



Report of the

Pennsylvania Bar Association

TASK FORCE ON LAWYER ADVERTISING

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REPORT OF THE PBA TASK FORCE ON LAWYER ADVERTISING

I. INTRODUCTION AND OVERVIEW

The Creation of the Task Force: The Scope of the Problem

On June 9, 2006, President Kenneth Horoho, the newly-elected President of the Pennsylvania Bar Association (PBA), gave his inaugural speech to the House of Delegates. During the speech, he outlined the goals of his year in office, and laid out his agenda for the year. One of the key goals was to improve the quality of lawyer advertising, and to return dignity to the legal professions' dealings with the public.

President Horoho said:

. . . It's a fact, then that some of the advertising being conducted by lawyers throughout our state is hurting the profession and affecting the public's perception of us. We will address this image problem through the creation of a Task Force on Lawyer Advertising, charged with determining if recommendations need to be made to the Supreme Court of Pennsylvania to enhance the quality of lawyer advertising.

The formation and the work of the Pennsylvania Bar Association's Task Force on Lawyer Advertising began with President Horoho's speech in early June 2006. This report will outline the composition and the work of the Task Force, and will summarize the conclusions and recommendations that were reached as a result of President Horoho's call to action.

In creating a Task Force on Lawyer Advertising, President Horoho was responding to complaints from many members of the Bar Association concerning the quality of lawyer advertising. Among many lawyers, there has been an increasing concern over lawyer advertising lowering the public's perception of the profession, and

distorting the public's understanding of the work of lawyers. There was a growing sense that the Bar Association, as a voluntary organization of lawyers, had a duty to protect the public, and to preserve the image of the profession in the eyes of the public. As a result, President Horoho asked the Task Force to study the efforts made in other states, to review their rules and regulations, and to suggest changes to the current Rules of Professional Conduct in effect in Pennsylvania. In addition, he asked the Task Force to consider programs and educational activities that could assist lawyers in advertising in a manner consistent with the Rules, and that would enable the public to protect itself from improper or unethical lawyer advertising and solicitations.

The concerns expressed by President Horoho were based upon, and supported, by the findings of the Study of Public Perceptions of Attorneys/Lawyers in the State of Pennsylvania, prepared by The Research & Planning Group, a private study group with expertise in public policy. Their report had been commissioned by the Pennsylvania Bar Association, and was issued in May, 2005. Their study, which was based on telephone polling throughout the state, was designed to evaluate the public's perception of lawyers in Pennsylvania. Some of their conclusions, based on their polling data of the public, were:

- “Nearly three in five respondents (56%) agreed, ‘attorneys/lawyers who advertise gave the legal profession a bad name.’”
- “Over four in five respondents (83%) agreed, the legal profession should enforce ethical guidelines and police itself.”

- “Over half of respondents (54%) said they have a negative impression of the type of advertising they see being done by lawyers on TV and in the Yellow Pages.”
- “Nearly three in four respondents (74%) agreed ending or toning down personal injury advertising on TV would improve the image of lawyers.”
- “Over four in five respondents (85%) agreed eliminating lawyers’ commercials that overemphasize money could improve the image of lawyers.”
- “Nearly seven in ten respondents (68%) agreed running ads promoting the contributions of lawyers to their communities would improve the image of lawyers.”

The conclusions of the 2005 PBA research study were buttressed by the results of a survey conducted by the Pennsylvania Bar Association in 1992, as part of its original project of amending the Rules of Professional Conduct. The survey conducted in 1992 was limited to members of the legal profession; unlike the 2005 study, it did not attempt to assess the public’s perception of lawyers. Nevertheless, the 1992 PBA survey determined that 98% of all respondents did not think that advertising had a positive effect on the legal profession, and 76% of the respondents felt that it had a negative impact. Seventy-three (73%) percent felt that restrictions should be placed on lawyer advertising.

The studies conducted in Pennsylvania mirrored studies performed in other states. For example, a very definitive study conducted in Florida, as part of its intensive effort to

strengthen its regulation of lawyer advertising, found that 85% of responding lawyers believe that lawyer advertising negatively affects the public's view of lawyers and the legal profession. Even 76% of those who advertised agreed, as did those 35 years of age and under.

The studies that have been described in the preceding paragraphs have been supported by the anecdotal evidence supplied to the leaders of the Pennsylvania Bar Association as they tour the various counties of the state. In meeting after meeting, they received complaints about the quality of lawyer advertising, and the deleterious effect on the profession as a result of distasteful ads run by certain members of the Bar. Lawyers who advertise, and who attempt to follow the rules, are placed at a competitive disadvantage by those lawyers who ignore the present curbs on certain forms of advertising. Lawyers who do not advertise believe that their reputation and standing in the community is lessened because of the ads run by certain of their colleagues, that project a greedy or over-reaching image of the profession. These concerns have been conveyed to the leadership of the Bar Association repeatedly, and demand an appropriate and well-considered response.

In addition to the increasing concern by lawyers and the public about lawyer advertising, the landscape of legal advertising itself has changed since the previous examination of this issue by the Pennsylvania Bar Association. In 1992, when the Pennsylvania Bar Association first undertook a major review of the lawyer advertising rules, there was very little computer-assisted communication between lawyers and the public. Since that time, there has been a surge of broadcast media , billboard, Internet, blogs, web sites, e-mails, and other forms of electronic communication by lawyers aimed at reaching the consumer in new ways not prevalent in 1992. These technological

advances since 1992 have raised serious questions whether the existing rules and regulations have kept pace with technology, and are adequate to deal with new and evolving methods of communication. Web sites have created issues of multijurisdictional practice that were not contemplated when the present Rules of Professional Conduct were originally adopted.

With this as a backdrop, President Horoho created the present Task Force, and gave it a broad mission statement. It was asked to look into the following areas of concern:

1. What recommendations can be made to dignify lawyer advertising?
2. How can we increase the public's understanding that it is important to secure the services of a lawyer when the need arises and balance that with the right of the legal profession to not only advertise but to market their services?
3. How can we advance the legitimate interest of our profession concerning the subject of lawyer advertising while being sensitive to the right of lawyers to market their services and earn a living in a very competitive environment?
4. Determine if there should be any changes in the enforcement of the rules regarding lawyer advertising.
5. If changes to the rules are needed what procedural and substantive changes should be made and should a program be developed for peer review of lawyer advertising?

6. What recommendations should be made to the Supreme Court as it relates to any change in our disciplinary rules regarding lawyer advertising including providing the disciplinary board increased spending to increase their prosecutorial efforts if violations of advertising rules occur?
7. Consider the need to educate members of the profession about the rules and procedure concerning lawyer advertising as well as educating the public.
8. What changes to any of the current rules should be made to address advertising over the Internet, including web sites, as well as other news media?

This report is the Task Forces' response to President Horoho's questions.

Previous Work of the Pennsylvania Bar Association

The work of the present Task Force is not the first venture of the Pennsylvania Bar Association in the field of lawyer advertising and solicitation.

