



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. Earlier this year, the House approved a number of amendments to the Rules for transmittal to the Administrative Board of the Courts. In June, COSAC circulated another set of proposed amendments for comment by interested groups. In response to comments received, the committee has made several amendments to its report, and is presenting its report to you for debate and vote at this meeting.

The proposed amendments may be summarized as follows:

- **Rule 1.0.** Delete the definitions of “Advertisement,” “Computer-accessed communication,” and “Qualified legal assistance organization” in Rule 1.0(c), and (p) respectively, since these terms will no longer appear in the Rules of Professional Conduct if Rules 7.1 through 7.5 are amended as COSAC proposes.
- **Rule 1.10.** Amend Rule 1.10(c) to permit prompt and effective screening to avoid imputation of conflicts arising from lateral hires, except in certain situations, based on New Jersey Rule 1.10(c), and add a new Comment [5F] to Rule 1.10 to explain the limitations on screening.
- **Rule 2.4.** Amend Rule 2.4(b) to require increased disclosures by lawyer-neutrals, and amend Comment [3] to Rule 2.4 to elaborate on this change.
- **Rule 4.1.** Amend Rule 4.1 and Comment [1] to make clear that Rule 4.1 is limited to “material” falsehoods. Add a new sentence to Comment [1] making clear that the rule applies only to statements to third persons, not to clients, but that statements to clients are governed by other rules.

**Rule 5.2:** Amend Comment [2] to make clear that the rule applies not only to applicable “law” but also to any applicable Rules of Professional Conduct.

- **Rule 5.4.** Add a new Rule 5.4(a)(4) to address a division of fees between New York lawyers and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors, and to add a new final sentence to Comment [2] to Rule 5.4 referring to subparagraph (a)(4).
- **Rule 5.5.** Amend Rule 5.5(a) by incorporating the essence of Rule 5.5(b) into Rule 5.5(a) for the sake of uniformity in rule numbering with the numerous jurisdictions that have adopted ABA Model Rule 5.5, and add a new Comment [3] to remind lawyers about New York Court of Appeals Rules that authorize limited practice by lawyers from other U.S. or foreign jurisdictions (e.g., 22 NYCRR Parts 521, 522, and 523).
- **Rules 7.1-7.5.** Streamline these complex advertising and solicitation rules by adopting in substantial part ABA Model Rules 7.1 through 7.3 (as amended in August 2018), while moving the substance of New York Rule 7.4 to amended Rule 7.2(c) and retaining New York Rule 7.5 in modified form.

Prof. Roy D. Simon, co-chair of the committee, will present the report at the November 2 meeting.

# **MEMORANDUM**

September 11, 2019 REVISED version  
of report originally circulated for public comment on June 6, 2019

**TO:** NYSBA Executive Committee and House of Delegates

**FROM:** Committee on Standards of Attorney Conduct (“COSAC”)

**SUBJECT:** ***REVISED*** COSAC Proposals to Amend Rules 1.0, 1.10, 2.4, 4.1, 5.2, 5.4, 5.5, and 7.1 through 7.5 of the New York Rules of Professional Conduct

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct. On June 6, 2019, COSAC circulated for public comment proposals to amend various New York Rules of Professional Conduct and their Comments. This is a revised report that reflects the public comments that COSAC received on the June 6<sup>th</sup> report.

COSAC received comments from the following groups:

- New York State Bar Association Labor & Employment Law Section
- New York State Bar Association Dispute Resolution Section
- New York State Bar Association Committee on Professional Ethics
- New York State Bar Association International Section
- New York County Lawyers Association Committee on Professional Ethics
- New York City Bar Committee on Professional Discipline
- New York City Bar Committee on Professional Responsibility

COSAC is grateful to these groups for the time and care they put into developing thoughtful comments. COSAC carefully considered all of these comments. COSAC accepted many of the suggested revisions, and all of the comments directed COSAC’s attention to areas of potential concern and helped COSAC to improve its earlier proposals.

In light of the comments received, COSAC has revised its proposals to amend or delete the following Rules (and to amend or eliminate some of the Comments to these Rules):

- Rule 1.0: Terminology

- Rule 1.10 Imputation of Conflicts of Interest
- Rule 2.4: Lawyer Serving as Third-Party Neutral
- Rule 4.1: Truthfulness in Statements to Others
- Rule 5.2: Responsibilities of a Subordinate Lawyer
- Rule 5.4: Professional Independence of a Lawyer
- Rule 5.5: Unauthorized Practice of Law
- Rule 7.1: Advertising
- Rule 7.2: Payment for Referrals
- Rule 7.3: Solicitation and Recommendation of Professional Employment
- Rule 7.4: Identification of Practice and Specialty
- Rule 7.5: Professional Notices, Letterheads and Signs

Please keep in mind that proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. In contrast, proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

We first summarize the proposals, then explain the issues and reasoning that led COSAC to propose each particular amendment, as well as the reasons that COSAC agrees or disagrees with the various suggestions submitted during the public comment period. We set out each proposed amendment in redline style, comparing COSAC's proposal to the existing New York Rules of Professional Conduct by striking out deleted language (~~in red~~) and underscoring added language (in blue). (In the case of Rules 7.1 through 7.5, however, strikeouts and underscoring reflect changes against the equivalent ABA Model Rules of Professional Conduct, because the proposed changes are too extensive to make a comparison to the existing New York rules meaningful.)

### **Summary of Proposals**

- **Rule 1.0.** Delete the definitions of “Advertisement,” “Computer-accessed communication,” and “Qualified legal assistance organization” in Rule 1.0(c), and (p) respectively, since these terms will no longer appear in the Rules of Professional Conduct if Rules 7.1 through 7.5 are amended as COSAC proposes.
- **Rule 1.10.** Amend Rule 1.10(c) to permit prompt and effective screening to avoid imputation of conflicts arising from lateral hires, except in certain situations, based on New Jersey Rule 1.10(c), and add a new Comment [5F] to Rule 1.10 to explain the limitations on screening.

- **Rule 2.4.** Amend Rule 2.4(b) to require increased disclosures by lawyer-neutrals, and amend Comment [3] to Rule 2.4 to elaborate on this change.
- **Rule 4.1.** Amend Rule 4.1 and Comment [1] to make clear that Rule 4.1 is limited to “material” falsehoods. Add a new sentence to Comment [1] making clear that the rule applies only to statements to third persons, not to clients, but that statements to clients are governed by other rules.
- **Rule 5.2:** Amend Comment [2] to make clear that the rule applies not only to applicable “law” but also to any applicable Rules of Professional Conduct.
- **Rule 5.4.** Add a new Rule 5.4(a)(4) to address a division of fees between New York lawyers and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors, and to add a new final sentence to Comment [2] to Rule 5.4 referring to subparagraph (a)(4).
- **Rule 5.5.** Amend Rule 5.5(a) by incorporating the essence of Rule 5.5(b) into Rule 5.5(a) for the sake of uniformity in rule numbering with the numerous jurisdictions that have adopted ABA Model Rule 5.5, and add a new Comment [3] to remind lawyers about New York Court of Appeals Rules that authorize limited practice by lawyers from other U.S. or foreign jurisdictions (*e.g.*, 22 NYCRR Parts 521, 522, and 523).
- **Rules 7.1-7.5.** Streamline these complex advertising and solicitation rules by adopting in substantial part ABA Model Rules 7.1 through 7.3 (as amended in August 2018), while moving the substance of New York Rule 7.4 to amended Rule 7.2(c) and retaining New York Rule 7.5 in modified form.

The remainder of this report will explain each of COSAC’s revised recommendations.

## **Rule 1.0**

### **Terminology**

In Rule 1.0, which is New York’s Terminology section, COSAC recommends deleting the definitions of “Advertisement,” “Computer-accessed communication” and Comment [1A] (explaining the term), and deleting “Qualified legal assistance organization.” These terms are no longer necessary or meaningful because they will no longer appear in the New York Rules of Professional Conduct if the Courts and the Association accept COSAC’s recommendations to amend the advertising and solicitation rules, Rules 7.1 through 7.5. The deleted terms and Comment [1A] (the only Comment that explains one of the deleted terms) are contained in Appendix A to this report.

#### **Public comments regarding Rule 1.0 and COSAC’s response**

The NYSBA Labor and Employment Law Section commented (in a footnote) on COSAC's proposed elimination of several definitions in Rule 1.0 by saying: "COSAC has also proposed changes to the 'Terminology' (i.e., definitions) portion of the current Rules. ... Obviously, if COSAC's substantive changes are ultimately adopted, these 'Terminology' changes should be made as well."

## **Rule 1.10**

### **Imputation of Conflicts of Interest**

COSAC proposes amendments to Rule 1.10(c). Earlier versions of COSAC's proposed amendments to Rule 1.10(c)(1)-(2) were presented by COSAC to the House of Delegates for debate in April 2019 but were tabled to permit COSAC to work out revised language articulating situations in which the screening measures described in Rule 1.10(c)(2) would *not* be effective to prevent imputation of conflicts. COSAC has worked with Sharon Stern Gerstman and Ron Minkoff, who offered motions from the floor at the April House of Delegates meeting, to draft the revised language in Rule 1.10(c)(3) and new Comment [5F] below, which they support.

The portion of COSAC's report presented at the April 2019 meeting dealing with Rule 1.10(c) is attached. *The only changes since the April proposal are to Rule 1.10(c)(3) and new proposed Comment [5F].* No other portions of the earlier Rule 1.10 report have been changed.

#### **Public comments regarding Rule 1.10 and COSAC's response**

COSAC did not receive any written public comments on its proposals to amend Rule 1.10(c) regarding screening of lateral hires. However, COSAC has responded to comments expressed in the House of Delegates. In November 2018, when COSAC presented its conflicts proposals for informational purposes, COSAC's proposal for Rule 1.10(c) provided that screening would be available to avoid imputation of conflicts of lateral-hire lawyers in *all* cases. That proposal triggered concerns from the floor that the proposed screening provision was not sufficiently protective when a client's lawyer, in the midst of a hotly litigated matter, moved to the opposing firm.

In January 2019, COSAC re-submitted its original proposal but, in response to the concerns expressed in November 2018, also offered an alternative proposal. Under that alternative—which COSAC did not favor—screening would not be available to prevent imputation of conflicts for lateral-hire lawyers who had "primary responsibility" for a litigated matter at their prior firm. A proposed new Comment to Rule 1.10 explained, "The lawyer with primary responsibility for the matter will generally be the lawyer who had the primary decision-making role in the matter." (Due to time constraints in January, the proposed Rule and Comment were not debated until April 2019.)

During the debate on the alternative proposal in April, House members Sharon Stern Gerstman and Ron Minkoff offered an amendment to COSAC's alternative proposal, urging

the House to adopt New Jersey’s approach to Rule 1.10(c). Under the New Jersey version of Rule 1.10(c), screening is not available to avoid imputation of conflicts from lateral-hire lawyers who, while at a former law firm, either participated in the management and direction of a litigated matter or had continuous day-to-day decision-making responsibility for the litigated matter.

Specifically, New Jersey Rule 1.10(c)(1) provides that screening of lateral-hire lawyers is available to avoid imputation only where “the matter does not involve a proceeding in which the personally disqualified lawyer had *primary responsibility*.” (Emphasis added.) New Jersey Rule 1.0(h), in turn, defines “primary responsibility” as follows:

“Primary responsibility” denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

The House voted in favor of the amended alternative proposal to adopt New Jersey’s approach, and the House then tabled COSAC’s pending proposal to allow COSAC to develop language to implement the New Jersey approach.

In accordance with the House’s instructions, COSAC has revised its proposed Rule 1.10(c)(3) to incorporate the key elements of New Jersey Rule 1.10(c).

