local disciplinary committees copies of all advertisements and solicitations they distributed — an incredibly broad and burdensome requirement not only for lawyers but also for the unfortunate disciplinary committees that would have received all this stuff. Draft Rules Section 1200.6(o).

The Final Rules require lawyers to file only "solicitations" targeted to New York residents. Mere "advertisements" (not rising to "solicitations") need not be filed at all. That fact, and the narrower definition of "solicitation," do limit the original requirement in the Draft Rules. Just how meaningful that limitation will turn out to be will depend on just how "conservatively" lawyers interpret the terms "advertisement" and "solicitation," as described above.

IDENTITY REQUIREMENT

The Draft Rules imposed special requirements whenever a lawyer's domain name does not include the name of the lawyer (e.g., my own Web site, real-estate-law.com). The Draft Rules required every page of any Web site using such a domain name to 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." Draft Rules Section 1200.7(e)(1). I pointed out in my July Submission that any Web site may somewhere include some very large type, such as 42-point headline type in a reprint of an article. Hence, I argued, the requirement to match the "largest" type size on the Web site could turn lawyers' Web sites into circuses.

In response, the Final Rules impose a perfectly reasonable set of requirements for Web sites with domain names of this type.

First, every page of such a Web site must "clearly

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and conspicuously include the actual name of the lawyer or law firm." Final Rules Section 1200.7(e)(1). Unfortunately, this requirement even applies to Web pages the lawyer cannot edit, such as "PDF" images or photographs from third parties. Thus, the lawyer may need to use "frames" to reduce the size of these pages and add the required disclosure. Though my own Web site uses this technology, it creates more trouble, and interferes with the user's experience, far more than it is worth.

Second, the lawyer cannot engage in the practice of law under the domain name. Final Rules Section 1200.7(e)(2).

Third, the domain name can't suggest an ability to obtain particular results, or otherwise violate the disciplinary rules. Final Rules Section 1200.7(e)(3).

These restrictions are for the most part perfectly tolerable.

The Final Rules no longer try to prescribe what attorneys should say in their advertisements.

WARNING REQUIREMENT

The Draft Rules required an "ATTORNEY ADVERTISING" warning on any "advertisement" or "solicitation" — both very broadly defined. For any email, the Draft Rules required the warning in the subject matter line.

The Final Rules continue those requirements, but they now apply only to communications that constitute "advertisements" under the narrower definition of that term in the Final Rules. The Final Rules also say that if an "advertisement" consists of a Web site, then the "Attorney Advertising" warning needs to appear on the home page. Final Rules Section 1200.6(f). Thus, the scope of the requirement depends, once again, on how one interprets "advertisement" under the Final Rules. I interpret the term narrowly and have so far not warned visitors to my Web site that they might be looking at "Attorney Advertising." If indeed they are embarking on a risky venture of that type, they will have to figure it out for themselves.

COURT BAN

The Draft Rules prohibited lawyers from depicting any "use of a courtroom or courthouse" in any advertisement or solicitation. Draft Rules Section 1200.6(d)(5). The Final Rules dropped this prohibition, quite appropriately.

SUBSTANTIVE REQUIREMENT

The Draft Rules would have required any advertising and solicitation to be "predominantly informational," and "designed to increase public awareness of situations in which the need for legal services might arise." OCA also thought all of this should be "presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm." Draft Rules Section 1200.6(a).

In my July Submission, I argued that OCA had no business prescribing the required contents of lawyer advertising; lawyers might choose to communicate other types of information; and the rules should not prohibit them from doing so as long as the communication is otherwise ethical.

The Final Rules no longer try to prescribe what attorneys should say in their advertisements.

CONCLUSION

Considered as a whole, the Final Rules — as they relate to Web sites and email — respond to almost all the objections in my July Submission.

I remain concerned about one minor detail, although a very central one: How broadly will the arbiters of legal ethics (including ethics committees in law firms) interpret the terms "advertisement" and "solicitation"? The Final Rules definitely seem to narrow the definitions. For the reasons described

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above, though, these definitions may still contain enough "mush" to invite a broad reading. This possibility seems particularly likely given the strong bias toward "conservatism" in this area. And if "conservatism" triumphs, the Final Rules could unnecessarily burden every New York attorney who uses a Web site or email.

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