In 1992, the Pennsylvania Bar Association created its first Task Force on Lawyer Advertising, largely as a response to the same kind of concerns that have brought the present Task Force into existence. The membership of the 1992 Task Force was diverse and wide-ranging, and conducted an intensive study of the existing Rules of Professional Conduct. Its work extended over a period of fourteen months, and included a survey that was conducted, by questionnaire, of all members of the Bar Association.

As a result of the work of the 1992 Task Force, extensive changes to the Pennsylvania Rules of Professional Conduct were proposed. The suggested changes affected Rules of Professional Conduct 7.1 through 7.7, which deal with advertising and

solicitation, and were designed to eliminate some of the more egregious forms of improper advertising and solicitation.

On April 18, 1994, the Supreme Court issued an Order amending the Rules of Professional Conduct to implement most of the changes proposed by the PBA's Task Force. The result was a significant strengthening of the Rules relating to advertising and solicitation. A Committee on Lawyer Advertising was created by the PBA for the purpose of monitoring changes in the law relating to lawyer advertising, and to make recommendations based on those changes. This Committee was an outgrowth of the work of the 1992 Task Force.

Two significant events occurred during the work of the 1992 Task Force, and the Lawyer Advertising Committee that was a by-product of the Task Force, that have a bearing on the conclusions and recommendations of the current Task Force.

In 1994, the PBA's Lawyer Advertising Committee proposed to the Supreme Court of Pennsylvania the creation of a Standing Committee on Lawyer Advertising and Client Solicitation, to be appointed by the Supreme Court, to review complaints concerning lawyer advertising, and to refer the complaints to the Disciplinary Board, if appropriate. In addition, the proposed Committee could initiate complaints to the Disciplinary Board, and render advisory opinions to inquiring lawyers.

This proposal was submitted to the Supreme Court of Pennsylvania in 1994, but was not adopted by the Court.

The PBA Committee on Lawyer Advertising also responded, in 1996, to the decision of the United States Supreme Court in *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618 (1995), by recommending a change in Rule 7.3 of the Pennsylvania Rules of Professional Conduct. The proposed change in the Rule would have prevented

communication by a law firm with a prospective client for 30 days following a personal injury or wrongful death (a so-called “blackout period”). The Rule change was combined with a proposal that any claimant release or statement obtained by an insurance representative during the 30 day period would be either null and void, or inadmissible in court.

This recommendation was not adopted by the Supreme Court of Pennsylvania. Later in this Report, it will be shown that these two issues exist today, and were topics for discussion by the current Task Force, particularly because of similar proposals adopted recently in Florida and New York.

In 1997, the President of the American Bar Association appointed a commission, officially known as the ABA Commission on the Evaluation of the Rules of Professional Conduct, and informally known as the “Ethics 2000 Commission,” to undertake a comprehensive review of the Model Rules of Professional Conduct, since their adoption by the ABA in 1983.

In May, 2001, the Commission issued its final report recommending amendments to the Model Rules, and these were approved by the ABA House of Delegates in August, 2001 and February, 2002.

Following the action by the American Bar Association, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility undertook the major task of reviewing the extensive amendments proposed by the Ethics 2000 Commission, and considering possible changes to the Pennsylvania Rules of Professional Conduct. The PBA Legal Ethics Committee studied the Commission’s efforts, and proposed sweeping changes to the Pennsylvania Rules, including Rules 7.1 to 7.7, the advertising and solicitation rules. The Committee’s recommended changes were

approved by the PBA House of Delegates, and, on August 23, 2004, the Supreme Court issued an Order adopting the Rules as amended, effective January 1, 2005.

The amendments to the Rules of Professional Conduct, adopted in 2004, left the rules relating to lawyer advertising and solicitation largely intact, except for certain updates to address more modern forms of advertising and electronic solicitation and to permit some previously prohibited forms of in person solicitation. However, Rule 7.1, the principal Rule prohibiting false or misleading communications concerning a lawyer's services, was changed significantly. Previously identified examples of presumptively improper communications, such as advertising previous verdicts or settlements, were removed from the black letter text of the Rule, and moved to the supporting C, to clarify the Rule and address Constitutional overbreadth concerns. This change in Rule 7.1, as will be described later in this Report, became the subject of considerable discussion by the members of the present Task Force.

This review of the previous work of the Pennsylvania Bar Association is not meant to provide a comprehensive picture of the effort that the Association has made, over the years, to grapple with the concerns and complaints frequently presented by lawyer advertising and solicitation. It does demonstrate, however, that the Association has a long-standing commitment to the members of the Bar, and to the public, to maintain lawyer advertising on a level that will not bring discredit to the profession, but, at the same time, will provide important information to members of the public in need of legal services.

In addition, this review of the previous work of the Pennsylvania Bar Association demonstrates that the Association has already supported various stringent Rules relating to lawyer advertising and solicitation that other states only now have under consideration,

and that some of the proposals for change in other states have already been considered by the Association, and, for one reason or another, were not adopted by the Supreme Court of Pennsylvania. Other Rule changes, which were put into effect in Pennsylvania as a result of the work of the 1992 Task Force, are being adopted in other states, to bring them into alignment with the position that Pennsylvania has taken for many years.

The Efforts of the New York State Bar Association

Without question, one of the catalysts to the creation of the 2006 Pennsylvania Bar Association Task Force on Lawyer Advertising has been the intensive effort of the New York State Bar Association to review and to strengthen its own Rules on advertising and solicitation. This effort by New York State, our neighbor to the North, has been watched with interest by the leadership of the Pennsylvania Bar. To some extent, the action of the New York Bar Association has prompted the work of the 2006 Pennsylvania Task Force, although the Task Force found, on examining the New York proposals, that many of them only brought New York into parity with Rules already in effect in Pennsylvania. Nevertheless, the work of the New York State Bar provided helpful direction for the work of our Task Force. Particularly in the area of “computer accessed communication,” the work of the New York Task Force was enlightening and groundbreaking.

The New York State Bar Association Task Force on Attorney Advertising was created by President A. Vincent Buzard in June 2005, to address many of the same concerns that had been expressed repeatedly to the leadership of the Pennsylvania Bar Association. The New York Task Force was similar in composition and organization to the 1992 Pennsylvania Task Force, and conducted its work largely through sub-committees that studied the many issues involved in lawyer advertising and solicitation.

As would be expected from a state with a large and sophisticated Bar Association, the product of its efforts was exhaustive, enlightening, and worthy of intense study and deliberation.

New York State, like Pennsylvania, has had to wrestle with the problems created by lawyer advertising and solicitation over a long period of time. The 2005 New York Task Force represented the third time since 1993 that New York was required to study attorney advertising. Thus, like Pennsylvania, the subject of attorney advertising has become a chronic issue, requiring repeated examination and curative efforts.

The New York Task Force for 2005 produced an exhaustive report dated October 21, 2005, which was approved by the New York State Bar Association's House of Delegates on January 27, 2006. Some of the contents of this Report will be described below.

Following New York's procedure, the Report and Recommendations of its Task Force were submitted to the four Presiding Justices of its Appellate Division, for their consideration and adoption. The proposals of the Task Force were not left intact by the four Presiding Justices, who altered a number of the proposals to place tougher restrictions on attorney advertising. To summarize the resulting proposals, it is easiest to quote from a press release issued by the New York State Unified Court System:

The proposed amendments include the following:

- * A 30-day moratorium on soliciting wrongful death or personal injury clients, protecting families suffering loss from overly aggressive marketing.
- * Ban on using testimonials by current clients or paid endorsements.