### **COSAC Discussion on Rule 1.10**

In revising proposed Rule 1.10(c)(3) for this report, COSAC has omitted New Jersey’s distinction between “policy-making” and “operational” levels because those terms are not entirely appropriate for litigation matters and because the concepts are sufficiently addressed by the distinction between “management and direction of the matter,” on the one hand, and “day-to-day decision-making responsibility,” on the other hand. COSAC has also inserted the term “substantial” to denote the kind of involvement indicated by the term “primary” responsibility in the New Jersey formulation.

Under COSAC’s revised formulation, lateral-hire screening would be unavailable to avoid imputation of conflicts not only from the lead counsel in a litigated matter, but from all lawyers who either (i) substantially participated in the management and direction of the matter, or (ii) had substantial decision-making responsibility in the matter on a continuous day-to-day basis.

### **COSAC’s proposal to amend Rule 1.10(c) and Comment [5F]**

COSAC proposes to revise Rule 1.10(c) and its accompanying Comments to provide as follows:

- (c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to

a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter; or

(2) the newly associated lawyer's current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule will not prevent imputation of conflicts within a firm pursuant to paragraph (a) of this Rule where the matter is a litigation, arbitration, or other adjudicative proceeding and the newly associated lawyer, while associated with the prior firm, either (i) substantially participated in the management and direction of the matter, or (ii) had substantial decision-making responsibility in the matter on a continuous day-to-day basis.

Proposed New Comment [5F] to explain Rule 1.10(c)(3):

[5F] Paragraph (c)(3) makes clear that the screening procedures set forth in paragraph (c)(2) are ineffective to prevent the imputation of disqualifying conflicts for lawyers with substantial litigation responsibilities in a matter at a former firm who move during a litigation, arbitration or other adjudicative proceeding to a law firm representing a party whose interests are materially adverse to the interests of the lawyer's former client in the same or a substantially related matter. The lawyers for whom screening will not prevent imputation of conflicts are those who, while working at a former firm, had either (i) substantial responsibility for the management and direction of a litigation, arbitration or other adjudicative proceeding or (ii) substantial responsibility about day-to-day matters on a continuous basis in such a proceeding. Screening under the terms described in paragraph (c)(2) and Comments [5C]-[5E] to Rule 1.10 remains effective to cure conflicts, however, in (i) transactional or other non-litigated matters and (ii) litigated matters where a law firm is hiring one or more lawyers (such as an associate or collaterally involved partner) who did some work on the matter at the opposing firm but did not have substantial responsibility of the kind described by subparagraph (c)(3).

## Rule 2.4

### Lawyer Serving as Third-Party Neutral

COSAC recommends amending Rule 2.4(b) to require increased disclosures by lawyer-neutrals, and recommends amending Comment [3] to Rule 2.4 to elaborate on this change.

Rule 2.4 first became part of the New York Rules of Professional Conduct in 2009 – the Code of Professional Responsibility had no equivalent. COSAC has examined Rule 2.4 and recommends amendments to the existing text of Rule 2.4(b) and to Comment [3], which elaborates on paragraph (b). The amended Rule and Comments would provide as follows:

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them and ~~When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer~~ shall explain to them the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COSAC also recommends corresponding changes to Comment [3] to Rule 2.4 which, as amended, would read as follows:

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving ~~in this role as third-party neutrals~~ may experience unique problems as a result of differences between the role of a third-party neutral and the role of a lawyer's ~~service~~ as a client

representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them [and to](#) ~~For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should~~ inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and [the lawyer's role](#) as a client representative, including ~~the inapplicability of the fact that~~ the attorney-client evidentiary privilege [does not apply when the lawyer is serving as a neutral](#). The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

#### **COSAC Discussion of Rule 2.4**

Currently Rule 2.4 requires a lawyer-neutral to inform all unrepresented parties that the lawyer-neutral does not represent them, but does *not* require the lawyer-neutral to provide a slightly fuller disclosure (explaining “the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client”) unless “the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter.” In contrast, Virginia Rule 2.4 requires a lawyer-neutral to give the fuller disclosure to all parties (represented or unrepresented), and Illinois Rule 2.4 requires a lawyer-neutral to give the fuller disclosure to all unrepresented parties.

COSAC believes that the fuller disclosure should be made to all unrepresented parties, for three reasons.

First, it is likely that in many cases unrepresented parties will lack a full understanding of the lawyer’s role. *See* N.Y. State 900 (2011) (“In nearly all instances where parents are unrepresented by counsel and inexperienced in mediation and other legal matters, Inquirer ‘reasonably should know’ that the parents do not understand Inquirer’s role...”).

Second, a bright-line rule would be a reasonable safeguard, avoiding the need for the lawyer-neutral to assess whether any party “does not understand the lawyer’s role in the matter.”

Third, the additional disclosure would not have to be lengthy, individualized or burdensome, and would not differ substantially from the simple disclosure that is already routinely required. Even requiring the fuller disclosure to all parties, as in Virginia, would not be very burdensome, but because represented parties presumably would not need Virginia’s detailed disclosure, COSAC is proposing a narrower requirement like the one adopted in Illinois.

**Public comments regarding Rule 2.4 and COSAC's response**

The NYSBA Committee on Professional Ethics supported COSAC's proposals, saying: "The addition of an affirmative disclosure obligation is reasonable, non-burdensome, and seeks to prevent confusion on the part of unrepresented parties."

The NYSBA Dispute Resolution Section had some reservations. It said:

The Section believes that the proposed changes to Rule 2.4 are generally desirable, but views a portion of the revisions to Comment 3 as potentially confusing. ...

In the Section's view, the last clause of that sentence - "including the fact that the attorney-client evidentiary privilege does not apply when the lawyer is serving as a neutral" - is potentially confusing, in that the mediation privilege does apply to render mediation discussions confidential, and unrepresented parties may not comprehend the distinction between the two types of protection. Instead, the Section recommends that the last clause be deleted. ...

COSAC appreciates that the Dispute Resolution Section has great expertise in mediation and other forms of dispute resolution, but COSAC does not agree with the recommendation to delete the last sentence. The mediation settlement privilege is quite a different thing from the attorney-client privilege. For example, in most courts, the settlement "privilege" does not prevent discovery of settlement materials, and Rule 408 of the Federal Rules of Evidence contains exceptions that are more commonly applicable than the attorney-client privilege. Moreover, COSAC believes that a mediator's mandatory disclosures regarding "the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client" directly imply absence of the attorney-client privilege. The thrust of Rule 2.4 is to avoid confusion when a neutral is also a lawyer, and pointing out that the attorney-client privilege does not apply helps to dispel the confusion between the role of a lawyer and the role of a neutral.

An unidentified member of the New York City Bar Professional Discipline Committee said:

Regarding Proposed Rule 2.4(b), 'Lawyer Serving as Third-Party Neutral', don't single out 'unrepresented' parties, but state that all parties should receive the explanation. Give the neutrals the benefit of the doubt in the scope of what they say, *e.g.*, there will be more disclosure if an unrepresented party is present.

COSAC disagrees with this suggestion. A party who is represented by a lawyer has likely been counseled in advance by that lawyer about what to expect in a proceeding before a neutral. A party represented by a lawyer is also far less likely to look to the neutral for legal advice. Nothing in proposed Rule 2.4 prevents a lawyer-neutral from explaining the neutral's role to represented parties, but the parties most in need of clarification about the role of a lawyer-neutral are unrepresented parties.

The same unidentified member of the New York City Bar Professional Discipline Committee said:

About Comment [3], to Rule 2.4, because it is premised on a 'potential for confusion,' I would eliminate the entire first sentence about non-lawyers and lawyers as unnecessary, and talk about a real 'potential for confusion' in ADR, if there is an unrepresented party. The draft of [3] mentions attorney-client privilege but does not even discuss confidentiality. One of the main reasons parties typically seek mediation or arbitration, not litigation in open court, is the promise of reasonable confidentiality. Yet in [3], the third-party neutral must make his disclosures to the unrepresented party and the privilege is the only point brought up. I can assure you, the unrepresented party will then be thoroughly confused. Instead, [3] should identify all the positive aspects of ADR, including how to define it to all parties, represented and unrepresented, the role of the third party neutral and what he does and does not do, etc. Comment [3] should be positive not negative in tone.

For reasons expressed above in responding to a similar idea, COSAC disagrees with this suggestion. The purpose of Rule 2.4 is not to promote the virtues of arbitration or mediation, but rather to avoid confusion when the neutral is also a lawyer. Proposed Rule 2.4 does not prevent a neutral from explaining the positive aspects of ADR, but the focus of Rule 2.4 is and ought to be on ensuring that parties to an ADR proceeding understand that a neutral who happens to be a lawyer is not serving as the lawyer for any party.

## **Rule 4.1**

### **Truthfulness in Statements to Others**

COSAC proposes to amend Rule 4.1 and Comment [1] to make clear that Rule 4.1 is limited to “material” falsehoods. New York Rule 4.1 has one paragraph, which reads, “In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” This is similar to ABA Model Rule 4.1(a), except that the ABA Rule includes a materiality requirement, referring to a “false statement of *material* fact or law.”

COSAC proposes amendments to Rule 4.1 and Comment [1], as follows:

#### *Rule 4.1 Truthfulness in Statements to Others*

**In the course of representing a client, a lawyer shall not knowingly make a false statement of [material](#) fact or law to a third person.**

COSAC also recommends a corresponding change to Comment [2] to Rule 4.1 and a change to Comment [1], which would read as follows:

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. [This rule prohibits false statements only to third persons, but false statements to clients are prohibited by other provisions, such as Rules 1.5\(d\)\(3\) and 8.4\(c\).](#) –As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] This Rule refers to [material misrepresentation](#) ~~statements of fact~~. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of [material](#) fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

### **COSAC Discussion of Rule 4.1**

In 2005, COSAC proposed that New York adopt the language of ABA Model Rule 4.1(a), which has the materiality requirement set forth in the amendment proposed above. *See* New York State Bar Ass'n, Committee on Standards of Attorney Conduct, *Proposed Rules of Professional Conduct*, at 319 (Sept. 2005). The New York Courts, however, adopted Rule 4.1 without the materiality requirement. (It appears that only three other states—Minnesota, North Dakota and Virginia –have adopted a version of Rule 4.1 that omits the word “material.”)

COSAC believes that amending Rule 4.1 to add a materiality requirement would merely conform the text of the rule to the reality that an immaterial false statement would not be considered sanctionable conduct. For example, as explained in Comment [2] to New York Rule 4.1, it is widely accepted that “[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim” are not typically treated as statements of fact that a counterparty would rely on. If a lawyer says, “My client will not accept a penny less than \$1,000,” when in fact the client has authorized a settlement or sale at \$750, that would not ordinarily lead to discipline (nor should it). The reason for that conclusion is that the statement, even if literally a statement of fact, is not viewed as a statement of *material* fact, and very few people would rely on such a statement. Moreover,

there is an interest in uniformity with the rules of other jurisdictions, and the amendment would make New York’s version of this rule consistent with the ABA Model Rule and the rules of most other U.S. jurisdictions.

COSAC also considered whether the text of the rule should be amended to prohibit false statements to a client as well as to a third person, but COSAC rejected this amendment to the text on the ground that the current rule is more consistent with the rules of other jurisdictions and with the overall structure and organization of the Rules. (In the ABA Model Rules and the rules of some other jurisdictions, “Article 4” is entitled “Transactions with Persons *Other Than* Clients.”) However, COSAC believes it is appropriate to add a new sentence to Comment [1] to Rule 4.1 to clarify that while this rule reaches only false statements to third parties, false statements to clients are prohibited by other provisions. Thus, COSAC recommends adding a new sentence to Comment [1] that says: “This rule prohibits false statements only to third persons, but false statements to clients are prohibited by other provisions, such as Rules 1.5(d)(3) and 8.4(c).”

