

Garden State CLE Presents:



Marketing Yourself & Your Law Firm -
ETHICALLY

Instructor

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Lesson Plan

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Part I

Rules of Professional Conduct

R.P.C. 7.1

a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the

services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Official Comment by Supreme Court (November 2, 2009)

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

R.P.C. 7.2

a) Subject to the requirements of R.P.C. 7.1, a lawyer may communicate information regarding the lawyer's services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication.

b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification

required in connection with the sale of a law practice as permitted by R.P.C. 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

R.P.C. 7.3

a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section(4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and

(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and

(iii) contains the following notice at the bottom of the last page of text:

"Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 970, Trenton, New Jersey 08625-0970. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of R.P.C. 7.1; or

(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by R.P.C. 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by R.P.C. 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated

with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's 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 nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(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.

(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) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have

received any financial or other benefit from such initiation or promotion.

(iii) 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.

(iv) 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.

(v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

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

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

R.P.C. 7.4

a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.

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 engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

R.P.C. 7.5

a) A lawyer shall not use a law firm name, letterhead, or other professional designation that violates R.P.C. 7.1.

b) A law firm practicing in more than one jurisdiction may use the same law firm name in New Jersey, provided the law firm name complies with this Rule. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the law firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a law firm name, or where the law firm name does not include the name of a lawyer in the firm or the name of a lawyer who has ceased to be associated with the firm through death or retirement, any advertisement, letterhead or other communication containing the law firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

c) A law firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

d) (1) Lawyers may state or imply that they practice in a partnership only if the persons designated in the law firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(2) When lawyers practice in an entity authorized by Rules 1:21-1A, 1:21- 1B, or 1:21-1C, the persons designated in the law firm name must be shareholders, members, or partners of the entity.

e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any law firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated with or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language. Use of a trade name shall be permissible so long as it is not misleading, comparative, or suggestive of the ability to obtain results. Where the law firm trade name does not include the name of a lawyer in the firm or the name of a lawyer who has ceased to be associated with the firm through death or retirement, any advertisement, letterhead or other communication containing the law firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

f) In any case in which a legal assistance organization referred to in Rule 1:21-1(e) practices under a trade name, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Official Comment to R.P.C. 7.5(e) by Supreme Court (July 27, 2015)

By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Smith & Jones Millburn Personal Injury Lawyers," provided that the law firm's primary location is in Millburn and its primary practice area is tax law or personal injury law, respectively. "John Smith Criminal Defense and Municipal Law" would also be permissible. However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results. Similarly, "Budget Lawyer John Smith, Esq." is not permissible as it is comparative and likely to be misleading; "Million Dollar Personal Injury Lawyer John Smith, Esq." is not permissible as it suggests the ability to achieve results; and "Tough As Nails Lawyer John Smith, Esq." is not permissible as it purports to describe the lawyer and does not describe the nature of the firm's legal practice.

Official Comment to R.P.C. 7.5(d) by Supreme Court (April 5, 2022)

The name of the partnership or entity may reflect the names of lawyers who were principal partners, members, or shareholders in a predecessor firm who are deceased or retired.

Part II **Recent Case Law – Web Sites**

In re Hyderally, 208 N.J. 453, 461-462(2011)

Notwithstanding our decision on the record of this case, we remind the Bar that attorneys are responsible for monitoring the content of all communications with the public—including their websites—to ensure that those communications conform at all times with the Rules of Professional Conduct. No attorney who has not complied with the requirements of Rule 1:39 should display the New Jersey Supreme Court Certified Attorney seal on a website, in other advertising, on letterhead or in any other form of communication, or otherwise state or imply that he or she has been certified pursuant to Rule 1:39. Prospectively, attorneys who are not authorized by Rule 1:39 to utilize the New Jersey Supreme Court Certified Attorney seal, but who display that seal on their websites or in other communication, will be subject to appropriate discipline. Whether a website is created by an outside consultant or developed and maintained by an attorney or his or her staff, all language and design that appears on it should be reviewed frequently for compliance with Rule 1:39 and all Rules of Professional Conduct.