- * Restrictions on using statements likely to create an expectation about results or that compare the lawyer's services with those of other lawyers.
- * Expansion of rules to cover computer and Internet-based advertising and solicitation, including restrictions on websites and e-mail, and bans on "pop-up" ads and chat-room solicitation.
- * Ban on using nicknames, mottos or trade names that suggest an ability to obtain results.
- * Requirement that ads stating "no fee will be charged if no money is recovered" disclose that client will remain liable for other expenses regardless of the case outcome.
- * Expansion of rules to cover out-of-state attorneys who solicit legal services in New York.
- * Requirement to include disclaimers in certain ads and to label certain communications as "advertisements."
- * Ban on fictionalized portrayals of clients, judges and lawyers or re-enactments of events that are not authentic.
- * Ban on depicting the use of a courtroom or courthouse.
- * Requirement to file all advertisements for legal services, including radio and television ads, with the attorney disciplinary committees for review, and to translate all foreign-language ads into English before filing.

The proposed changes recommended by the New York State Bar Association were circulated for comment by the members of the Bar, and, following receipt of that input as well as comments from the Federal Trade Commission (“FTC”), several of the initial and more stringent proposed changes were not adopted by the New York Courts. The final result of this effort, changes in New York’s Code of Professional Responsibility, went into effect on February 1, 2007.

The Pennsylvania Task Force on Lawyer Advertising has examined the New York proposals with great care, and has followed closely and with great interest the debate in New York state over the changes to its advertising Rules. A number of those changes simply bring New York state into the same position that Pennsylvania had already taken, as a result of its 1992 Task Force. Other New York rule changes represent recommendations made by the 1992 Pennsylvania Task Force that were not implemented by the Supreme Court of Pennsylvania. The remaining New York rule changes provided considerable food for thought to the present Pennsylvania Task Force as it went about its work.

In addition to the proposed New York rule changes providing ample areas of consideration and debate for the Pennsylvania Task Force, conversations with the general counsel for the New York State Bar Association highlighted the considerable passion and opposition that this subject engenders. The members of the Pennsylvania Task Force learned, as a result of those conversations, that this issue is far from settled in New York state, and, just as happened in Florida, well-financed groups are mobilizing to make a constitutional challenge to the proposed New York rules.

Limitations on the Efforts of the Task Force

Any effort to examine the subject of lawyer advertising and solicitation runs head-on into a number of restrictions and limitations that must be heeded, at the peril of provoking the same type of legal challenges that arose in Florida, and will, in all probability, be waged in New York. Contrary to the view of a great many members of the Bar, it is simply not possible to wave a magic wand, and to return the legal profession to what many regard as its glory days, before the advent of legal advertising. For better or worse, those days are past, and any group that tries, conscientiously and realistically, to deal with the subject of attorney advertising in today's world, has to deal with the realities of the limitations on what can be done to curb abuses. These limitations are numerous and are powerful, and a number of them will be discussed below.

1. First Amendment Considerations

The Pennsylvania Task Force on Lawyer Advertising was very much aware, as would anyone considering the topic of attorney advertising, of the seminal decision in the field, *Bates v. State Bar of Arizona*, 433 U. S. 350, decided in 1977 by the United States Supreme Court. Although derided by its critics, including some of the dissenting Justices, as turning the legal profession from a "learned profession" into just another form of commercial activity, many feel that *Bates* has brought about the "profound changes" in the practice of law that Justice Powell predicted in his dissent, and considerably "weakened" the "supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective states to oversee the regulation of the profession [.]"

The *Bates* Court confirmed that the public's right to information is paramount over the Bar's desire to regulate the activity of the legal profession. The Bar's interest in maintaining professionalism took second place to the consumer's right to receive

information about legal services. The Court observed that, “commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.” Specifically, the Court concluded that attorney advertising may offer benefits to the administration of justice (433 U. S. at 376), help lower costs for consumers (433 U. S. at 378), and may even increase the quality of legal services in the marketplace (433 U. S. at 379). As a result, the Supreme Court of the United States, through Justice Blackman, held that attorney advertising is a form of commercial speech protected by the First Amendment.

Under the restrictions of *Bates*, attempts to regulate lawyer advertising are circumscribed. However, the Court held open the door for the regulation of advertising that is “false, deceptive, or misleading”, and forecast, accurately, that there would be “special problems of advertising on the electronic broadcast media” that might “warrant special consideration.”

The *Bates* decision, and the cases following it, which are discussed in the second part of this Report, render the attempt by any Bar Association to regulate in the field of lawyer advertising both problematic and difficult, and places a sharp limitation on the activities of any responsible Task Force designated to scrutinize this issue.

In performing its work, the Task Force was well aware of the sentiment of many members of the Bar that the *Bates* decision was a 5-4 decision, by a Court whose membership has changed since 1977. Some well-informed observers, such as Will Hornsby, the ABA’s staff counsel for its Commission on Advertising, from 1990 until 2003, have said:

“If a state passes restrictive rules that are challenged, I could see a conservative Court, that deems free speech less free than it was 25 years ago, overturning the *Bates* decision.” (Bar Leader July - August 2006)

Nevertheless, in spite of the attitude of many that a changing court might alter the parameters of *Bates*, a responsible Task Force must take the law as it finds it, and work within the restrictions placed upon it by the courts. We cannot ask our Supreme Court to approve lawyer advertising rule changes that do not in our view likely pass the test of First Amendment constitutionality in the hope that ultimately the U.S. Supreme Court will pass on our rules and approve them. We view our mission to present to our Court rules which will improve the advertising climate and which pass constitutional muster. Consequently, the shadow of *Bates* was ever present as the Task Force performed its work.

2. Antitrust Considerations

In addition to *Bates*, antitrust regulations also impinged on the work of the Task Force. The Federal Trade Commission has been very active in this field, and has stated its view that “advertising informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs.” See Submission of the staff of the FTC to the American Bar Association Commission on Advertising (June 24, 1994) at 2-3. Antitrust cases that deal with professional advertising reflect a concern that advertising restrictions may be used by professional groups to reduce competition and maintain high price levels, and to favor established groups over new and lower cost competitors.

The Pennsylvania Task Force was assisted greatly in its work by the analysis of the antitrust laws performed by the New York Bar Association, and contained in its very comprehensive report. There is no need to provide a summary of those laws here, but the analysis by the New York State Bar provided helpful guidance to the work of this Task Force.

The Task Force, along with the guidance of the New York material, reviewed the decision of the United States Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), which refused to immunize the Virginia State Bar against an antitrust lawsuit challenging the association's enforcement of minimum fee schedules. The *Goldfarb* decision was another cautionary warning against too far-reaching restrictions on advertising.