**Public comments regarding Rule 4.1 and COSAC’s response**

The NYSBA Committee on Professional Ethics stated:

We agree. COSAC recommends adding a materiality Standard to the prohibition on false statements. This is consistent with law and common sense. Issues of materiality and reasonable reliance are entwined; inadvertent or even knowing mistakes of immaterial facts or law are not worthy of disciplinary attention.

The NYSBA Labor and Employment Law Section commented on COSAC’s proposed changes to Rule 4.1 as follows:

... The change to Comment [2], adding the word “material” is simply intended to have the language of the Comment match the proposed change in the Rule itself. The reason for the change in Comment [1] is to remind lawyers that while Rule 4.1 itself is limited to misstatements to third parties, and not clients, other existing Rules prohibit misrepresentations to clients.

On one hand, we understand how this change to the text of the Rule makes some sense and that for conduct to be subject to discipline, it may be appropriate that there be some materiality threshold. We also recognize that as multijurisdictional practice for lawyers continues to be common and even expand, absent unusual local interests, there is value in having uniform rules of professional conduct across those jurisdictions.

On the other hand, it gives us some pause that the change could be seen as, at least implicitly, “approving” (or at least minimizing the inappropriateness) of misstatements when they are “immaterial.” We believe lawyers should not engage in

misstatements, material or otherwise. On balance, we would prefer to see this Rule unchanged in this manner.

(As an aside, Rule 8.4 contains a general prohibition against, among other things, “misrepresentations” by lawyers in any context. That provision does not contain an explicit materiality threshold and one is not proposed by COSAC at this time. We do not understand this incongruity.)

If the text of the Rule is in fact changed as proposed by COSAC, then the proposed change to the Comment makes sense. However, in that case, a new reference to “material” should be added to the first sentence of Comment [2], in addition to its proposed placement in the third sentence of that comment.

In any event, we think the “reminder” to lawyers in Comment [1] that other Rules can apply to misstatements to clients is appropriate.

COSAC appreciates that adding the word “material” to Rule 4.1 and its Comments has both advantages and disadvantages, but COSAC stands by its proposal. COSAC does not believe that the change will be seen as approving immaterial false statements or minimizing their inappropriateness.

COSAC agrees that lawyers should not engage in misstatements, material or otherwise, but the real question here is whether lawyers should be subject to professional discipline for making immaterial false statements, especially if a lawyer makes an inconsequential false statement by mistake. COSAC therefore agrees with the NYSBA Ethics Committee that “inadvertent or even knowing mistakes of immaterial facts or law are not worthy of disciplinary attention.”

As to the supposed incongruity between the proposed materiality threshold in Rule 4.1 and the lack of a materiality element in Rule 8.4(c), COSAC notes that “misrepresentation” connotes a more serious violation of norms than an immaterial false statement. As the last sentence of existing Comment [2] says: “Lawyers should be mindful of their obligations under applicable law to avoid *criminal* and *tortious* misrepresentation.” (Emphasis added.)

However, COSAC agrees that a new reference to “material” should be added to the first sentence of Comment [2], and COSAC has revised its proposal accordingly.

## **Rule 5.2**

### **Responsibilities of a Subordinate Lawyer**

COSAC recommends that in the sixth sentence in Comment [2], the phrase “in light of applicable law” should be amended to read “in light of applicable Rules of Professional Conduct and other law.” The sentence in its entirety would thus read:

[2] ... To evaluate the supervisor’s conclusion that the question is arguable and the supervisor’s resolution of it is reasonable in light of applicable [Rules of Professional Conduct and other](#) law, it is advisable that the subordinate lawyer undertake research, consult with a designated partner or special committee, if any (*see* Rule 5.1, Comment [3]), or use other appropriate means.

### **COSAC Discussion of Rule 5.2**

It should be obvious that a subordinate attorney should consider both applicable Rules of Professional Conduct and other applicable law in evaluating the supervisor’s conclusion and resolution of a question of professional duty. COSAC’s proposed amendment makes this obvious proposition explicit.

A possible objection to COSAC’s proposed insertion is that the term “applicable law” by itself already implies both substantive law and ethics rules. A search of the New York Rules of Professional Conduct, however, shows numerous instances – both in the black letter law and in the Comments – where the Rules of Professional Conduct and/or other law are distinguished. *See, e.g.*, Rule 1.1(c)(1); Comments [8], [10], [13], [14], and [15] to Rule 1.2; Rule 1.4(a)(5); and Rule 1.6(b)(4). Since lawyers cannot assume that “applicable law” in Comment [2] already includes both applicable law *and* the ethics rules, Comment [2] should be amended to make explicit that Rule 5.2 also encompasses any applicable Rules of Professional Conduct.

### **Public comments regarding Rule 5.2 and COSAC’s response**

The NYSBA Labor and Employment Law Section commented on COSAC’s proposed changes to Rule 5.2 by saying: “We do not have any issue with this clarification of the Comment.”

The NYSBA Ethics Committee also supports this proposal. It said: “We agree. ... Although we have long considered the Rules to be within the ambit of Rule 5.2, the profession will benefit from clarity on this point.”

Since none of the public comments raised any objections to this proposal, COSAC has not revised its original proposal.

## **Rule 5.4**

### **Professional Independence of a Lawyer**

COSAC recommends adding a new Rule 5.4(a)(4) to address a division of fees between New York lawyers and out-of-state co-counsel or referring lawyers who work in law firms with nonlawyer owners or supervisors. Proposed new Rule 5.4(a)(4) would read as follows:

(4) A lawyer or law firm may divide a fee with another lawyer or law firm that has nonlawyer owners or nonlawyer supervisors provided that:

- 
- (i) nonlawyer ownership of law firms is permitted in the jurisdiction whose professional conduct rules governs the other lawyer's conduct;
- 
- (ii) the lawyer who divides the fee does not permit any nonlawyer to interfere with the lawyer's independent professional judgment or with the client lawyer relationship; and
- 
- (iii) the division of fees with the other lawyer complies with Rule 1.5(g).

COSAC also recommends adding a new final sentence to Comment [2] to Rule 5.4 to explain the new subparagraph. Comment [2] to Rule 5.4 would thus provide as follows:

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f), providing that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's professional judgment and the client gives informed consent. Rule 5.4(d) does not prohibit a lawyer from participating in a fee-sharing arrangement permitted under Rule 5.4(a).

#### **COSAC Discussion of Rule 5.4**

In 2012, the NYSBA House of Delegates (“HOD”) adopted an extensive report prepared by the Task Force on Nonlawyer Ownership. At that time, the HOD further resolved to refer the issue of how to implement the policy behind the Inter Firm Fee Sharing Proposal to COSAC and requested that COSAC report back to the HOD. (The Task Force Report is extensive and will not be summarized here.)

COSAC discussed whether to implement fee sharing with nonlawyer-owned firms by way of a Comment, on the one hand, or by way of a change in black letter rule, on the other hand. This topic has received substantial attention over the years – see ABA Formal Ethics Opinion 13-464 (2013) (entitled “Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers”); N.Y. State Ethics Op. 889 (2011), N.Y. State Ethics Op. 911 (2012), N.Y. State Ethics Op. 1038 (2014) (all addressing issues relating to jurisdictions that allow nonlawyer partners). There appears to be a need for more formal guidance, so we recommend an amendment to the black letter rule.

The language of proposed subparagraph (a)(4)(ii) is based on language found in Rule 1.8(f)(2), which provides that a lawyer shall not accept anything of value related to the lawyer's representation of the client from one other than the client unless, among other things, “(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship ....”

COSAC has also amended Comment [2] to Rule 5.4 to clarify that fee division arrangements permitted by proposed Rule 5.4(a)(4) are not prohibited by Rule 5.4(d), which bars New York lawyers from practicing in an entity authorized to practice law for profit if a non-lawyer owns any interest therein.

**Public comments regarding Rule 5.4 and COSAC's response**

The NYSBA Labor and Employment Law Section commented on COSAC's proposed changes to Rule 5.4 by saying:

This change adds guidance for a situation not currently expressly provided for in the Rules by basically permitting fee sharing with firms comprised of non-lawyer owners and supervisors (even though those structures are not permitted in New York), provided those firms are properly authorized to operate in that manner in their home jurisdiction, and the New York lawyer is not aware of the exercise of any impermissible control by the non-lawyer control over that other lawyer's professional judgment.

We do not have any issues with this proposal.

A member of the New York City Bar Professional Discipline Committee said:

The way this condition is expressed would appear to condone, if not promote, willful ignorance on the part of the New York lawyer about whether the advice and judgment of the out-of-state lawyer is controlled by a nonlawyer. While a rule that required the New York lawyer to conduct a thorough investigation into possible influences on the out-of-state lawyer's judgment would be impractical, other approaches might avoid the risk of promoting willful ignorance. Options could include: (i) a good faith belief that the out-of-state lawyer's judgment is not compromised by nonlawyer ownership; or (ii) a reasonable inquiry relating to the same. There could also be other approaches along the continuum of "has no knowledge" to "performed a full investigation" that would balance the competing concerns.

Perhaps the following language for proposed Rule 5.4(4)(ii) would be acceptable:

(ii) no nonlawyer, to the **reasonable belief** of the lawyer who divides this fee, controls or directs the other lawyer's professional judgment ....

COSAC has not accepted this suggestion directly, but has revised proposed Rule 5.4(a)(4)(ii) by substituting phrasing taken from existing New York Rule 1.8(f)(2). The revised phrasing strikes a better balance between imposing a burden on New York lawyers to investigate the operation of a law firm with nonlawyer partners or managers, on the one hand, and allowing New York lawyers to be willfully ignorant of the operation of such a law firm, on the other hand. As re-formulated, proposed Rule 5.4(a)(4)(ii) puts the emphasis where it ought to be—on avoiding nonlawyer interference with the New York lawyer's independent professional judgment. The injunction not to permit "interference with the lawyer's independent professional judgment or with the client lawyer relationship" seems to have worked well in

warding off interference by a person who is directly paying a lawyer's fees to represent another, and COSAC thinks it will work well to ward off interference by a nonlawyer who is merely receiving an indirect share of the fees by virtue of his or her out-of-state (or foreign) law firm's role as co-counsel to a New York lawyer.

The NYSBA Ethics Committee expressed some concern about COSAC's June 6<sup>th</sup> proposal, commenting as follows:

We do not oppose, with a caveat. ... COSAC does not tell us why it perceives a need for "more formal guidance." In our view, ample authority exists to support the same result. This is an issue with ever-increasing importance - witness the movement in California for non-lawyer ownership of law firms - and we wonder whether this is the moment to be changing the Rules. We believe, too, that the knowledge component in the proposed amendment should refer to Rule 1.0(k), which defines "know" to mean not only actual knowledge, but also knowledge that may be inferable from the circumstances. Although we do not oppose the change outright, we think this proposed amendment would benefit from further study.

COSAC accepted the Ethics Committee's invitation for "further study," which has led to the reformulation outlined above, but COSAC disagrees with the Ethics Committee's implication that "more formal guidance" is unnecessary. COSAC recognizes that ample authority exists to support the same result, but much of that authority is in ethics opinions - see the "COSAC Discussion of Rule 5.4" above (citing several New York ethics opinions). When there is a consensus about an ethical issue that is not addressed in the Rules of Professional Conduct, it is often helpful to reflect that consensus in the rules.