Part III
Committee on Attorney Advertising (CAA)
Rules 1:19A-1 thru 1:19A-8
Published Opinions Available at this Link
<https://njlaw.rutgers.edu/cgi-bin/ethics.cgi#caa>

Rule 1:19A-2 – Jurisdiction

(a) Advisory Opinions and Ethics Grievances. The Advertising Committee shall have the exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications with Rules of Professional Conduct 7.1 "Communications Concerning a Lawyer's Service," 7.2 "Advertising," 7.3 "Personal Contact with Prospective Clients" (excluding subsections (c), (d), (e) and (f)), 7.4 "Communication of Fields of Practice," and 7.5 "Firm Names and Letterheads," and with any duly approved advertising guidelines promulgated by the Advertising Committee with the approval of the Supreme Court.

Rule 1:19A-3 – Advisory Opinions

a) Form of Inquiry. All inquiries shall be addressed to the Secretary. The Advertising Committee shall accept inquiries from any member of the New Jersey bar. Inquiries shall be in writing and shall have appended to them a copy of the questioned advertisement or other related communication and shall contain a certificate that any opinion of the Advertising Committee will not affect the interests of the parties to any pending action. The inquiry shall be accompanied by a letter brief or brief citing the Rules of Court, Rules of Professional Conduct or Advertising Guidelines, if any, that are applicable, and shall state clearly the factual situation in detail and the inquirer's position as to the propriety of the advertisement or other related communication.

(c) Effect of Opinions; Publication. An opinion approving an advertisement or other communication shall, until and unless revised in accordance with section (d) or reconsidered, be a bar to prosecution of ethical charges against the lawyer or law firm, except for a prosecution based on a charge that it is false or misleading in violation of R.P.C. 7.1(a)(1). An opinion disapproving an advertisement or other related communication shall, until and unless revised in accordance with section (d) or reconsidered, be binding upon the inquirer and anyone with actual or constructive knowledge thereof so that such use of a disapproved advertisement or other related communication shall be per se unethical conduct.

Part IV

Significant CAA Opinions

a) Opinion 48 – Honors, awards and accolades – limitations and disclaimers

When referring to an accolade or honor that compares lawyers, the factual basis for the comparison must be verifiable. R.P.C. 7.1(a)(3)(ii). Further, the conferrer of the award must have made appropriate inquiry into the fitness of the lawyer. Official Comment to Rule of Professional Conduct 7.1. See also In re Opinion 39, 197 N.J. 66, 76(2008) (The rating or certifying methodology must have included inquiry into the lawyer’s qualifications and considered those qualifications in selecting the lawyer for inclusion. See Committee Opinion 42 (December 2010) (R.P.C. 7.1 Comparing an Attorney Services With Other Attorneys Services: Permissible Language When Communicating Inclusion in Super Lawyers and ~Best Lawyers Lists or Referring to Membership in Organizations Such as Million Dollar Advocates Forum.

Opinion 45 – Advertisements Claiming Expertise

The committee finds that the terms “expertise,” “specialist,” and “specialization,” if true, are not inherently misleading. Thus, their use, if accurate, is not prohibited under Rule of Professional Conduct 7.1(a).

Should attorney advertising using the terms “expertise,” “specialist,” and “specialization” be challenged, the Committee will require the lawyer to substantiate the accuracy of the claim. The substantiation of “expertise” calls for a higher showing of accomplishment and capability than “specialist” and “specialization,” which connotes a concentration of time in a particular area. Factors supporting the claim of “expertise,” “specialist,” or “specialization” include education, experience, and training. Inclusion on attorney ratings lists such as Super Lawyers and Best Lawyers, or receipt of similar accolades, does not support the claim that a lawyer has “expertise” in a field of law.