Finally, and most significantly, the Task Force had available to it the critique by the FTC of the new Rules being proposed in New York state. The Commission, in its letter of September 14, 2006 to the Office of the Court Administrator, expressed its reservations about the restrictive new regulations proposed in New York. It said:

“The FTC Staff believes that while deceptive advertising by lawyers should be prohibited, restrictions on advertising and solicitation should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. As to the proposed amendments, the FTC Staff is concerned that several provisions are overly broad, may restrict truthful advertising, and may adversely affect prices paid and services received by consumers. Moreover, the FTC Staff believes that New York can adequately protect consumers from false and misleading advertising by using less restrictive

means such as requiring clear and prominent disclosure of certain information.”

This clear expression of the position of the FTC sounded a warning note for the work of our Task Force.

3. Considerations of “Good Taste”

The Pennsylvania Task Force on Lawyer Advertising that considered the Rules, circa 1992, came to the conclusion that regulations attempting to restrict advertising on the basis of “good taste” were ineffectual, subjective, and probably, unconstitutional. Therefore, it concluded that “Regulation on the basis of ‘good taste’ alone is not recommended.” (See Task Force Report, p. 36).

The present PBA Task Force concurs in this conclusion for the same reasons expressed by the previous Task Force. Questions of good and bad taste are too ever-changing and variable, to be helpful in framing advertising regulations. In addition, they are of dubious constitutionality, in light of the pronouncements of the Supreme Court of the United States.

4. Attitudes of Lawyers Towards Advertising

Lawyer attitudes towards legal advertising are far from fixed or monolithic. This was confirmed at a forum conducted by the Bar Association of Erie County (Buffalo, N. Y.), attended by advertising and non-advertising lawyers. According to President Jerry McCarthy of that Association, there was no consensus among the lawyers on the subject.

“Some of them thought advertising is the worst thing to ever happen to the profession and wanted it done away with, and others say advertising is here to stay and that lawyers should just be sure not to overstate our qualifications.” (Bar Leader, July-August, 2006)

There is a similar diversity of views among the lawyers of Pennsylvania. Many forms of attorney advertising or client solicitation are perfectly acceptable to most Pennsylvania lawyers. Large corporate-oriented law firms spend sizable sums of money to produce glossy brochures advertising their services, and there is no outcry when they distribute these to clients. Golf outings are used to host and to solicit client business, and no one bats an eye at their use, or demands that they be restricted. Both are forms of attorney advertising and solicitation, but are accepted by most members of the Bar.

On the other hand, lawyers have an almost instinctive repugnance to aggressive advertising that appears on billboards, or on radio or television.

Lawyers' willingness to accept, even endorse, advertising in the form of glossy brochures, newsletters, seminars and golf tournaments, while at the same time expressing a distaste for much lawyer advertising on TV, radio, and billboards, creates a dichotomy that makes it difficult for any Task Force assigned the task of formulating generic rules that apply to all attorney advertising and solicitation. The rules must be applied fairly-handedly and across the board, or not at all. Thus, the Task Force had to bear in mind, as it performed its work, that the members of the Bar are not united in their attitudes toward attorney advertising, and that some forms of advertising/solicitation are considered acceptable, while others are not.

5. The Values in Play: Consumer Benefit vs. Public Perception of Lawyers

As a final limitation on the work of the Task Force, it faced the fundamental and most important consideration of balancing the two values that are in head-on conflict when regulating attorney advertising.

On the one side, there is the important value of consumer access to information about legal services. This is the value that the United States Supreme Court weighed in the balance, and found paramount in *Bates*.

On the other side of the scale, the legal profession has an important value to uphold and to promote in the form of the image and standing of the profession. This is also a recognized and important value. For example, a recent Florida State Supreme Court decision held that a legal advertisement that featured a pit bull demeaned the legal profession and misled the public. *The Florida Bar v. Pape*, 918 So.2d 240 (2005). The Florida Supreme Court said that the public perception of lawyers was a factor that could be considered in examining the advertisement in finding it to be improper. As long ago as the decision in *Spencer v. Honorable Justices of Supreme Ct. of Pa.*, 579 F. Supp. 880 (E. D. Pa. 1984), Judge Lord ruled:

“The state has a substantial interest in maintaining the image and stature of the legal profession. This interest is advanced by requiring lawyers advertisements to be ‘dignified’.” 579 F. Supp. at 892

One bar leader succinctly summed up the challenge facing the Task Force on Lawyer Advertising in balancing these competing values when he said:

“The challenge for bar leaders is how to address advertising that is distasteful and tacky without having an adverse impact on access to information.” (Bar Leader, July-August 2006)

Balancing these two important but contending values was the challenge faced by the Task Force on Lawyer Advertising as it began its work, and the recommendations contained in the last section of this Report, are its response to that challenge. The Task

Force does not present these Recommendations with the expectation that they will satisfy everyone, or that they will immediately correct a chronic problem that has concerned lawyers, not only in Pennsylvania, but across the country for many years. Indeed, the Recommendations of the Task Force are presented as proposals that could make some progress towards improving the present situation, and that represent a responsible approach to ameliorating some of those problems, given the legal limitations that restrained the work of the Task Force.

Composition and Work of the Task Force

The leadership of the Pennsylvania Bar Association appointed the membership of the Task Force, announced its charge and mission statement, and requested that it make appropriate recommendations to the Association's House of Delegates.

The membership of the Task Force was carefully selected by the Bar Association's leadership, so that all points of view could be represented in the discussions of the Task Force. The Task Force Co-Chairs both served as former Presidents of the Association and both have extensive experience with the ethical and other professional issues raised by lawyer advertising. The Task Force membership included two of the most active advertising law firms in Pennsylvania. It also included a number of lawyers who vigorously question all forms of attorney advertising and solicitation. Members of the judiciary served on the Task Force, as well as attorneys who had served as Chair of the Disciplinary Board of the Supreme Court of Pennsylvania and as Chair of the Legal Ethics and Professional Responsibility Committee. Representatives of small, rural counties served, as well as representatives from large, urban areas. The Task Force included sole practitioners, lawyers from small law firms, as well as lawyers

who work in some of the state's largest law firms. Plaintiff's lawyers and lawyers who defend cases both served on the Task Force, and worked side by side.

In this way, a diversity of views was achieved, and all points of view were given a fair hearing. The biographies of the members of the Task Force are collected at the end of this report.

The members of the Task Force were assisted in their work by members of the Staff of the Pennsylvania Bar Association. Particularly, the Task Force wants to acknowledge the able assistance of Mr. Bruce Pinto of the Association, who coordinated the work of The Task Force.

At the initial meeting of the Task Force on June 8, 2006, President Ken Horoho outlined the goals of the Task Force. He indicated that the Task Force was created in order to respond to requests by numerous lawyers that the Bar Association determine if steps could be taken to dignify and up-grade lawyer advertising, and the recent publication of the PBA's Task Force on Public Relations, showing that the public had a negative view of attorney advertising. In essence, he requested the Task Force to answer two basic questions: 1) Was there a need to upgrade the quality of legal advertising and, 2) if so, what could be done to accomplish this goal?