Moreover, in the wake of the 2012 report of the NYSBA Task Force on Non-Lawyer Ownership, the House of Delegates instructed COSAC to consider this issue and to recommend a change in the text of Rule 5.4 or its Comment. COSAC has decided that expressing the consensus in the black letter text of Rule 5.4 (rather than merely in a Comment) provides the clearest and most authoritative guidance to New York lawyers.

## **Rule 5.5**

### **Unauthorized Practice of Law**

COSAC recommends amending Rule 5.5 by incorporating the essence of Rule 5.5(b) into Rule 5.5(a) so that amended Rule 5.5 will match ABA Model Rule 5.5(a). As amended, New York Rule 5.5 would read as follows:

~~(a)~~ A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

~~(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.~~

To conform with the above amendments to the black letter text of Rule 5.5, COSAC proposes the following change in existing Comment [1] and proposes adding a new Comment [3]. As amended, the Comments to Rule 5.5 would read as follows:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. ~~Paragraph (a)~~ [Rule 5.5](#) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and ~~also paragraph (b)~~ prohibits a lawyer from assisting a nonlawyer in the unauthorized practice of law.

[3] [New York lawyers shall not assist out-of-state and foreign lawyers in the unauthorized practice of law. The practice of law in New York by lawyers who are not admitted in New York but who are admitted in other U.S. jurisdictions and foreign jurisdictions, including those serving as in-house counsel and as legal consultants, is governed by applicable court rules, including without limitation the New York Court of Appeals Rules for the Licensing of Legal Consultants \(22 NYCRR Part 521\), the New York Court of Appeals Rules for the Registration of In-House Counsel \(22 NYCRR Part 522\), and the New York Court of Appeals Rules for the Temporary Practice of Law in New York \(22 NYCRR Part 523\), as amended from time to time.](#)

### **COSAC Discussion of Rule 5.5**

The purpose of combining former subparagraphs (a) and (b) of Rule 5.5 into a single paragraph is simply to conform to the approach in ABA Model Rule 5.5, thus making New York's rule numbering consistent with the numbering of ABA Model Rule 5.5 and the many jurisdictions that have adopted it. This is not a substantive change.

Regarding the new Comment [3], New York lawyers should be aware of the significant change in New York's regulation of temporary practice brought about by Parts 522 and 523. COSAC considered reciting verbatim the Court of Appeals Rules as part of the black letter ethics Rules in Rule 5.5, but COSAC concluded that it is sufficient to include references to Parts 522 and 523 in new Comment [3]. Given the brevity of the Comments to Rule 5.5 and the general availability of those Comments to practitioners, this should accomplish the purpose of ensuring that New York lawyers are made aware of these important court rules and their interplay with the Rules of Professional Conduct.

### **Public comments regarding Rule 5.5 and COSAC's response**

The NYSBA Committee on Professional Ethics supports the change to both the text and Comment. It said:

We agree. COSAC recommends deleting Rule 5.5(b) and incorporating its intent into Rule 5.5(a). This is an editing exercise, not a substantive change. We also see a benefit in citing rules on foreign consultants, in-house counsel, and temporary practice in the Comments.

The NYSBA Labor and Employment Law Section also supports this change. It said: “We do not have any issue with a new Comment [3] simply referencing Parts 521, 522 and 523 and thereby putting lawyers on notice where to look for New York’s rules in this area.”

The NYSBA International Section supported COSAC’s addition of new Comment [3] to Rule 5.5 but suggested adding two other sentences expressing the idea that “we want to encourage collaborative co-counsel arrangements between New York lawyers and foreign lawyers by which each can give advice about their own respective laws and coordinate their advice accordingly so that the client gets the best result possible.” Specifically, the International Section suggested adding the following language at the end of proposed new Comment [3]:

New York lawyers are encouraged to seek the assistance of lawyers admitted to the practice of law in other states or foreign jurisdictions where the laws of other states or other foreign jurisdictions may apply to or be relevant to the representation of their clients. At the same time, New York lawyers should be mindful not to facilitate out-of-state and foreign and out-of-state attorneys in the unauthorized practice of New York law.

COSAC appreciates the International Section’s suggestions but does not accept them. We will explain COSAC’s reasons with respect to each sentence.

As to the International Section’s proposed new sentence encouraging New York lawyers to seek the assistance of non-New York lawyers, COSAC is concerned that urging lawyers to consult with non-New York co-counsel where the laws of other jurisdictions may apply or may be relevant subtly shifts the balance that a lawyer must strike between engaging out-of-state co-counsel (at additional cost to the client), on one hand, and having the New York lawyer advise on a point of non-New York law (which may be straight-forward or immaterial, or may be solidly within the expertise of the New York lawyer or New York co-counsel, as Delaware corporation lawyer is for many New York lawyers). If a lawyer makes the wrong decision about whether to seek assistance from an out-of-state or foreign lawyer, the suggested new sentence to the Comment will likely be cited in hindsight as evidence that the lawyer should have engaged non-New York co-counsel on the issue. The purpose of COSAC’s proposal is simply to alert lawyers to the existence of other relatively recent authorities, outside the Rules of Professional Conduct, regulating practice by non-New York lawyers in New York. Nothing about COSAC’s proposed new Comment, which is merely a straightforward string of citations to recently adopted court rules, calls for encouragement to consult with non-New York co-counsel. Nor does COSAC’s proposed new Comment discourage such consultation – it simply points out the court rules.

As to the International Section’s proposed new sentence warning New York lawyers not to facilitate the unauthorized practice of law, COSAC believes that the proposed warning is not necessary. The opening sentence of proposed new Comment [3] plainly says, “New York lawyers shall not assist out-of-state and foreign lawyers in the unauthorized practice of law.” There is no reason to add another reminder at the end of this short Comment.

## **Rules 7.1 through 7.5**

## **(advertising, solicitation, and related topics)**

COSAC recommends amending New York Rules 7.1 through 7.4 and the Comments to those rules to conform substantially to ABA Model Rules 7.1-7.3 (formerly ABA Model Rules 7.1 through 7.5) as amended by the ABA in August 2018. The ABA deleted Rules 7.4 and 7.5 entirely, incorporating some of the text and Comments into ABA Model Rules 7.1 and 7.2 and the Comments to those Rules. As discussed below, the New York attorney advertising and solicitation rules are unnecessarily complicated and unduly burdensome, and COSAC believes it is time to simplify and update New York's rules in this area.

In modernizing its advertising rules, the ABA issued a report that identified three trends that demand “simplicity and uniformity in the regulation of lawyer advertising.” ABA, *Report: Lawyer Advertising Rules of the 21<sup>st</sup> Century*, at 1 (Aug. 2018).

First, the growth of multijurisdictional practice favors the elimination of the “current web of complex, contradictory and detailed advertising rules” that exists across jurisdictions in the U.S. *Id.* Indeed, according to the chair of the ABA Center for Professional Responsibility, there is “breathtaking variation” in advertising rules among the states. *ABA Model Rules on Lawyer Advertising To Be Modernized* (Aug. 6, 2018), available at [www.abajournal.com/news/article/model\\_rules\\_on\\_lawyer\\_advertising\\_to\\_be\\_modernized](http://www.abajournal.com/news/article/model_rules_on_lawyer_advertising_to_be_modernized). This variation “impedes lawyers’ efforts to expand their practices” into new jurisdictions “and thwarts clients’ interests in securing the services they need.” *ABA Report* at 1.

Second, widespread use of social media and the Internet allows lawyers to “use innovative methods to inform the public about the availability of legal services.” *Id.* But “[c]onflicting state advertising regulations . . . unreasonably impede” these marketing innovations, which often involve “borderless forms of marketing.” *APRL Report* at 5. (“APRL” is the acronym for the Association of Professional Responsibility Lawyers.)

Third, the lawfulness of “burdensome and unnecessary restrictions on the dissemination of accurate information about legal services” is called into question by recent developments in First Amendment and antitrust jurisprudence. *ABA Report* at 1. As the ABA Standing Committee on Ethics and Professional Responsibility explained in proposing the amended advertising rules:

The Supreme Court announced [in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)] that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.

*ABA Report*, at 1-2 (footnote omitted). In its report, APRL reviewed cases since *Bates* in which courts have addressed restrictions on lawyer advertising, see *APRL Report* at 7-18. APRL observed that “there is no shortage of cases” in which lawyer advertising regulations failed the First Amendment test for restrictions on commercial speech set forth by the

Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *APRL Report* at 18. APRL concluded that “attorney advertising regulations are, in many cases, unconstitutional and unsustainable.” *Id.*

These trends counsel strongly in favor of replacing New York’s attorney advertising rules with the recently amended ABA Model Rules. Indeed, the current state of electronic advertising by lawyers, particularly those with multijurisdictional practices, does not respect state boundaries. Therefore, an absence of uniformity necessitates, as a practical matter, that lawyers and law firms comply with multiple rules.<sup>1</sup> In these circumstances, uniformity among the advertising rules of different jurisdictions has obvious benefits.

We discuss Rules 7.1 through 7.5 one at a time, and set out the public comments received and COSAC’s response to those public comments. We recommend that New York adopt substantial parts of those rules in place of the current New York rules on advertising and solicitation. We will also discuss a revised proposal that COSAC has developed, in response to public comments, to incorporate parts of existing New York Rule 7.5 into Rule 7.4. Because the new Rules and Comments that COSAC is proposing below would replace the New York advertising rules almost in their entirety with the ABA versions of those rules, striking out the deleted language (~~in red~~) and underscoring added language (in blue) reflects departures from the ABA Model Rules rather than from the existing New York Rules.

## **Rule 7.1**

### **Advertising**

The current title of New York Rule 7.1 is “Advertising.” COSAC proposes to change the title to the title of amended ABA Model Rule 7.1: “Communications Concerning a Lawyer’s Services,” which COSAC believes is a more helpful description.

New York Rule 7.1 regulates lawyer “advertising” in considerable detail, subjecting it to numerous substantive, procedural and record-keeping requirements. Foremost among these requirements is a prohibition on advertising that is “false, deceptive, or misleading.” Rule 7.1(a)(1).<sup>2</sup> “

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<sup>1</sup> See, e.g., N.Y. State 1042 (2014) (reasoning that the rules applicable to the website, letterhead and business card of a New York lawyer practicing in D.C. while a D.C. bar application is pending “depend on the jurisdiction where the lawyer ‘principally practices,’ and whether the conduct of the lawyer will have its ‘predominant effect’ in another jurisdiction where the lawyer is licensed or deemed to be licensed”).

<sup>2</sup> Rule 7.1(a)(1) overlaps the broad prohibition against “conduct involving dishonesty, fraud, deceit or misrepresentation” of Rule 8.4(c). Nonetheless, the drafters of the New York Rules and the ABA Model Rules appear to see value in separately prohibiting “false, deceptive, or misleading” communications concerning lawyers’ services, and so do we.

Advertising” is defined in Rule 1.0(a) as any communication “by or on behalf of a lawyer” about the lawyer’s services, “the primary purpose” of which is “the retention of the lawyer.” However, the definition expressly exempts communications to existing clients or other lawyers. Since existing New York Rule 7.1 applies only to “advertisements,” it does not apply to communications to existing clients or to other lawyers.

In COSAC’s view, existing Rule 7.1 is too narrow in scope, overly complicated, and largely unique to New York.

*Too narrow.* Rule 7.1 is too narrow because it carves out communications with “existing clients” or “other lawyers.” COSAC has eliminated these two exemptions from Rule 7.1(a) (existing clients and other lawyers) because they send the wrong signal to lawyers and set a trap for unwary lawyers who read Rule 7.1 in isolation without considering other rules. Such lawyers may feel free to make a false or deceptive statement about the lawyer’s services to existing clients or other lawyers. But a false or deceptive statement to an existing client or other lawyer, for the purpose of seeking retention or otherwise, might well violate Rule 8.4(c), which prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation” in any situation.