In sum, the Committee finds that accurate self-described specialization or expertise, without more, is not necessarily misleading and, if true, may be included in attorney advertising. Lawyers bear the burden of demonstrating the necessary education, training, and experience to substantiate such claims. Only lawyers who are certified by the Supreme Court or an organization approved by the American Bar Association may call themselves “experts.”

Opinion 42 – Super Lawyers

Amended Rule of Professional Conduct 7.1(a)(3) requires that the factual basis for a comparison of attorneys' services must be verifiable. Further, the attorney must include the name of the comparing organization and must be satisfied that the conferrer has made appropriate inquiry into the attorney's fitness. The attorney must include a description of the standard or methodology on which the accolade is based. Lastly, the attorney must state that the advertisement has not been approved by the Supreme Court. This information is necessary to protect consumers from communications that are misleading and likely to raise unjustified expectations. When adequate information is available to consumers of legal services, they should be able to differentiate between accurate puffery and unsupportable exaggeration.

Opinion 41 – Bona Fide Office

The ACPE notes that, in general, an attorney should not permit the receptionist of a "virtual office" to field telephone calls to the attorney. Prospective clients calling an attorney or law firm assume that they are reaching an employee and may disclose confidential and sensitive information. The "virtual office" receptionist is not an employee of the attorney's law firm and should not be entrusted with confidential client information.

There is no prohibition on use of a home as a bona fide office for the practice of law provided that the home office meets the requirements of the Rule. An attorney who practices law from a home office should take appropriate steps to preserve confidentiality of client information. Accordingly, client meetings must be in private, files should be secure, and the attorney's computer, telephone, answering machine, fax machine, and the like should not be accessible to persons not associated with the law practice so that there is no inadvertent disclosure of confidential information.

Rule 1:21-1(a) does not prohibit an attorney from meeting clients in a location other than the office. Attorneys are permitted, for example, to meet clients at the clients' homes or offices, or at another location that may be more convenient to the client. As long as the bona fide law office is in fact the place where the attorney can be found, and clients could be met there, an attorney's decision to meet clients at a location outside that office does not render the office noncompliant with Rule 1:21-1(a).

The ACPE recognizes that many solo practitioners do not have support staff and so when they are in court, meeting clients, filing papers, or otherwise not in the office, no one is there during normal business hours. Attorneys who are out of their offices generally are accessible by telephone, as calls to the office can readily be routed to a cell phone or other hand-held device. But Rule 1:21-1(a) also requires regular physical presence by the attorney at the office during business hours. An attorney who is out of the office during normal business hours does not violate the bona fide office rule provided the absence from the office is occasional and the attorney is otherwise reachable by telephone, email, or the like. If the attorney is regularly out of the office during normal business hours, then a responsible person must be present at the office.

Opinion 36 – Internet Advertising and Disclaimer

When advertising is done through a vehicle which is not explicitly referenced as an advertisement, and is not readily known to consumers as a place of pure advertising (as, for example, the Yellow Pages would be), there is a possibility that the presentation and language could lead a reasonably informed consumer to believe that the listing has some sort of professional or authoritative imprimatur, as a kind of endorsement, such as an authorized lawyer referral service might give (e.g., a web page presented as “anti-trust lawyers.com,” as a hypothetical). Such a presentation could, intentionally or inadvertently, thus mislead consumers into believing it was other or more than simply a paid advertisement and carried greater weight. Such a consequence would appear more likely when only a very limited number of lawyers are listed for a particular geographical, subject matter or other defined area.

To forestall such a possibility, we conclude that a lawyer who seeks to give anything of value in order to participate in such a listing must, before doing so, ensure that the listing or advertisement contains a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that “all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.” With such disclosure, the proposed activity is permissible, as long as it otherwise complies with R.P.C. 7.1 and R.P.C. 7.2, as noted above.