Before the Task Force met, its members received and reviewed voluminous notebooks containing the previous work of the PBA, the Ethics 2000 Commission, and the rules and regulations adopted in several states that have been in the forefront of regulating lawyer advertising. In particular, the rules adopted in Florida and the recent report by the New York State Bar Association, were closely examined, as well as regulations adopted in other states, such as Texas and West Virginia. This background material was invaluable in providing topics for discussion by the Task Force.

An organizational meeting of the Task Force was held in Harrisburg, Pennsylvania on June 8, 2006. At the initial meeting, President Horoho addressed the Task Force, and expressed his concerns, and the position of the leadership of the Bar Association. A number of issues were discussed at the organizational meeting, and it was agreed that a report would be prepared to be submitted to the PBA House of Delegates, at their meeting in June, 2007.

To perform its work efficiently, the Task Force was divided into four sub-committees. The Subcommittee on Changes to Existing Rules was chaired by Thomas Wilkinson of Philadelphia; the Subcommittee on Enforcement of Existing Rules was chaired by Marvin Rudnitsky of Selinsgrove; the Subcommittee on Internet/Web Site and Out-of-State Advertising was chaired by Kevin French of Lancaster; and the Subcommittee on Education of Lawyers and the Public was chaired by Carol Shelly of Doylestown.

At the initial meeting, and thereafter, there were a number of issues of particular concern that were identified. The following issues, although not definitive, were the major areas of discussion during the work of the Task Force.

- * False, deceptive or misleading advertisements, in print, broadcast, and on-line advertisement.
- * The 2005 amendment to RPC 7.1 deleted specific guidance from the body of the Rule, and placed it in the commentary. Did this sacrifice specificity and make the Rule vague and ambiguous?

- * Lack of enforcement of advertising improprieties under the current system. Does the Disciplinary Board have the resources to police the present large-scale advertising activity in Pennsylvania? What steps could the Bar Association take to fill this need, either by itself, or in conjunction with the Board? Is a peer review mechanism feasible, and would it be accepted by the Supreme Court of Pennsylvania?
- * Should the PBA favor a system requiring the filing of all advertisements in a central depository, with a random review of the ads, such as New York state has proposed? Should Pennsylvania adopt a pre-screening system of advertisements, such as Florida has?
- * The inadequacy of the current Rules to deal with “computer accessed communications”, and specifically, out-of-state web sites, and contact of prospective clients by e-mail. How to deal with the jurisdictional issues arising from Web sites accessible in Pennsylvania produced by out-of-state law firms? How to deal with in-state lawyers with non-compliant Web sites accessible in other states?
- * Targeted direct mail solicitations that do not inform the recipient of information that may be necessary to make an informed decision. Should the mailing to identified as

“attorney advertisement”, and contain additional disclaimers?

- * The issue of lawyer referrals, and the brokering of cases by lawyers who advertise with no intent to actually represent the client, merely to refer them to other lawyers.
- * The issue of “sham” offices, in advertisements that suggest that lawyers have offices in multiple counties, when, in fact, the offices are only addresses, with no one physically present.
- * The adoption of a “blackout period” of 15 or 30 days, such as was adopted in Florida and New York, but rejected in Pennsylvania when proposed previously.
- * The need for the Bar Association and other organizations to devise methods of educating the public in distinguishing proper from improper advertising and solicitation.
- * The need for the Bar Association or other organizations to conduct seminars, produce publications, formulate guidelines, or to take other measures to promote proper advertising.

Following the initial organizational meeting, the Task Force held a number of follow-up meetings of the entire Task Force. The issues outlined above were discussed in depth, and vigorously debated by the members of the Task Force. Each subcommittee was assigned the task of filing a written report of its conclusions. The rules and

regulations adopted in other states were examined and debated extensively, and the rules of New York and Florida proved particularly useful in generating discussions.

The Task Force had discussions, through its meetings with the Disciplinary Board of the Supreme Court of Pennsylvania, to try to determine the Disciplinary Board's ability to deal with the issues of attorney advertising, and to receive any suggestions from it. The cooperation of the Board in providing information was appreciated by the members of the Task Force.

In addition to meeting and discussing the topics that were identified as particularly troublesome, the Task Force advertised in the major legal publications to solicit comments and suggestions from practicing lawyers. The comments that were received by the Task Force were insightful and useful to the Task Force, and reflect the diversity of opinions among lawyers about attorney advertising. A sampling of some of the E-mail comments is contained below, with the name of the author deleted.

The advent of attorney advertising on television has generally lowered the status of lawyers. This has occurred for multiple reasons: first, the type and content of many ads is offensive to both the profession and the public; second, the constant hammering we receive uses television advertising as its' poster boy, even if the hammering is unfair or unreasonable; third, it revives the old accusation of ambulance chasing to the detriment of all of us.

Pittsburgh, PA.

Advertising is giving us all a bad name. Unfortunately, it is the best way to get business honestly. The solution is to outlaw legal advertising and

punish those lawyers who “pay” for cases. I know, the Phillies will win the world series first.

Philadelphia, PA.

As a 100% plaintiff’s personal injury lawyer who has engaged in TV advertising over the years, I urge the powers that be to take whatever action is necessary to amend the rules of professional conduct to ban all attorney advertising—especially on TV! Personal injury attorney advertising has done nothing but bring disrepute to our profession and poison the jury pool against plaintiffs. Regardless of the 1st Amendment issues, it is long past time for the profession to rein in this blight against the practice.

Pittsburgh, PA.

Generally, my observation is that the radio and tv advertisements are low grade drivel that denigrates the profession. I believe that over the last 20 years, the ads have poisoned citizens and particularly jurors against lawyers that represent injured parties. I believe that the insurance industry and the conservative right have successfully made this emotional pitch into a false political issue. Most good trial attorneys only accept and only present cases with recognizable merit.

Pittsburgh, PA.

I am frankly appalled and amazed at much of the lawyer advertising I see, particularly on radio and television, but also in print, and sometimes on

web sites. It too often goes so far over the line as to what is permissible one wonders where the members of the Disciplinary Board are hiding, or whether they ever turn on the TV. The frequency of violations is increasing rapidly, from my viewpoint.

Philadelphia, PA.

I think personal injury lawyer advertising in the form of television ads and mailings following accidents is directed to attract the unknowledgeable, uninformed person, is unprofessional, and is derogatory to our profession.

Emporium, PA.

By way of background I am a solo practitioner in Montgomery County. While I advertise on the Internet, through the yellow pages, and by public speaking, the single most effective method I have found for obtaining business is through direct mailing. I cannot tell you how many clients have come to me grateful that they received such mailing. I often hear comments along the lines of "I had no idea where to turn until I got your letter." I would thus urge the task force to recommend the continued permission of direct mailing by attorneys.

East Norriton, PA.

I am aware that my thoughts are much out of line with the state of affairs in the legal profession now, but as a lawyer who has practiced 50 years I'd like to get this off my mind. Taste should not be legislated, and I admit that some of my objections to lawyer advertising is a matter of taste. But

most advertising is coarse (see any edition of the Yellow Pages), much of it makes false or unsupportable claims (“we specialize in . . . “ listing everything a lawyer may do) and I know of no research that shows any benefit to the public from such ads. I believe if anyone bothered to ask the public we’d learn that advertising brings the profession into disrepute.