*Overly complicated.* New York Rule 7.1 has eighteen subparts, which makes the rule too complicated. A number of the requirements imposed by the rule are redundant, including the prohibition on advertising that violates another rule, as well as specific prohibitions that, in our view, fall within the general prohibition on “false, deceptive, or misleading” advertising.<sup>3</sup> Similarly, numerous provisions of New York Rule 7.1 specify content that may appear in advertising provided that it is not “false, deceptive or misleading.”<sup>4</sup> Moreover, many of the specific requirements in Rule 7.1 are of dubious benefit. For example, Rule 7.1(e)(3) requires certain statements regarding the lawyer’s services to be accompanied by a specific disclaimer: “Prior results do not guarantee a similar outcome.” Exactly those words must be used, even in contexts where they do not fit, such as where an advertisement does not describe any prior results but characterizes the quality of the lawyer’s services or compares the lawyer’s services with the services of other lawyers. *See* Rule 7.1(d)(4); N.Y. State 1001 ¶ 6 (2014); (disclaimer required in law firm newsletter); N.Y. State 834 (2009) (disclaimer required in advertisements containing testimonials or endorsements). In any event, we have

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<sup>3</sup> *See* Rule 7.1(c)(1) (prohibiting the use of paid endorsements without disclosure of the payment); Rule 7.1(c)(2) (prohibiting portrayals of fictitious firms or associations of lawyers); Rule 7.1(c)(3) (prohibiting the use of actors to portray lawyers or clients); Rule 7.1(c)(4) (prohibiting advertisements that “resemble” legal documents).

<sup>4</sup> *See* Rule 7.1(b) (“Subject to the provision of paragraph (a),” which prohibits “false, deceptive, or misleading” advertising, “an advertising may include information as to . . . .”); Rule 7.1(e)(1) (“It is permissible to provide the information set forth in paragraph (d) provided . . . its dissemination does not violate paragraph (a) . . .”).

been told that similar disclaimers required for financial industry advertising are generally regarded as ineffective.

As another example, Rule 7.1(f) requires the legend “ATTORNEY ADVERTISING” to be affixed to most electronic “advertisement[s],” but the line between providing information and seeking retention is unclear. Lawyers seeking to inform the public about legal matters through electronic client alerts, blogs or social media posts (*e.g.*, Linked-In or Facebook) may be discouraged from providing valuable information. As a result, Rule 7.1(f) raises difficult questions about whether the “primary purpose” of a blog post or other electronic communication is “the retention of the lawyer.” *See ABA Commission on Advertising, A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies* 14-16 (July 1998).

*Unique New York provisions.* Many provisions in New York’s complex existing rule are unique to the New York Rules of Professional Conduct (*i.e.*, they have not been adopted by any other states). Since relatively few New York cases and ethics opinions have interpreted these unique provisions, lawyers from New York and elsewhere find it difficult to research the meaning of New York’s advertising rules. Eliminating the unique provisions and taking other steps to simplify New York’s advertising rules will make interpretation easier.

*COSAC’s recommendation.* COSAC recommends that New York Rule 7.1 be replaced by ABA Model Rule 7.1. This recommendation is consistent with the recommendation in APRL’s 2015 report, which concluded that “a practical solution” to the problems with attorney advertising rules “is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer’s services.” *Id.* at 3.

In contrast to New York Rule 7.1, ABA Model Rule 7.1 applies broadly to all communications “about the lawyer or the lawyer’s services” – including to existing clients and other lawyers – and imposes a simple prohibition on “false or misleading” communications. This model rule has been broadly adopted by jurisdictions across the U.S., so New York’s adoption would increase national uniformity. Again, uniformity is highly desirable given the interstate nature of modern legal practice and the geographically borderless nature of advertising on television, radio, the Internet, and other electronic media, as well as in national and regional print publications.

#### **Public comments regarding Rule 7.1 and COSAC’s response**

In the proposals circulated on June 6, 2019, COSAC recommended adopting the ABA approach of deleting Rule 7.5 entirely, and recommended addressing law firm names, letterhead, and professional designations solely in Comments [5] – [8] to Rule 7.1, rather than keeping existing New York Rule 7.5 (“Professional Notices, Letterhead, and Signs”). However, comments received during the public comment period have persuaded COSAC to keep New York Rule 7.5 and to continue to address law firm names and related issues in

Rule 7.5 and its Comments. We explain COSAC's decision to keep Rule 7.5 in our discussion following that rule.

The NYSBA Labor and Employment Law Section commented on COSAC's proposed changes to Rule 7.1 by saying, in part:

While we recognize that advertising abuses can be detrimental to the public, and therefore have some reservations about changes that might be seen by some lawyers as allowing them to push the envelope even further in that regard, on balance we believe that both the push towards more uniform standards across the country, as well as simplified standards that can promote compliance, are good things and, from our perspective, these changes can be supported.

A member of the New York City Committee on Professional Discipline said:

I urge the Committee to stay the course on our RPC regarding Advertising, Solicitation and the like, Rules 7.1 - 7.5. New York has charted a course that has served us well since we adopted these Rules, why should we join the ABA approach for the sake of doing so?

COSAC disagrees. COSAC does not believe that the existing complex and highly detailed rules governing advertising and solicitation have served New York well, and COSAC has expressed multiple reasons aside from increased uniformity with the ABA (and hence with other jurisdictions) for modernizing and streamlining Rules 7.1 through 7.5.

The text of existing New York Rule 7.1 and its Comment are contained in an Appendix to this report. As amended, New York Rule 7.1 and its Comment would provide as follows:

***Proposed Rule 7.1***  
**Communications Concerning a Lawyer's Services**

**A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.**

**COMMENT**

[1] This Rule governs all communications [that a lawyer makes](#) about [the lawyer or the lawyer's services](#), including advertising [and including communications to existing clients and to other lawyers](#). Whatever means are used to make known [a lawyer or a lawyer's services](#), statements about them must be truthful. [A lawyer who makes false statements or misrepresentations about the lawyer or the lawyer's services may also be violating Rule 8.4\(c\), which prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation."](#)

[2] ~~Misleading truthful statements are prohibited by this Rule.~~ This Rule also prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A law firm may not use a name that is misleading - see Rule 7.5(b). A firm may be designated by the names of all or some of its current members, or by the names of deceased members where there has been a succession in the firm's identity ~~or by a trade name if it is not false or misleading.~~ A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer, or with a public or charitable legal services organization. If a firm uses a ~~trade~~-name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication - cf. Rule 7.5(b)(2).

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm's letterhead and in other permissible listings should make

clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions – see Rule 7.5(b).

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(h)(e), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners – see Rule 7.5(c).

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm – see Rule 7.5(b).

[8A] A lawyer may utilize a domain name for an internet web site that does not include the name of the lawyer or the lawyer’s firm if (1) all pages of the web site include the actual name of the lawyer or firm; (2) the lawyer or law firm does not attempt to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules – see Rule 7.5(e).

[8B] Likewise, a lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules – see Rule 7.5(f).

## **Rule 7.2**

### **Payment for Referrals**

The current title of New York Rule 7.2 is “Payment for Referrals.” COSAC proposes to change the title to the title of amended ABA Model Rule 7.2: “Communications Concerning a Lawyer’s Services: Specific Rules.” The new title is more descriptive of proposed Rule 7.2, which will cover more than simply payment for referrals.

New York Rule 7.2(a) generally bars a lawyer from providing “anything of value” to anyone to obtain a recommendation or a client. The rule contains several exceptions:

- referrals of clients to nonlegal professionals permitted by Rule 5.8, *see* Rule 7.2(a)(1);
- referral fees permitted by Rule 1.5(g), *see* Rule 7.2(a)(2); and
- payment of “usual and reasonable fees” to a qualified legal assistance organization, *see id.*

Separately, Rule 7.2 permits lawyers to accept referrals from an organization like a prepaid legal services plan (*e.g.*, a military legal assistance office), and permits lawyers to represent the organization’s members. *See* Rule 7.2(b).

ABA Model Rule 7.2(b), as amended in 2018, has several advantages over New York Rule 7.2, above and beyond uniformity with many other jurisdictions.

First, amended Model Rule 7.2(b) clarifies that the model rule’s prohibition on giving anything of value for referrals reaches any “promise” of anything of value.

Second, Model Rule 7.2(b) makes clear that a lawyer may “pay the reasonable costs” of permissible advertisements and communications, and “pay for a law practice in accordance with Rule 1.17.” *See* Model Rule 7.2(b)(1), (3). This codifies certain “implied exceptions” that, according to Professor Simon, “should ... be read into Rule 7.2(a),” including paying for advertising and paying for a law practice. Roy D. Simon & Nicole Hyland, *SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* 1525 (Thomson Reuters, 2019 ed.).

Third, Model Rule 7.2(b) creates a new exception that permits nominal tokens of appreciation “that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.”

ABA Model Rule 7.2(c) addresses claims that a lawyer is “certified as a specialist.” New York has previously treated such claims in the text of Rule 7.4 (“Identification of Practice and Specialty”). COSAC now recommends replacing existing New York Rule 7.4 and its Comments with the simpler language of ABA Model Rule 7.2(c), as well as Comments [9]-[11], which explain claims of specialization. Our discussion of Rule 7.4 below contains some additional detail.

### **Public comments regarding Rule 7.2 and COSAC’s response**

During the public comment period, the NYSBA Committee on Professional Ethics objected to COSAC’s proposed new exception in Rule 7.2(b) allowing a lawyer to “give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.” The NYSBA Ethics Committee said:

We agree with the proposed revisions of Rule 7.2 except that, in our view, the suggested allowance of a “nominal gifts as an expression of appreciation” is an ambiguous and potentially troublesome loophole for which codification in the Rules seems superfluous. One person’s “nominal gift” of a modest floral arrangement is another person’s diamond Rolex.

COSAC is persuaded by the Ethics Committee’s points, and consequently has eliminated the proposed exception for nominal gifts.

The NYSBA Ethics Committee has also persuaded COSAC to amplify Comment [5] to be consistent with N.Y. State Ethics Op. 1131 (2017), which ensures that when a nonlawyer referral service recommends a particular lawyer, the recommendation (i) is based on a non-discretionary ministerial system and (ii) is not a function of whether the lawyer pays more than others for inclusion in the service. The NYSBA Ethics Committee said:

The NYSBA Ethics Committee also objected to COSAC’s proposed Comment [8], as follows:

Equally puzzling is the statement in Comment [8] that reciprocal referral arrangements should be of “indefinite duration,” a requirement that does not exist in Rule 5.8. If the sole purpose of this proposed language is to alert a lawyer of the need to revisit such arrangements “to determine whether they comply with the Rules,” as COSAC says, then we would delete the phrase “indefinite duration” and substitute language that a lawyer “must be continuously alert to compliance with the Rules” in maintaining such arrangements.

COSAC is persuaded and has revised Comment [8] to eliminate the reference to “indefinite duration.”

The NYSBA Ethics Committee also objected to proposed Comment [12] because, in explaining the “contact information” that Rule 7.1 requires lawyers to include in advertisements, proposed Comment [12] listed a physical office address as an option rather than a requirement. The Ethics Committee said:

We also object to the language in proposed Comment [12] that defines a lawyer’s essential contact information as “an email address *or* a physical office location” (emphasis added). The location of a lawyer’s physical location is an important data point in a client’s choice of counsel, among other reasons owing to a client’s reasonable consideration of the geographic proximity of the lawyer to the client. No logical basis exists why this information should not be supplied, and its omission may well be regarded as misleading to the public.