Opinion 35 – Solicitation of a Person Who May Already be Represented

If an attorney who sends a direct mail or e-mail solicitation to a prospective client knows or through reasonable diligence should know that the intended recipient is represented in the matter by an attorney, the soliciting attorney may be in violation of R.P.C. 4.2. In view of the alacrity with which these solicitations are being sent to prospective clients the proposed client may or may not have retained an attorney to represent his or her interests in the matter and that information may not be uniformly available to attorneys sending these solicitation letters. Accordingly, the text of any such solicitation e-mails or letters must contain the following language within the text in a font size which is the same as the text that: “If you are already represented by counsel in this matter, please disregard this advertisement.”

The Committee has determined that this will achieve a fair balance between the free speech interest in sending a solicitation and the individual interest in being free from perceived pressure when receiving such a solicitation. It will also accommodate the expectations of the public that attorneys should not attempt to replace, without invitation, an attorney already representing that individual.

Opinion 33 – Client Endorsements and Testimonials

Endorsements and testimonials are invariably given by clients whose cases have been concluded in a manner satisfactory to them. Statements of satisfaction by those clients can be attributable to the results which the client perceives to be the most optimal in a particular matter or matters. A client who has obtained what he or she believes to be a satisfactory result will be more likely to praise the lawyer than a client who believes that he or she is less successful, although the lawyer who “lost” a particular case or was “less successful” in a matter may, in fact, have been better prepared, more knowledgeable and, overall, the better lawyer.

Client endorsements or testimonials which extol in any manner the professional efficiency or effectiveness of a lawyer are prohibited. An endorsement is a subjective statement reflecting the opinion or belief of the client furnishing the endorsement or testimonial. Such endorsements or testimonials, if addressed to the professional effectiveness of the lawyer, may create unjustified expectations, R.P.C. 7.1(a)(2), as to results which the lawyer can achieve. An endorsement or testimonial also measures, without professional expertise, the results obtained for the client with results that might be obtained by the lawyer in representing a future client in different circumstances. R.P.C. 7.1(1)(3)

Finally, such endorsements are necessarily given by a person who does not have the professional expertise to qualitatively judge the results achieved by the lawyer and, therefore, do not furnish relevant information to be considered in the selection of counsel. R.P.C. 7.2(a).

A lawyer or law firm may utilize endorsements or testimonials from clients addressed to the satisfaction of the client based on the interaction between lawyer and client, for example, that the lawyer was sympathetic or concerned, returned calls, communicated frequently, was prompt in responding to client requests, or was professional in their dealings, if:

- (a) the endorsement or testimonial as to these matters is, in fact, that of the client, is truthful in all respects and does not compare one lawyer with another;
- (b) does not describe the work or the quality of the work which the lawyer has performed for the client; and
- (c) the client consents to the use of such an endorsement or testimonial in the marketing or advertising program of the attorney.

Additionally, the use of any endorsement or testimonial given by a client under the above guidelines must cease when the lawyer no longer has a reasonable basis to believe that the client's opinion remains essentially unchanged. In this regard, notification of a change in the client's opinion need not come directly from the client. Such changes may be implied or inferred from subsequent events that would lead to a reasonable belief that the client is no longer satisfied with the lawyer or the law firm.

Opinion 32 – Internet Domain Names

The Committee concludes that a firm may use a different form of its name for purposes of Internet access and retrieval of information about the firm and its services. The URL name form may be used provided the name selected is not false or misleading. The firm employing the domain name may not state, imply, or attempt to practice law using that name in violation of R.P.C. 7.5. The selected name may not communicate false or misleading information “about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. The domain name may not create an unjustified expectation R.P.C. 7.1(a)(2), state or imply results that can be achieved by means that violated the

Rules of Professional Conduct, R.P.C. 7.1(a)(2), or compare the lawyer's service with other lawyers' services, R.P.C. 7.1(a)(3). Furthermore, the Internet form of the firm's name must be for location purposes only and may not state or imply recognition or certification of a specialty other than as authorized by R.P.C. 7.4. The firm may not convert the Internet domain name to the formal name of the firm or use that name in lieu of the formal name as required by R.P.C. 7.5.