Philadelphia, PA.

I am an attorney practicing for 40 years in Lacka. Co. My personal opinion of legal ads by the profession is that they should not be allowed in any media. Having practiced both with legal ads and without I feel that the rapid decline of the image of the bar and of attorneys in general can be traced to the onset of legal advertising.

Carbondale, PA.

I began my practice of law at a time when there was no advertising permitted at all so perhaps I am more conservative than many members of the bar. I don’t think there is anything wrong with an attorney placing an ad in some form of media which merely lets the public know what services he is offering. The advertising currently in vogue, particular in television goes way beyond that. The attorneys advertising on television, in my opinion, are not being professional attorneys, but are being salesmen. I believe whatever we do involving advertising should preserve the dignity of our profession.

Clearfield, PA.

I think that lawyer advertising – on billboards and television especially – has caused huge and possibly irreparable damage to the profession. Most of such advertising makes lawyers look greedy, vulgar, and unethical, the kind of people who assume that if someone gets hurt then it must be someone’s fault – someone else’s fault.

Gettysburg, PA.

I understand that the Pennsylvania Bar has created a task force to examine the issue of lawyer advertising. I believe that the ads I have seen in Yellow Page advertising are professional and inform the public of lawyer services. But as the saying goes, “It only takes one.”

West Chester, PA.

Summary of Conclusions and Recommendations

Based on its extensive review of the subject, the Task Force advocates a number of changes in the present ethics rules relating to attorney advertising and solicitation, the method of enforcing those rules, and efforts by the Bar Association and other groups to educate the public and the legal profession about advertising by attorneys. A detailed analysis of those recommendations is contained in Section III of this Report. In summary, the Task Force requests that the House of Delegates of the PBA adopt the following recommendations to the Supreme Court of Pennsylvania:

Changes to the Rules of Professional Conduct

Changes are necessary that would:

1. Provide for a clearer definition of “false, misleading, and deceptive” advertising, particularly as embodied in RPC 7.1.

2. Provide for a system for the filing and review of advertising, to insure better enforcement of existing Rules.
3. Provide for better identification of targeted direct mail advertising and cautioning consumers about undue reliance upon such mailings in selecting a lawyer.
4. Provide for more effective regulation or monitoring of the content of lawyer Web site and Internet advertising and solicitation.
5. Provide for more effective regulation of case brokering and referral by lawyers who advertise but who do not intend to handle the cases they solicit.

Enforcement of Advertising Rules

The Task Force recommends that consideration be given to rule changes that would provide for the central filing of lawyer advertising, coupled with the grant of authority to conduct random reviews of the lawyer advertising that is so filed or maintained pursuant to the obligation already present in Rule 7.1(b) to maintain records of advertising for a period of two years. The group or committee would be empowered to both (1) review lawyer advertising on a regular basis and educate the lawyers and law firms whose advertising is reviewed concerning the proper application of the governing rules to the advertising content submitted, and (2) forward examples of improper advertising believed to be in violation of the advertising rules to the Office of Disciplinary Counsel (“ODC”) or the Disciplinary Board of the Supreme Court of Pennsylvania.

Understanding full well that resources at the ODC level are scarce, it may be necessary and most productive for any monitoring effort to first focus on those forms of potentially false and misleading advertising that are the most intrusive and most frequently generate complaints. To accomplish such an initiative, even on an occasional “random audit basis,” it is apparent that some enhancement of the resources available to the ODC and the Disciplinary Board would be desirable, perhaps including the designation of at least one ODC staff counsel in each district office to be primarily responsible for lawyer advertising enforcement efforts on a part-time basis. The Task Force recommends that the Association offer to appoint lawyers to an advertising study group capable of (1) promptly and effectively assisting the Association membership with advertising-related issues as they arise,¹ and (2) service as a resource to the ODC and the Board in identifying advertising warranting further investigation and potential discipline.

Education and Public Relations

Advertising guidelines, such as promulgated by the Monroe County Bar Association in New York state, should be adopted by the Pennsylvania Bar Association, and circulated to the membership of the Bar.

The Pennsylvania Bar Association, and local bar associations, should initiate a campaign of seminars and educational activities to sensitize lawyers to the rules relating to advertising and solicitation, and the desirability of dignity in attorney advertising.

The Pennsylvania Bar Association should take measures to work with the Supreme Court of Pennsylvania to provide guidance and education to sensitize

¹ This proposal is not intended to remove or preclude the existing service provided by the members of the Committee on Legal Ethics and Professional Responsibility, who convey confidential guidance to PBA members concerning their compliance with the Rules of Professional Conduct, including the advertising rules.

Pennsylvania lawyers to the need for advertising that is (1) not misleading, (2) dignified and (3) does not degrade the profession.

This summary is merely a bare bones outline of the major proposals of this Task Force. Section III of this Report will provide an more in-depth look at how the Task Force feels these goals can be achieved.

II. LEGAL BACKGROUND OF LAWYER ADVERTISING

A. AN HISTORICAL OVERVIEW: UNITED STATES SUPREME COURT DECISIONS²

Thirty years ago, the United States Supreme Court held that lawyer advertising is a form of commercial speech entitled to constitutional protection under the First and Fourteenth Amendments. Because of the constitutional issues involved, cases involving lawyer advertising have frequently been heard by the United States Supreme Court. These decisions provide a constitutional framework which delineates the permissible ambit of state regulation of lawyer advertising and solicitation.

(i) *Bates*: Lawyer Advertising Recognized As Protected Commercial Speech

In 1977, in *Bates v. The State Bar of Arizona*,³ the Supreme Court held that truthful advertising by lawyers of routine legal services and the terms on which they would be provided is protected by the First and Fourteenth Amendments against blanket prohibition by a state. The Court recognized for the first time that commercial speech by a lawyer is protected by the First Amendment.

In *Bates*, two lawyers who operated a legal clinic advertised in a local newspaper that they were offering legal services at “very reasonable fees” and listed their fees for

² This historical overview is based, in part, upon PBA Formal Opinion 85-170, dated November 25, 1985 on Lawyer Advertising and Solicitation, and has been updated to reflect significant developments in the law after the Formal Opinion was issued.

³ 433 U.S. 350 (1977) (*Bates* was a 5 to 4 decision of the Court; however, the Court has reaffirmed the majority’s holding in subsequent decisions).

certain routine services, such as an uncontested divorce, uncontested personal bankruptcy, simple adoption and change of name. The Arizona Bar determined that the lawyers violated the state's disciplinary rules banning all lawyer advertising and disciplined the lawyers involved. The lawyers appealed, arguing that the disciplinary rules were overly restrictive and violated their rights under the First and Fourteenth Amendments.

The Supreme Court observed that, as an exercise of their power to regulate the professions and to protect consumers, states are free to ban all advertising that is inherently "false, deceptive or misleading" or which proves to be misleading in practice. When, however, a communication is neither false or misleading nor related to unlawful activity, states can regulate commercial speech only to advance or protect a substantial state interest and then only if such regulations are narrowly drawn. Since commercial speech is not accorded the same level of protection as political speech or other forms of protected expression under the First Amendment, states need only establish that their regulations impose reasonable restrictions on the time, place and manner of advertising and are narrowly crafted to protect or advance a substantial state interest.