COSAC is not persuaded by this point. Many New York lawyers practice out of their homes and do not want to advertise a home address, and other New York lawyers practice out of temporary offices that may change relatively often, making it burdensome to update every advertisement with a current physical address. In any event, potential clients can ordinarily ascertain a lawyer’s address by searching online or by calling the lawyer – and even lawyers whose offices are distant may be willing to travel to the client’s geographic location to meet in person. Accordingly, while lawyers are free to advertise the address of their physical offices, and may see advantages in doing so, COSAC does not believe that lawyers should be required to advertise a physical office address.

The NYSBA Ethics Committee also submitted several other comments that did not persuade COSAC. Specifically, the Ethics Committee objected to the references in proposed

Comments [6] and [11] to Rule 7.2 to the extent that they refer to the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act, which have not been adopted in New York State. COSAC believes that the references are descriptive only and that they are helpful in explaining the application of Rule 7.2.

Similarly, the Ethics Committee objected to Comments [9] and [11] to Rule 7.2 as follows:

The proposed revision of Comment [9], with an unqualified statement that a lawyer is “generally permitted” to state that the lawyer is a “specialist” in an area of law, is inconsistent with the proposed text of Rule 7.2 – which places qualifications on its usage – and also the proposed Comment [11], which outlines criteria for using that label. This language should be deleted.

... [P]roposed Comment [11] ... intimates that New York may adopt a certification process in harmony with the Model Rules, a prediction for which no evidence exists and is unlikely to prove true. Numerous indicia of excellence exist today of unquestioned credibility and exacting standards – the American Colleges of Trial Lawyers, Bankruptcy Lawyers, Trust and Estate Lawyers, to name a few – and we question whether bar-sanctioned qualifiers need to be added to the list.

COSAC regards the objection to the term “specialist” as unpersuasive as long as the representation is true, and COSAC believe that proposed Comment [9] is inconsistent with the proposed text of Rule 7.2(c), which governs claims that a lawyer is “certified” as a specialist in a particular field of law. A lawyer’s claim to be a “*certified* specialist” triggers the requirements of Rule 7.2(c), but a claim to be a “specialist” without certification is permitted as long as the claim is not false or misleading under Rule 7.1. As to whether New York might at some point adopt a certification process in harmony with the ABA Model Rules of Professional Conduct, COSAC sees no harm in allowing for the possibility, which has the added virtue of conforming to ABA Comment [11].

The NYSBA Labor and Employment Law Section commented on COSAC’s proposed changes to Rule 7.2 by saying, in part: “As with respect to the proposed changes to Rule 7.1, on balance we think these changes, promoting uniformity and simplicity, are worth supporting.”

The NYSBA Dispute Resolution Section commented on proposed Rule 7.2(c), saying:

... [T]he proposed changes to Rule 7.2 are also generally desirable. However, with regards to Comment 10 to Rule 7.2... In addition to identifying the designation of lawyers practicing before the Patent and Trademark Office and the designation of admiralty practice, the Section believes that additional clarification regarding the designation of arbitrators and mediators by certain organizations in the alternative dispute resolution field would also be helpful to the bar and necessary to avoid unwarranted and unintended transgressions of the prohibition.

Specifically, before the final sentence – “A lawyer’s communications about these practice areas are not prohibited by this Rule.” – the Section recommends that the following additional language be inserted: “Similarly, organizations such as the Chartered Institute of Arbitrators, the Center for Effective Dispute Resolution, and the International Mediation Institute designate arbitrators and mediators as experienced in the alternative dispute resolution field.” ...

COSAC does not accept the Dispute Resolution Section’s suggestion, for several reasons.

First, admiralty and patent practice are different from practice in other areas of law because, as Comment [10] says, “The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts.” New York’s ethics rules have therefore singled out admiralty and patent practice for nearly fifty years, since New York adopted the old Code of Professional Responsibility in 1970.

Second, COSAC does not agree that adding specific references to the suggested organizations is necessary to avoid unwarranted and unintended transgressions of Rule 7.2(c). The prohibition in Rule 7.2(c) is only against claiming to be “certified” as a specialist by a qualifying organization, so lawyers who are not certified by one of the organizations named by the Dispute Resolution Section are free to note that they practice in the mediation or arbitration area without transgressing Rule 7.2(c).

Third, many different organizations certify specialists, in many areas of law – see [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standing-committee-on-specialization/resources/resources\\_for\\_lawyers/sources\\_of\\_certification/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standing-committee-on-specialization/resources/resources_for_lawyers/sources_of_certification/) (listing organizations approved by the ABA to certify lawyers as specialists).

The text of existing New York Rule 7.2 and its Comment are contained in an Appendix to this report. As amended, New York Rule 7.2 and its Comment would provide as follows:

***Proposed Rule 7.2***  
**Communications Concerning a  
Lawyer’s Services: Specific Rules**

- (a) A lawyer may communicate information regarding the lawyer’s services through any media.
- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
  - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; ~~and~~

~~(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.~~

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

## COMMENT

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

## Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a

“recommendation” if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] [Reserved.] ~~Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer’s services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.~~

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. A lawyer may participate in a for-profit lead generation service if (i) the lawyer is selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client’s legal problem or the qualifications of the selected lawyer to handle that problem, and (ii) the selection of a particular lawyer is not based on whether the selected lawyer pays more than others for inclusion in the service. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other

client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. *See, e.g.*, the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer – [see Rule 5.8\(c\)](#). Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(g)(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive – [see Rule 5.8\(c\)](#) – and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements ~~should be of indefinite duration and~~ should be reviewed periodically to determine whether they comply with these Rules. ~~This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.~~

### **Communications about Fields of Practice**

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts.

A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia, or a U.S. Territory, or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia, or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

#### **Required Contact Information**

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information should always include a telephone number or a physical office address, and may also include a website address, ~~a telephone number,~~ an email address, ~~or a physical office location,~~ and other contact information that may be helpful to clients and potential clients.

### **Rule 7.3**

#### **Solicitation and**

#### **Recommendation of Professional Employment**

The current title of New York Rule 7.3 is “Solicitation and Recommendation of Professional Employment.” COSAC proposes to change this to the title of amended ABA Model Rule 7.3: “Solicitation of Clients,” which COSAC believes is an accurate description.

Rule 7.3 governs “solicitation” by a lawyer, which is defined in existing New York Rule 7.3(b) as advertising that is “directed to, or targeted at, a specific recipient or group of recipients,” and “a significant motive for which is pecuniary gain.” Rule 7.3 seeks to prevent over-reaching by lawyers in situations in which potential clients may be taken advantage of—such as when clients feel pressured to respond immediately (*e.g.*, in-person or real-time phone communications) or may be emotionally vulnerable (*e.g.*, shortly after a mass tort or other incident).

But Rule 7.3 goes too far, because several of its provisions are unnecessary to protect potential clients and are otherwise undesirable. For example, Rule 7.3(c)(1) generally requires that solicitations be filed with an attorney disciplinary committee, and requires lawyers to maintain lists of the recipients of certain solicitations for at least three years. This rule has been criticized as “impos[ing] complex and burdensome filing and recordkeeping requirements on lawyers, and impos[ing] heavy administrative burdens on disciplinary authorities.” *Simon’s New York Rules*, at 1592-93.

Further, Rule 7.3(e) gives defendants and insurance companies an unfair advantage by restricting the time that lawyers may solicit clients injured in mass torts and other incidents. In particular, Rule 7.3(e) generally prohibits solicitations by lawyers “relating to a specific incident involving potential claims for personal injury or wrongful death” prior to 30 days after the incident. This prohibition gives parties that have an interest in defending against these claims, such as insurance adjusters, an unfair advantage because it permits them to settle claims before potential plaintiffs may have obtained legal representation. (Plaintiffs are of course free to contact lawyers on their own, without awaiting a solicitation, but many people do not know any lawyers, or don’t know how to quickly find a lawyer who handles injury claims.)

Accordingly, COSAC recommends that Rule 7.3 be replaced by amended ABA Model Rule 7.3. The Model Rule is significantly simpler and lacks the unnecessary, unduly burdensome, and unfair provisions in Rule 7.3 that we have highlighted above. In addition, adopting Model Rule 7.3 will promote uniformity if, as expected, other jurisdictions also adopt it.

#### **Public comments regarding Rule 7.3 and COSAC’s response**

The New York State Bar Ethics Committee generally agreed with COSAC’s proposed revisions to Rule 7.3, but had two objections:

First, we believe the proposed exemption of in-person solicitation by a lawyer of a “person who routinely use for business purposes the type of legal services offered by the lawyer” [a phrase used in proposed Comment [5] as amended] is vague and ambiguous. ... If the client has experienced the problem only once or twice before, and used a lawyer, does that make the relationship “routine”? If the client has previously used the lawyer only in a specific geographic area, may the lawyer personally solicit the client for a like matter in a different venue? The Rules apply to every lawyer in the governance of the attorney- client relationship, and COSAC’s unsubstantiated assertion that the danger of overreaching is small may be true with sophisticated clients having large in-house legal departments, but this proposal seems to us to rampant with possibilities of abuse. *See* N.Y. State 1110 ¶ 22 (2016) (cautioning against in-person solicitation of attendees at a tax seminar for in-house counsel).

Second, we do not believe that Internet chat rooms are more akin to writings than in-person solicitation. For this reason, we would amend Comment [2] so to reflect.

COSAC disagrees with the objection to the word “routinely” in proposed Comment [5]. The Comment gives several examples, and ethics opinions can elaborate further if necessary.

COSAC understands the concern about treating chat rooms as written communications in Comment [2], and has therefore revised Comment [2] so that it no longer refers to chat rooms at all. Proposed Comment [2] thus does not resolve whether chat rooms are more like writings or more like live in-person solicitation, but leaves the issue open for further interpretation by courts, commentators, and ethics committees.

The NYSBA Labor and Employment Law Section commented on COSAC’s proposed changes to Rule 7.3 by saying:

We generally agree with these changes because they do serve to greatly simplify the Rules and to remove provisions that are both burdensome to lawyers (such as the filing of solicitations with local grievance committees ... and the retention of solicitations for a period of three years) and of questionable effect.

As amended, New York Rule 7.3 would provide as follows:

***Proposed Rule 7.3***  
**Solicitation of Clients**

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with **a**:

(1) **a** lawyer;

(2) **a** person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) **a** person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

#### COMMENT

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information, or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone, and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include text messages, or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1), is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

The text of existing New York Rule 7.3 and its Comment are contained in an Appendix to this report.

## **Rule 7.4**

### **Identification of Practice and Specialty**

COSAC recommends that New York should delete Rule 7.4 as a freestanding rule but also (i) should move the substance of Rule 7.4 to Rule 7.2(c) and (ii) should replace New York's existing language with the language of ABA Model Rule 7.2(c). COSAC also recommends that New York adopt Comments [9]-[11] to ABA Model Rule 7.2, which explained Rule 7.2(c). These steps will promote simplicity, uniformity, and constitutional rights.

Lawyers have a First Amendment right to describe their qualifications in a manner that is not false, deceptive or misleading, and this right should not be unduly burdened. *See, e.g., Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (reversing discipline against a Florida attorney for using accurate and truthful "CPA" and "CFP" designations in her commercial communications); *Hayes v. New York Attorney Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, (2d Cir. 2012) (upholding existing disclaimers in New York Rule 7.4(c), striking down disclaimers that subsequently were deleted from Rule 7.4(c), and holding that Rule 7.4(c)(3) was unconstitutional as applied). *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 257 (2010) ("a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature," are "*inherently likely* to deceive" or have "*in fact* been deceptive") (quoting *In re R.M.J.*, 455 U.S. 191, 202 (1982)).