The Committee has concluded that under the circumstances outlined in this opinion an attorney or law firm may adopt a domain name that does not include the name of the firm or any of its lawyers. The attorney may use the domain name in advertising as long as the name is for the purpose of locating and identifying a website, not as a substitute way to identify the attorney or law firm. Assuming the law firm is authorized to use the proposed domain name, the firm would also be permitted to use that name as a means to direct potential clients to the firm's web site.

Opinion 31 – Use of Photographs of Judges

The Committee has been asked for its opinion as to the propriety of including photographs of judges on an attorney's Internet webpage. Publication of judges' photographs for other than promotional purposes is permissible. However, if judicial photographs are presented as part of an advertising or marketing venture their use is controlled by and subject to the Rules of Professional Conduct and the Code of Judicial Conduct.

Electronic advertising communications may constitute constitutionally protected commercial speech. However, electronic communications, either directly or through a link, may violate the Rules of Professional Conduct in that portrayal of a judge, in the context of an attorney's promotional communication, is tantamount to an unspoken and prohibited testimonial or endorsement.

Including the image of a judge on an attorney's website is improper because “it is likely to create an unjustified expectation,” because of the implicit endorsement by the judge who appears on the website. Further, a commercially appropriated judicial image may “imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”

A judge may not permit another to use his or her image because that use would violate the Code of Judicial Conduct which provides that, “A Judge should not

lend the prestige of office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence.”

Opinion 30 – Written Solicitations to Declare Bankruptcy

The overall tone, design and content of these letters soliciting clients to seek legal representation and file a bankruptcy petition have the capacity to cause alarm, great concern and even fear. These attorneys boldly assert the potential benefits of their representation in bankruptcy without hinting at any of the concerns or pitfalls of these complex and far-reaching legal proceedings. Attorneys who send these letters have invariably attempted to exert pressure by reciting potential consequences and benefits when they are no more than guessing as to whether their “solutions” are applicable to the recipient of the solicitation. The civil action defendant may have a valid defense, the complaint may be in error, the defendant may make payment and cure the claimed default or use alternative options available under the Fair Foreclosure Act, or the amount in controversy may be modest and capable of satisfaction. These solicitation letters many times violate R.P.C. 7.3(c)(2) by use of coercion, duress or overreaching; R.P.C. 7.1(a)(2) by raising unjustified expectations; or R.P.C. 7.1(a) by making false or misleading communications or by omitting necessary facts. The disclosures required by R.P.C. 7.3(a)(5) in many of these solicitation letters appear in an inconspicuous manner.

Future Requirements

In the future, attorneys who seek clients by written solicitation from defendants in civil actions, including foreclosure actions, for which a bankruptcy proceeding is a possible resolution, must:

- 1) personally verify the accuracy of all statements contained in the solicitation letter, including the name and address of the addressee, and the specific nature of the litigation which must be recited in the body of the letter;
- 2) advise the prospective client that his or her name and the nature of the litigation was obtained by an appropriate inquiry under Rule 1:38;
- 3) provide the salutation to the individual to whom the letter is being sent;

4) include information sufficient to inform an unsophisticated individual, in a form similar to that required in the Fair Debt Collection Practices Act, of the potential pitfalls and disadvantages of a bankruptcy proceeding. An illustration of an acceptable disclosure, if made in a sufficiently conspicuous manner, is as follows:

NOTICE

The decision to file bankruptcy is a serious choice. Bankruptcy is not for everyone. It is a drastic remedy that can affect your credit for many years and will affect your ability to use the bankruptcy code at a future time when you may need it more. The majority of chapter 13 plans are never successfully completed and the funds paid do not cure the mortgage arrears or allow redemption of property. Upon filing a bankruptcy you may lose control of your property and you may not dismiss a bankruptcy proceeding without court approval once it is filed. The decision of when to file a bankruptcy is also crucial and dependent on your individual circumstances. Be sure to discuss the potential pitfalls of bankruptcy as well as its advantages with any professional you are considering.