In *Bates*, the Arizona State Bar advanced several arguments in support of the state's blanket ban on lawyer advertising. The Arizona State Bar contended that permitting lawyers to advertise would have an adverse effect on professionalism, that lawyer advertising is inherently misleading, legal advertising would adversely effect the administration of justice, would have undesirable economic effects, would have an adverse effect on the quality of legal services and would create problems for disciplinary enforcement. The Court rejected each of these arguments. With respect to the concern that advertising would have an adverse effect on professionalism, the Court stated that it

found the postulated connection between advertising and the erosion of true professionalism to be “severely strained”.⁴ The Court noted that other professions advertise and they are not harmed. The Court also rejected the argument that legal advertising is inherently misleading because legal services are too individualized to prevent informed comparison by consumers of legal services. The Bar’s argument on this point was undermined by the Bar’s own legal services program in which participating attorneys agreed to perform stated services at standardized rates.

At the core of the Court’s decision is the Court’s view that permitting commercial speech by lawyers serves to advance several important interests, including the consumer’s concern for the free flow of information, such as the availability, nature and prices of legal products and services, and that this serves the public interest because it “performs an indispensable role in the allocation of resources in a free enterprise system.” “In short, such speech serves individual and a societal interests in assuring informed and reliable decision making.”⁵

At several points in its decision, the Court observed that the organized Bar plays a “special role” in overseeing lawyer advertising and in educating and informing the public. For example, with regard to the argument that lawyer advertising is inherently misleading, the Court observed:

Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the

⁴ *Bates*, 433 U.S. at 368.

⁵ *Bates*, 433 U.S. at 364.

public. In any event, we view as dubious any justification that is based upon the benefits of public ignorance. [Citation omitted.] Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.⁶

The Court further stated:

We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straight forward. And, of course, it will in the latter's interest, as in other cases of misconduct of the bar, to assist in weeding out those few who abuse their trust.⁷

⁶ *Bates*, 433 U.S. at 375.

⁷ *Bates*, 433 U.S. at 379.

The Court concluded its opinion, stating: “...We expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.”⁸

The Court reserved for another day whether claims regarding the quality of legal services, claims that are not subject to measurement or verification, warrant restriction. Writing for the Court, Justice Blackmun stated:

[M]isstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services — a matter we do not address today — are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.⁹

The Court also did not address in-person solicitation, disclaimers, or “the special problems of advertising on the electronic broadcast media.”¹⁰

After *Bates*, although states were free to regulate lawyer advertising, such regulation was subject to the constitutional rights of lawyers to engage in commercial speech. Moreover, states were not permitted to impose a blanket prohibition on all advertising by lawyers. The Court, in subsequent decisions, reaffirmed a lawyer’s right to engage in truthful and not misleading commercial speech without undue restriction by the states. The Court has not, however, addressed the issue of whether advertising claims regarding the quality of legal services is misleading and, therefore, subject to

⁸ *Bates*, 433 U.S. at 384.

⁹ *Bates*, 433 U.S. at 383-84.

¹⁰ *Bates*, 433 U.S. at 384.

restriction.¹¹ While the Court did not rule on state regulation of in-person solicitation, it recognized that such activity might pose dangers of overreaching and misrepresentation not encountered in newspaper or other advertisements and, thus, may be subject to restriction.

(ii) *Ohralik*: In-Person Solicitation May Be Constitutionally Prohibited

A year after *Bates* was decided, in 1978, the Supreme Court was asked to review a case which addressed one of the issues to which it had alluded in *Bates*, the propriety of regulations prohibiting in-person solicitation. In *Ohralik v. Ohio State Bar Association*,¹² the Association had initiated disciplinary proceedings against a lawyer arising out of his personal solicitation of accident victims in their homes and at their hospital beds. The Court held that a state may discipline a lawyer for soliciting clients in-person for pecuniary gain. The Court recognized that protection of the public from fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct was a legitimate and important state interest.¹³ The Court further observed that, in addition to its general interest in protecting consumers and regulating commercial transactions, states also bear a special responsibility for maintaining standards of conduct among members of

¹¹ With respect to the regulation of content, in *Zauderer v. The Office of Disciplinary Counsel of Ohio*, 471 U.S. 626 (1985), the Supreme Court held that a lawyer could be disciplined for advertising that a client would not owe a fee in a contingency case while not disclosing that the client would remain responsible for costs. In *Peel v. Lawyer Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Supreme Court held that it was not misleading for a lawyer to state truthfully on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. In *In re: R.M.J.*, 455 U.S. 91 (1982), the Supreme Court held that a lawyer could identify his areas of practice and the jurisdictions in which he was licensed to practice in professional announcement cards and newspaper advertisements where it was not shown that the information was false or misleading.

¹² 436 U.S. 477 (1978).

¹³ *Ohralik*, 436 U.S. at 462.

the licensed professions.¹⁴ The Court stated that a lawyer's procurement of remunerative employment was an interest only marginally affected with First Amendment concerns and fell squarely within the states' powers to regulate economic and professional matters.¹⁵

The immediacy of a particular communication and the imminence of harm are factors the Court has considered when evaluating whether certain communications should receive less protection than others. For example, unlike a printed, public advertisement which simply provides information and leaves the recipient free to act upon it or not, in *Ohralik* the Court noted that in-person solicitation by a lawyer may exert undue pressure on a prospective client to supply an immediate response without pause for reflection or comparison. Moreover, unlike a newspaper or other public advertisement, in-person solicitation may not be visible or otherwise open to public scrutiny making it difficult if not impossible to obtain reliable proof about what transpired, thus, creating problems for disciplinary enforcement.

The Court in *Ohralik* weighed a lawyer's interest in seeking remunerative employment against the state's interests in prohibiting the conduct, including the state's interests in protecting consumers and regulating commercial transactions and the state's "special responsibility for maintaining standards among the members of the licensed professions."¹⁶ In this connection, the Court stated, "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." The Court concluded that in-person solicitation is "inherently conducive to

¹⁴ *Ohralik*, 436 U.S. at 460.

¹⁵ *Ohralik*, 436 U.S. at 459.

¹⁶ *Ohralik*, 436 U.S. at 460.

overreaching and other forms of misconduct.”¹⁷ As a result, the Court held that Ohio had a strong interest in regulating and prohibiting such conduct without a showing of actual harm. “The Rules prohibiting [in-person] solicitation are prophylactic measures, the objective of which is the prevention of harm before it occurs.”¹⁸

(iii) *Primus*: Targeted Mail Solicitation Permitted as Non-Commercial Political Speech

The same day that *Ohralik* was decided, the Supreme Court issued its decision in *In re: Primus*.¹⁹ *Primus* involved a lawyer who wrote to a prospective litigant to advise her that free legal assistance was available from a non-profit organization, the American Civil Liberties Union (“ACLU”), which used litigation as a form of political expression. The Board of Commissions on Grievances and Discipline of the Supreme Court of South Carolina filed a complaint against the lawyer, charging her with unethical solicitation. In its opinion, the Court emphasized that the lawyer’s letter was not a communication of a purely commercial offer of legal assistance to a lay person.²⁰ Instead, the letter, as a mode of political speech, fell under the more generous and much broader protections of the First Amendment reserved for associational freedoms. As a result, the state was held to a much stricter standard than that normally applied to the regulation of commercial speech. Further, the Court noted that a letter did not carry with it the same potential for abuse as did in-person solicitation.