In 2018, the ABA amended the ABA Model Rules by moving the provisions regarding specialization from Model Rule 7.4 to the text of Model Rule 7.2(c), and by moving Rule 7.4's Comments to Comments [9] to [11] to Model Rule 7.2. As a result, Model Rule 7.4(c)

is significantly more streamlined than New York Rule 7.4—yet we believe the Model Rule is just as effective in preventing false, deceptive, or misleading advertisements about claims of specialization.

We recommend that New York delete existing Rule 7.4 in its entirety and replace it with ABA Model Rule 7.2(c) and Comments [9]-[11] to Rule 7.2, which are set forth above. The text of existing Rule 7.4 and its Comment are contained in Appendix A to this report. However, Rule 7.4 will remain in the New York Rules of Professional Conduct next to the bracketed words indicating that the substance of former Rule 7.4 has been moved to Rule 7.2(c) and accompanying Comments.

#### **Public comments regarding Rule 7.4 and COSAC’s response**

The New York State Bar Ethics Committee generally agreed with COSAC’s proposed approach to Rule 7.4 – deleting Rule 7.4 in its entirety but moving the substance to proposed Rule 7.2(c) and Comments [9]-[11] to Rule 7.2.

The NYSBA Labor and Employment Law Section commented on COSAC’s proposed changes to Rule 7.4 as follows:

Substantively, the most significant change in the proposed language is that rather than prohibiting identifying oneself as a “specialist” unless so certified by a recognized organization (as is the case now), the Rule would only prohibit identifying oneself as “certified” as a specialist unless in fact certified by a recognized organization. We think that change is warranted. For example, many of our Section’s members are indeed “specialists” in labor and employment law (e.g., having practiced exclusively in that area for decades) although not so certified by any organization. Under the current Rule, we strive to find ways around the literal language of the rule by noting we “specialize in” this area (or use similar language touting our “expertise” or that our practice is “limited exclusively to”), while artificially avoiding use of the word “specialist.” This change would eliminate the need to jump through these artificial hoops. On the other hand, given that all advertising must be truthful, a lawyer could not claim to “specialize” in something unless that was indeed the case.

Since none of the public comments objected to COSAC’s proposal, COSAC has not revised its original proposal.

### ***Proposed Rule 7.4*** **Identification of Practice and Specialty**

[\[Former Rule 7.4 has been deleted but the substance of former Rule 7.4 and its Comments have been moved to Rule 7.2\(c\) and accompanying Comments to Rule 7.2.\]](#)

## **Rule 7.5**

### **Professional Notices, Letterheads, and Signs**

New York Rule 7.5 has no counterpart in the ABA Model Rules as amended in 2018, and COSAC's June 6, 2019 proposals recommended that New York adopt the ABA approach by deleting the black letter text of Rule 7.5 entirely and moving the substance of the rule to Comments [5]-[8] to Rule 7.1. However, during the public comment period, two different groups opposed COSAC's recommendation to delete Rule 7.5. COSAC agrees with those public comments, so COSAC now recommends retaining New York Rule 7.5 in modified form, for the reasons stated below.

Rule 7.5(a) expressly permits lawyers to use various forms of promotional materials, including web sites, professional cards, letterhead and signage, provided that they comply with Rule 7.1, statutes and court rules. Thus, other than its superfluous reference to statutes and court rules, Rule 7.5(a) is redundant of Rule 7.1. Accordingly, in August 2018 the ABA deleted the black letter text of Rule 7.5 and moved the substance of Rule 7.5 to Comments [5] - [8] to Rule 7.1.

The remainder of New York Rule 7.5 sets forth detailed regulations of partnership names, Internet domain names and phone numbers that, while not expressly redundant of any other rule, arguably are nothing more than specific applications of the general prohibition against false and misleading communications. *See* Rule 7.5(b)-(f).

#### **Public comments and COSAC's response**

The NYSBA Labor and Employment Law Section commented on COSAC's proposed elimination of Rule 7.5 as follows:

We believe that there is some value to practitioners in having the current examples of specific applications of the general prohibition against false and misleading communications included in the Rules (for instructional purposes). As a result, while we can agree with the elimination of current Rule 7.5, we would recommend that COSAC consider including its specific examples in the Comments to Rule 7.1.

The NYSBA Ethics Committee also criticized the proposed deletion of Rule 7.5, saying that "the wholesale deletion in service of a perceived need to conform to the ABA Model Rules or to strive for simplicity, may have unintended consequences which COSAC does not confront." The NYSBA Ethics Committee also elaborated on its opposition to allowing law firms to use trade names in New York, saying:

We do not agree with proposed ... endorsement of "trade names" as the name of a law firm, even with the condition that the trade name not be "false or

misleading.” In our view, this is a summons to trickery, for trade names are pregnant with possibilities for mischief. Should a law firm be able to call itself “The Go-To Pros” or “Ben & Jerry’s Firm” or “Service with a Smile Firm”? We think not. We are mindful of the permissible use of mottos, domain names, phone numbers, and other branding devices. COSAC does not explain why this change-altering over a century of standard custom and usage in naming firms – is needed or desirable. We believe neither is true.

In all events, we recommend that for-profit firms be expressly forbidden from adopting as a trade name those names traditionally used by non-profit providers of legal services, a circumstance that “false or misleading” is inadequate to cure. ...

These comments have persuaded COSAC, which now proposes to retain Rule 7.5 and its Comments, but to move parts of the text of Rule 7.5 to the Comments to Rule 7.5.

COSAC also stands by its earlier recommendation to adopt ABA Comments [5]-[8] to Rule 7.1, which elaborate on law firm names and related matters, but COSAC has modified those Comments to reflect the particular language of New York Rule 7.5. Finally, since existing Rule 7.5(b) is a long paragraph covering multiple subjects, COSAC proposes to break it down into multiple subparagraphs, each covering a different topic.

As amended, New York Rule 7.5 would provide as follows (redlined against existing New York Rule 7.5, striking through language deleted by COSAC in ~~red~~ and underscoring language added by COSAC in blue):

### ***Proposed Rule 7.5***

#### **Professional Notices, Letterheads and Signs**

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, ~~including the following:~~

~~(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;~~

~~(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;~~

- ~~(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or~~
- ~~(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.~~
- (b) (1) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that
- (i) the name of a professional corporation shall contain "PC" or such symbols permitted by law,
  - (ii) the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and,
  - (iii) if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.
- (2) Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by **qualified bona fide** legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein.
- (3) A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.
- (4) A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) 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;
- (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;
- (3) the domain name does not imply an ability to obtain results in a matter; and
- (4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

## COMMENT

### Professional Status

[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.

[1A] A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following: (i) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates; (ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4; (iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or (iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or

Rule 7.4. A letter- head of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated “Of Counsel” on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

### **Trade Names and Domain Names**

[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name [www.ableandbaker.com](http://www.ableandbaker.com), or [www.ab.com](http://www.ab.com), or [www.able.com](http://www.able.com), or [www.ablelaw.com](http://www.ablelaw.com). However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm’s name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as [www.realestatelaw.com](http://www.realestatelaw.com) or [www.ablerealestatelaw.com](http://www.ablerealestatelaw.com) or a colloquial domain name such as [www.dirtlawyers.com](http://www.dirtlawyers.com). Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name [www.realestatelaw.com](http://www.realestatelaw.com), the firm may not advertise that people buying or selling homes should “contact [www.realestatelaw.com](http://www.realestatelaw.com)” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name [www.win-your-case.com](http://www.win-your-case.com) or [www.settle-for-more.com](http://www.settle-for-more.com) because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name [www.ableandbaker.com](http://www.ableandbaker.com) because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

### **Telephone Numbers**

[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.

[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].

**APPENDIX A**  
**EXISTING NEW YORK RULES GOVERNING**  
**ATTORNEY ADVERTISING AND SOLICITATION**

**Rule 1.0. Terminology**

(a) “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.

(c) “Computer-accessed communication” means 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, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(p) “Qualified legal assistance organization” means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

**Computer-Accessed Communication**

[1A] Rule 1.0(c), which defines the phrase “computer-accessed communication,” embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

**Rule 7.1 Advertising**

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

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

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

- (1) legal and nonlegal education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law-related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;
- (2) names of clients regularly represented, provided that the client has given prior written consent;

- (3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; non- legal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and
- (4) legal fees for initial consultation; contingent fee rates in civil matters, when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service, hourly rates, and fixed fees for specified legal and nonlegal services.
- (c) An advertisement shall not:
- (1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
- (2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
- (3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or
- (4) be made to resemble legal documents.
- (d) An advertisement that complies with paragraph (e) may contain the following:
- (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;
- (3) testimonials or endorsements of clients, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer or law firm's services.
- (e) It is permissible to provide the information set forth in paragraph (d) provided:
- (1) its dissemination does not violate paragraph (a);
- (2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and
- (3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."; and

- (4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.
- (f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words “Attorney Advertising” shall appear therein. In the case of electronic mail, the subject line shall contain the notation “ATTORNEY ADVERTISING.”
- (g) A lawyer or law firm shall not utilize meta-tags or other hidden computer codes that, if displayed, would violate these Rules.
- (h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.
- (i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.
- (j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.
- (k) 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 for a period of not less than one year. A copy of the contents of any web site covered by this Rule 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.
- (l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.
- (m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the

lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

## **COMMENT**

### **Advertising**

[1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes. First, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive or misleading. Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. 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 the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers or recipients and convey its content in ways that will be understandable and helpful to them. Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so long as those techniques do not render the advertisement false, deceptive or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The “Attorney Advertising” label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm’s services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm’s services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, non-commercial communications motivated by a not-for-profit organization’s interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term “current client” for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a “current client” for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm’s cases, personnel, clients or achievements) generally would be considered advertising. 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 the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. 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 of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

### **Recognition of Legal Problems**

[9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other 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, the communication is not considered advertising.

### **Statements Creating Expectations, Characterizations of Quality, and Comparisons**

[11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Accordingly, if 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 five years," "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." 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 lawyer that the lawyer's average jury verdict for 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 that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] 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. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is "Hard-Working," "Dedicated," or "Compassionate" without the necessity to provide factual support for such subjective claims. On the other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the "Best," "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 law firm may not advertise that it will obtain "Big \$\$\$," "Most Money," or "We Win Big."

### **Bona Fide Professional Ratings**

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, 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.

### **Meta-Tags**

[14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term

“personal injury specialist” into a search engine will be directed to that lawyer’s web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word “specialist.” However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

### **Advertisements Referring to Fees and Advances**

[15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer’s or law firm’s ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are “unique in the area,” “unlike other firms,” available “only at our firm,” “extraordinary,” or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

### **Retention of Copies; Filing of Copies; Designation of Principal Office**

[16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm’s work is performed.

### **Rule 7.2 Payment for Referrals**

**(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:**

**(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and**

**(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).**

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or (iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal

service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

**COMMENT**

**Paying Others to Recommend a Lawyer**

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. See Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of printing directory listings and newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (lawyer's responsibility for conduct of nonlawyers).

[2] A lawyer may pay the usual charges of a qualified legal assistance organization. A lawyer so participating should make certain that the relationship with a qualified legal assistance organization in no way interferes with independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary, rather than competence and quality of service.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with potential clients are in conformity with these Rules. For example, the organization's advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested that it was a lawyer referral

service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

[4] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1, 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (a) by agreeing to refer clients to the other lawyer or nonlawyer so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients. Conflicts of interest created by such arrangements are governed by Rule 1.7. A lawyer's interest in receiving a steady stream of referrals from a particular source must not undermine the lawyer's professional judgment on behalf of clients. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprising multiple entities.