5) not attempt to indicate a special relationship, expertise, experience or knowledge which will or may provide a more favorable result than other licensed New Jersey attorneys;

6) not raise unjustified expectations or use language or format susceptible of unduly enticing a person because of possible economic or personal consequences of a judgment; and

7) not raise false hope for relief inapplicable to the individual person's circumstances.

Opinion 29 – Written Solicitations for Representation in Municipal Court

Attorneys who send solicitation letters seeking to obtain clients from among those persons charged with municipal court violations must:

1) Personally verify the accuracy of all statements contained in the solicitation letter, including the name and address of the addressee and the specific nature of the charge, which charge must be recited in the body of the letter.

- 2) Advise the prospective client that his or her name and the offense charged in the specific municipal court was obtained by an appropriate inquiry under Rule 1:38.
- 3) Be specific in the salutation to the individual to whom the letter is being sent.
- 4) Satisfy himself or herself that the individual charged with the municipal court offense is not under the age of 18 years.
- 5) Not attempt to indicate a special relationship or knowledge which will or may provide a more favorable result than other licensed New Jersey attorneys.
- 6) Not raise unjustified expectations or use language which is susceptible of unduly pressuring a person because of possible consequences or potential penalties unrelated to the specific offense charged.
- 7) Not misstate the role of the prosecutor or municipal court judge, or their functions in the justice system.

Finally, the Committee urges that all attorneys who advertise their services to defendants in municipal court matters review the Rules of Professional Conduct in order to remind themselves of the obligations of an attorney seeking professional employment through written communications. These include the requirements that (a) the envelope used to forward any such letter [See Committee on Attorney Advertising Opinion 20, 144 N.J.L.J. 1046 (June 19, 1996) and 5 N.J.L. 1302 (June 17, 1996)] and the letter itself, contain the word ADVERTISEMENT in capital letters, prominently displayed at the top of the first page of text, R.P.C.7.3(b)(5)(i), in a font which is two sizes larger than the general text of the solicitation letter and (b) the notices required at the bottom of the last page of text, R.P.C. 7.3(b)(5)(ii) and (iii), be in a font size no smaller than the general text of the letter.

Opinion 27 – Certified Trial Attorneys in the Firm

While a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law, the lawyer “may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraph (b) of [the] Rule.” Respondents' failure to include the names of the attorneys in the firm who were certified at the time the advertisements were published created the clearly false implication that they were certified as specialists in civil and criminal litigation.

Based upon the foregoing, the Committee holds that attorneys may not advertise or otherwise communicate the fact that attorneys in the firm are certified in any of the areas of certification available from the Supreme Court without also specifically identifying the attorneys who have been so certified.

Opinion 24 – Communicating Expertise and Specialization

A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

R.P.C. 7.4 does not prohibit self-described specialization or expertise. Rather, it is the communication or suggestion of certification as a specialist that is governed by the Rule. Consequently, the Committee holds that accurate self-described specialization or expertise, without more, is not necessarily misleading and, if true, may be included in advertising and on attorneys' letterheads. Opinion 7, which indicates a conclusion to the contrary, is hereby overruled.

Opinion 23 – Publishing Newspaper Column on the Law

The Committee has received an inquiry from an attorney who proposes to purchase space from local newspapers with small circulations in order to publish a weekly column on a legal topic that may be of interest to the general public. The first paragraph or two of the column will be a discussion of a legal topic in general terms; specific legal advice will not be given. The last paragraph will provide information about the inquirer's law firm, its practice and philosophy, and a telephone number at which the firm can be reached.

There is nothing inherently improper about the publication of a column discussing a legal topic. To the extent that the column contains information and advice about occurrences such as motor vehicle accidents, the purchase or sale of a home, the advisability of drafting a will, or a change in the law, the author is engaging in an activity traditionally assumed by attorneys. In fact, were it not for the last paragraph providing information about the law firm and a telephone number at which the firm can be reached, the column would not be considered advertising. See CAA Docket No. 33- 88 (sending letters to current and prospective clients concerning recent changes in the automobile insurance laws did not constitute advertising or an attempt to solicit business). However, the presence of the last paragraph providing information about the inquirer's law firm converted the proposed legal column into an advertisement.