[5] Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

[6] In determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement, the factors to be considered include (a) whether legal work awarded to the contributor or solicitor, if any, was awarded pursuant to a process that was insulated from political influence, such as a "Request for Proposal" process, (b) the amount of the contribution or the contributions resulting from a solicitation, (c) whether the contributor or any law firm with which the lawyer is associated has sought or plans to seek government legal work from the official or candidate, (d) whether the contribution or solicitation was made because of an existing personal, family or non-client professional

relationship with the government official or candidate, (e) whether prior to the contribution or solicitation in question, the contributor or solicitor had made comparable contributions or had engaged in comparable solicitations on behalf of governmental officials or candidates for public office for which the lawyer or any law firm with which the lawyer is associated did not perform or seek to perform legal work, (f) whether the contributor has made a contribution to the government official's or candidate's opponent(s) during the same campaign period and, if so, the amounts thereof, and (g) whether the contributor is eligible to vote in the jurisdiction of the governmental official or candidate, and if not, whether other factors indicate that the contribution or solicitation was nonetheless made to further a genuinely held political, social or economic belief or interest rather than to obtain a legal engagement.

### **Rule 7.3 Solicitation and Recommendation of Professional Employment**

**(a) A lawyer shall not engage in solicitation:**

**(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or**

**(2) by any form of communication if:**

**(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;**

**(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;**

**(iii) the solicitation involves coercion, duress or harassment;**

**(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or**

**(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.**

**(b) For purposes of this Rule, "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.**

**(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:**

**(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is**

- maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:
- (i) a copy of the solicitation;
  - (ii) a transcript of the audio portion of any radio or television solicitation; and
  - (iii) if the solicitation is in a language other than English, an accurate English-language translation.
- (2) Such solicitation shall contain no reference to the fact of filing.
- (3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.
- (4) Solicitations filed pursuant to this subdivision shall be open to public inspection.
- (5) The provisions of this paragraph shall not apply to:
- (i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;
  - (ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or
  - (iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).
- (d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.
- (e) 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, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.
- (f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.
- (g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.
- (h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.
- (i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

***COMMENT***

### **Solicitation**

[1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called “solicitation.” Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however, are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules 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, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A “solicitation” means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, see Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that 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 is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

### **Directed or Targeted**

[3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, 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). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term “specific incident” is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an 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 toward 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 solicitations.

### **Solicitations Relating to a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death**

[5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction, in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is a current client. A "specific incident" is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, see Comments [3]-[4]. For example, solicitations intended to be of interest only 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 not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) 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 (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person's family member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

### **Extraterritorial Application of Solicitation Rules**

[8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c). Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

#### **In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication**

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – see Rule 1.0(c) (defining “computer-accessed communication”) – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging (“IM”), and other similar types of “conversational” computer-accessed communications—whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

#### **Rule 7.4 Identification of Practice and Specialty**

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying

organization is identified and the following statement is prominently made: “This certification is not granted by any governmental authority.”

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: “This certification is not granted by any governmental authority within the State of New York.”

(3) A statement is prominently made if:

(i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and

(ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

### ***COMMENT***

[1] Paragraph (a) permits a lawyer to indicate areas of practice in which the lawyer practices, or that his or her practice is limited to those areas.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office.

[3] Paragraph (c) permits a lawyer to state that the lawyer specializes or is certified as a specialist in a field of law if such certification is granted by an organization approved or accredited by the American Bar Association or by the authority having jurisdiction over specialization under the laws of another jurisdiction provided that the name of the certifying organization or authority must be included in any communication regarding the certification together with the disclaimer required by paragraph (c).

### **Rule 7.5 Professional Notices, Letterheads and Signs**

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a

continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on

those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) 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;
- (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;
- (3) the domain name does not imply an ability to obtain results in a matter; and
- (4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

### ***COMMENT***

#### **Professional Status**

[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being partners or associates if they only share offices.

#### **Trade Names and Domain Names**

[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name [www.ableandbaker.com](http://www.ableandbaker.com), or [www.ab.com](http://www.ab.com), or [www.able.com](http://www.able.com), or [www.ablelaw.com](http://www.ablelaw.com). However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm’s name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as [www.realestatelaw.com](http://www.realestatelaw.com) or [www.ablerealestatelaw.com](http://www.ablerealestatelaw.com) or a colloquial domain name such as [www.dirtlawyers.com](http://www.dirtlawyers.com). Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name [www.realestatelaw.com](http://www.realestatelaw.com), the firm may not advertise that people buying or selling homes should “contact [www.realestatelaw.com](http://www.realestatelaw.com)” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name

www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.

### **Telephone Numbers**

[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.

[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].

**APPENDIX B**  
**COSAC SURVEY OF STATE RULES ON**  
**ADVERTISING AND SOLICITATION**

COSAC's Marketing Subcommittee prepared this Appendix to help provide national context for COSAC's recommendations. The Appendix illustrates many ways in which New York is an outlier in the regulation of attorney advertising and solicitation.

Rule 7.1

I. ABA Model Rule 7.1

A. The following States have adopted the black letter text of ABA Model Rule, either verbatim or with no changes of substance. (Note that the black letter text of ABA Model Rule 7.1 was not amended in 2018, and these States have not yet adopted the amended Comments to ABA Model Rule 7.1.)

1. Arizona
2. Connecticut
3. Delaware
4. Illinois
5. Indiana
6. Iowa
7. Maine
8. Maryland
9. Massachusetts
10. Minnesota
11. Nebraska
12. Oklahoma
13. Pennsylvania
14. Rhode Island
15. Tennessee
16. Vermont
17. Washington
18. Wyoming

B. The following State has continued to use the pre-2002 version of the black letter text of ABA Model Rule 7.1:

Mississippi

- C. Two States follow the pre-2002 version of the black letter text of ABA Model Rule 7.1, with certain additions (mentioned below):
1. West Virginia
  2. Wisconsin
- D. The following States have adopted rules whose black letter text differs substantially from ABA Model Rule 7.1:
1. California
  2. Florida
  3. Kentucky
  4. New York
- E. Most other States (and the District of Columbia) have in most part adopted the black letter text of ABA Model Rule 7.1 as an introduction but otherwise vary their respective versions of Model Rule 7.1 as discussed below.
- II. Comparison of the provisions of New York Rule 7.1 with those of most other jurisdictions:
- A. New York’s Rule 7.1 (a)(1) and (a)(2) are not different in substance from ABA Model Rule 7.1.
- B. The rest of New York Rule 7.1 (i.e., Rule 7.1(b)-(r)), however, reflects significant additions:
- 7.1(b)(1) - permitting descriptions of various background items is unique;
  - 7.1(b)(2) - permitting use of client name if written consent was given is unique;
  - 7.1(b)(3) - permitting disclosure of bank references and various forms of credit and prepayment plan arrangements, relationships with entities providing “non-legal” services is unique;
  - 7.1(b)(4) - permitting fee information including range of fees and scope of services - the following jurisdictions have mandatory disclosure requirements as to fees, costs and scope of services offered: Georgia, Missouri, Louisiana, Montana and New Jersey;
  - 7.1(c) - Prohibitions - The following are prohibited: 7.1(c)(1) paid “endorsements” or “testimonials” without disclosure of compensation thereof. The following jurisdictions have similar

prohibitions: Louisiana, Missouri, Montana, Rhode Island, South Dakota, Utah and West Virginia. Arkansas and South Carolina prohibit all such endorsements even without regard to payment;

- 7.1(c)(2) - of fictitious portrayals of clients or law firms or associations between lawyers. The following jurisdictions have like or similar prohibitions: Louisiana, Missouri, North Carolina, Rhode Island and South Dakota;
- 7.1(c)(3) - of actions to portray judges, lawyers or clients. The following jurisdictions have like or similar prohibitions: Louisiana, Missouri, North Carolina and Rhode Island.
- 7.1(c)(4) - of communications made to resemble legal documents. Colorado has a like prohibition;
- 7.1(d) and (e) - The following statements are permitted if true and not misleading, are accompanied by the disclaimer that “prior results do not guarantee similar results” and “can be factually supported”.
- 7.1(d)(1) - reasonably likely to create an expectation of achievable results. The following jurisdictions have similar or like prohibitions but do not provide for disclaimers: Georgia, New Hampshire, New Jersey, North Dakota, South Carolina, Texas, Alabama, Alaska, Arkansas, Colorado, Kansas, Missouri, Utah, Nevada and Montana. Note that these prohibitions although requested disclaimers were present in the prior to 2002 version of ABA Model Rule 7.1.
- 7.1(d)(2) - of statements that confuse the lawyer’s services with services of other lawyers. Similar prohibitions but without a disclaimer are present in the Rules 7.1 of: Georgia, Hawaii, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Texas, Alabama (except as to certified lawyers without disclaimers requested), Arkansas and Colorado. Note that a similar prohibition without disclaimers requested existed in the prior to 2002 version of ABA Model Rule 7.1.
- 7.1(d)(3) - of “testimonials” or “endorsements” of clients and former clients [presumably with written consent] Arkansas prohibits all such testimonials or endorsements.
- 7.1(d)(4) - of descriptions or characterizations of services of the lawyer or law firm. Similar prohibitions but without provision for disclaimers are the Rules in Alabama, Arkansas, Arizona, Colorado,

Idaho, New Hampshire, New Jersey, South Carolina, Texas, South Dakota and Missouri. Note that a similar provision without disclaimers was present in the prior to 2002 version of ABA Model Rule 7.1.

- 7.1(e)(4) - “Testimonials” or “endorsements” by clients in pending matters must be the subject of written informed consent (See Rule 7.1(b)(3)). This is unique.
- 7.1(f) - Print advertisement must be accompanied by the legend, “Attorney Advertising”. This is unique but a like legend is required under Model Rule 7.3 (i.e. “Direct Communications With Clients”).
- 7.1(g) - Prohibiting use of meta-tags and other such codes in violation of New York’s Rules. This is unique.
- 7.1(h) - Requiring the names of the law firm, lawyers, office address and telephone numbers. South Dakota has a similar Rule.
- 7.1(i) - The advertisement has to be legible and capable of being read by an “average person.” This is unique.
- 7.1(j) - Lawyer must have available for fixed fee clients a written statement of the scope of covered services. (*See Rule 7.1(b)(4)*)
- 7.1(k) - Retention of copies of advertisements. This is unique except for Florida.
- 7.1(l) - Limiting lawyers to advertised fees. (*See Rule 7.1(b)(4)*).
- 7.1(m) - Lawyers bound for 30 days as to fees advertised. (*See Rule 7.1(b)(4)*).
- 7.1(n) - Similarly to Rule 7.1(m) binding lawyer for 30 days to representations made on broadcasted advertising.
- 7.1(o) - Prohibiting payment to appear on radio, television, plays or the like. This is unique.
- 7.1(p) - Advertisements for contingent fee matters must comply with Judiciary Law Section 488(3). (*See Rule 7.1(b)(4)*)
- 7.1(q) - Lawyers may be employed to participate in education of the public as to legal problems and protection of lawyers. This is unique.
- 7.1(r) - Lawyers may speak publicly or write for publications. This is unique.

C. Provisions that have been adopted in other U.S. jurisdictions (but not New York) as part of Rule 7.1

- Required disclosures of references to other lawyers: Montana, Colorado, Missouri.
- Required disclosures of jurisdictions in which the lawyer is licensed to practice: Montana.
- If the lawyer advertises that the lawyer has received honors, then the lawyer must also disclose details as to who awarded the honors: North Dakota.
- Prohibition of the use of nicknames and honors: South Carolina.
- Restrictions on solicitations, mutual referrals, violations of certain statutes, etc.: District of Columbia.