Opinion 22 – Promoting Prior Service as a Municipal Court Judge

The Committee has received an inquiry from an attorney who served as a municipal court judge in "numerous" cities and townships from 1979 through and including 1983. He has asked whether he may communicate the fact that he is a former municipal court judge in advertisements to be published in the regional newspaper and the Bell Atlantic Yellow Pages.

The information conveyed by a statement communicating one's former service as a public official readily identifies for consumers an attorney who has a familiarity with, is seeking, and willing to handle a particular type of matter. See Opinion 4, 122 N.J.L.J. 746 (1988)(attorney may advertise by area of practice in telephone directories) and Opinion 7, 127 N.J.L.J. 753 (1991)(attorney may communicate concentration in a field of practice). This is consistent with the requirement that attorney advertising be "predominantly informational." R.P.C. 7.2(a).

However, the mere statement that one was once a municipal court judge, without more, may be potentially misleading. Pursuant to R.P.C. 7.1(a)(1), a communication may be misleading if it "omits a fact necessary to make the statement as a whole not materially misleading." Information concerning the number of or exact years of an attorney's service as a municipal court judge and the municipalities in which that service took place will assist consumers in determining whether or not the attorney possesses the knowledge, experience and familiarity with local roads, businesses, or police departments they are looking for in an attorney to protect their rights. Conversely, the absence of such information may lead the consumer to make a hasty or uninformed decision concerning the choice of counsel. Consequently, we hold that an attorney may advertise the fact that the attorney is a former municipal court judge only if the attorney includes the years and location(s) of service in the advertisement.

Opinion 21 – Use of Designation “Of Counsel”

Questions concerning the definition of the ubiquitous and ambiguous term "Of Counsel" are being asked with increasing frequency, not only in inquiries submitted to this Committee, but of the Ethics Hotline as well. Based upon the inquiries the Committee has received, it is clear that the term means different things to different people and that perplexity rather than certainty is the norm.

Part of the problem lies in the fact that no Rule of Professional Conduct addresses the of counsel relationship directly. The subject is addressed only generally by R.P.C. 7.5(a), under which a lawyer is prohibited from using a firm name, letterhead, or other professional designation that violates R.P.C. 7.1(a)(1); that is, a designation that is false or misleading. R.P.C. 7.5(d), in turn, provides that "[l]awyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services." The Rule simply does not mention or discuss the of counsel relationship. In comparison, DR 2-102 of the Model Code of Professional Responsibility provides, in pertinent part, that "[a] lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate."

The Advisory Committee on Professional Ethics, which had jurisdiction over issues concerning attorney advertising and solicitation prior to our existence, addressed this relationship in three published opinions. In Opinion 443, 104 N.J.L.J. 561 (1979), the ACPE held that there was no legal or ethical prohibition against a lawyer, including a retired judge, acting of counsel to more than one firm, provided that the association complied with all applicable disciplinary rules.

In Opinion 444, 104 N.J.L.J. 567 (1979), the ACPE determined that two partners in a firm could appear as of counsel on the letterhead of a sole practitioner whose office was located in another county, and that the sole practitioner's name could appear on their letterhead in the same capacity as well. In arriving at this decision, the Committee assumed that the attorneys designated as of counsel would be available to clients of the separate firms and that any division of fees would not offend the then applicable disciplinary rules. Since the proposed designation appeared to accurately portray the relationship to the public and was in no way misleading, it was deemed to be proper.

However, in Opinion 522, 112 N.J.L.J. 384 (1983), the ACPE denied a New Jersey firm's request to list a Pennsylvania law firm on its letterhead as of counsel because the relationship between the firms was one of each firm referring legal matters to the other. The Committee held that listing the Pennsylvania firm as of counsel

would be misleading by indicating that the out-of-state firm had some relationship with the New Jersey firm, which was not the case. The Committee could see "no valid reason for attorneys to include on their letterheads referral attorneys or firms ... to whom they refer legal matters."

The American Bar Association has directly addressed the relationship and defined it as one where there will be "a close, regular, personal relationship; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, status ordinarily conveyed by the term 'associate,' which is to say a junior non-partner lawyer, regularly employed by the firm." ABA Formal Opinion 90-357 (1990). Consultation or collaboration on an occasional basis is not sufficient. *Ibid.*

Although the possibilities are numerous, they all seem to have a common thread. In each instance the attorney designated as of counsel will have hands-on responsibility for, or will frequently render advice on, a law firm's matters. Consequently, as long as an attorney's relationship with a law firm is close, ongoing, and involves frequent contact for the purpose of providing consultation and advice, the attorney may be designated as of counsel on the law firm's letterhead, business cards, advertisements and related communications.

Opinion 15 – Testimonials

Testimonials have traditionally been prohibited on the grounds that they create unjustified expectations about results the lawyer can achieve. R.P.C 7.1(a)(2). The primary objection has been that statements of satisfaction about results obtained or the lawyer's services tend to mislead the public into believing that similar results can be achieved for them. An additional objection has been that claims regarding the quality of the lawyer's legal services cannot be measured or verified. Suffolk County (New York) Ethics Opinion 85-11 (1985); Moss, "Law Practice Marketing," 61 *Notre Dame L. Review* 601, 621 (1986).

Although the content of testimonial advertising may in some cases create unjustified expectations, the technique is not inherently misleading. The fact that such advertising may tend to mislead the public or present lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on this mode of protected commercial speech. Cf. *Shapiro vs. Kentucky Bar Ass'n.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475(1988). There are less restrictive and more precise means through which such potential abuses may be regulated. *Id.*

In the context of advertising, a testimonial is commonly understood to be a first-hand expression of appreciation. If it is to be a truthful statement about the lawyer's services, as required by R.P.C. 7.1(a)(1), it must be uttered by or quoted from an identifiable person who actually received those services. Consequently, a testimonial may not be employed unless the statement has been uttered by an actual named client who has received the lawyer's services.

Model Rule of Professional Conduct 7.1(b), the equivalent of our R.P.C. 7.1(a)(2), would nevertheless prohibit the use of client testimonials. The Comment to Model Rule 7.1(b) provides that:

Statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

However, we remain convinced that a total ban on this mode of advertising is both unjustified and unwarranted. Although generally disfavored, disclaimers are less restrictive and a more precise means through which any potential abuses may be regulated. Shapiro vs. Kentucky Bar Ass'n, *supra*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475.

Statements regarding past performance may well create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. Yet, any requirement that a disclaimer or disclosure recite the specific facts and legal circumstances peculiar to an individual matter would be unduly burdensome. Therefore, we believe that the following, more generic disclaimer will address these concerns: "Results may vary depending on your particular facts and legal circumstances." This disclaimer must be prominently and effectively displayed in all print and television advertising. In order to reinforce this message, the disclaimer must also be recited by the narrator at least once prior to the conclusion of a television or radio advertisement. In circumstances such as those presented here, the attorney should include this disclaimer in any general or targeted direct-mail solicitation letter and/or make certain that it is included and prominently displayed in the body of the testimonial letter itself.

Opinion 3 – Billboards

No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

The proposed billboard advertisement does not contain any information that would be violative of the above rule. Indeed, the information being presented is precisely that which the Court recognized as traditionally disseminated through print advertising. *Id.* at 104 N.J. at 528-29.

The proposed medium of advertising--a billboard--merits particular scrutiny. However, the Committee can discern no reason why a billboard cannot serve as a predominantly informational source of advertising about the availability of legal services. The principles and constraints that govern other forms of print advertisements are equally applicable, as are enforcement mechanisms for false, misleading, or non-rational advertisements.

In reaching this result, the Committee must emphasize that it is only considering printed billboard advertising. Electronic billboards, and particularly those on which action advertisements can be displayed, may present special problems similar to those involved with advertisements on television. Such electronic advertisements are not at issue in this inquiry.