The Court observed that the letter imparted information which was material to making an informed decision to authorize litigation, and in a manner that gave the recipient the opportunity to arrive at a deliberate decision:

¹⁷ *Ohralik*, 436 U.S. at 464.

¹⁸ *Ohralik*, 436 U.S. at 464.

¹⁹ *Ohralik*, 436 U.S. at 412.

²⁰ *Primus*, 436 U.S. at 422.

The transmittal of this letter — as contrasted with in-person solicitation — involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessened substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct.²¹

The Court held that the state could not discipline a lawyer for soliciting in-person and by letter a prospective client for the purpose of expressing personal political beliefs and to advance the civil liberties objectives of the ACLU through litigation, rather than to derive financial gain. The Court's decision was based largely upon the fundamental interests of political speech and associational freedoms protected under the First and Fourteenth Amendments.

(iv) ***In re: R.M.J.: Truthful and Not Misleading Mailings Permitted in Absence of Substantial State Interest***

In 1982, four years after *Ohralik* and *Primus* were decided, the Supreme Court heard *In Re R.M.J.*,²² which involved a lawyer charged with violating Missouri disciplinary rules when he announced the opening of his office by mailing professional announcement cards to a select list of addressees, and placed ads in newspapers and the yellow pages identifying the jurisdictions in which he was licensed to practice, and also listing his areas of practice. Since neither the identification of the jurisdictions in which the lawyer was licensed to practice nor the listing of his areas of practice were shown to be misleading, the Court held that such information could not be restricted in the absence

²¹ *Primus*, 436 U.S. at 435-36.

²² 455 U.S. 191 (1982).

of a substantial state interest. The Court concluded that the State of Missouri had failed to demonstrate that it had a substantial state interest in prohibiting such a direct mail solicitation. The Court noted that a state may have greater difficulty regulating and supervising mailings than it would have with public advertising; however, Missouri had failed to demonstrate its inability to supervise such mailings. As a result, the Court held that Missouri's blanket prohibition of all such mailings was overbroad and, therefore, unenforceable.

(v) ***Zauderer: Newspaper Advertising Targeted to Persons with a Specific Legal Problem Permitted***

In 1985, the Supreme Court issued a plurality opinion in *Zauderer v. The Office of Disciplinary Counsel of the Supreme Court of Ohio*.²³ Zauderer, an Ohio lawyer, ran a newspaper advertisement informing readers that his firm would represent defendants in drunken driving cases and that his fee would be refunded if they were convicted of drunk driving. Thereafter, he ran another newspaper advertisement which publicized his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dalkon Shield Intrauterine device. This advertisement featured a line drawing of the device. The ad stated that if there was no recovery, no legal fees would be owed by the client. The ad did not mention the client's responsibility to pay costs.

The Supreme Court held that the state could not discipline a lawyer for running a truthful newspaper advertisement targeted to persons with a specific legal problem.²⁴ The Court observed that there was nothing misleading about the information provided in

²³ 471 U.S. 626 (1985). The opinion in *Zauderer* is divided into six parts. Concurring and dissenting opinions were filed as to different holdings by five Justices. Special care should, therefore, be taken when evaluating *Zauderer*.

²⁴ *Zauderer*, 471 U.S. at 639-41.

the advertisement and, consequently, a state's power to regulate deceptive advertising could not justify Ohio's decision to prohibit and discipline a lawyer for running such an advertisement.

The Court also reasoned that a newspaper advertisement is substantially different from in-person solicitation. As the Court noted previously in *Ohralik*, in-person solicitation is rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. The Court further noted that in-person solicitation presents a unique regulatory problem because it is not visible or otherwise open to public scrutiny.²⁵ Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate according to the Court. In addition, the Court further observed that a printed advertisement, unlike a personal encounter, is not likely to involve pressure on the potential client for an immediate yes or no decision concerning representation. Thus, in the Court's view, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than in-person solicitation by a lawyer.²⁶

The Court also held that the use of illustrations or pictures in advertisements served an important communicative function and was entitled to First Amendment protection.²⁷ The Court opined that, as long as the illustration is accurately rendered and cannot be said to be misleading, it should be accorded the same protection as other forms of commercial speech. Finally, the Court held that information supplied by the lawyer regarding his contingent fee was at least partially misleading in that it failed to make

²⁵ *Zauderer*, 471 U.S. at 641.

²⁶ *Zauderer*, 471 U.S. at 652.

²⁷ *Zauderer*, 471 U.S. at 647.

clear that the client would have to pay the expenses of the litigation if the litigation was lost. Therefore, the Court held that Ohio's decision to discipline the lawyer for this particular omission was permissible.²⁸

(vi) *Shapero*: Targeted Direct Mail as Protected Commercial Speech

In 1988, in *Shapero v. Kentucky Bar Association*,²⁹ the Supreme Court held that a lawyer's targeted, direct-mail solicitation that was neither false nor misleading was entitled to First Amendment protection. Justice Brennan, writing for the Court, held that because the lawyer's letter was neither deceptive nor false, the lawyer's targeted, direct-mail solicitation was entitled to constitutional protection similar to the newspaper advertisements at issue in *Zauderer*. The Kentucky Bar Association argued that it had the right to discipline the lawyer because the letter was directed to a specific recipient. The Supreme Court rejected this justification. The Court observed that merely because a targeted, direct-mail solicitation presented opportunities for isolated abuses or mistakes, this did not justify a total ban on this mode of protected commercial speech.³⁰ The Kentucky Bar Association also argued that a targeted letter rose to the level of intrusiveness of in-person solicitation, which the Court had held in *Ohralik* could be prohibited. The Court distinguished targeted letters, and print advertisements generally, from in-person solicitation by noting that unlike an in-person contact, the recipient of a letter can "effectively avoid bombardment of [her] sensibilities by simply averting [her] eyes."³¹ The Court stated that a targeted letter does not invade a reader's privacy any more than a letter mailed to the general public.³² Under *Shapero*, truthful and not

²⁸ *Zauderer*, 471 U.S. at 652.

²⁹ 486 U.S. 466 (1988).

³⁰ *Shapero*, 486 U.S. at 476.

³¹ *Shapero*, 486 U.S. at 475.

³² *Shapero*, 486 U.S. at 476.

misleading targeted, direct-mail sent to a person known to have a specific legal problem is protected commercial speech.

(vii) *Peel*: Advertising Certification Permitted Under Limited Circumstances

In 1990, the Court decided *Peel v. Lawyer Registration & Disciplinary Commission of Illinois*.³³ In *Peel*, the Court held that it was permissible for a lawyer to state on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. *Peel*'s letterhead contained the following statements: "Certified Civil Trial Specialist By the National Board of Trial Advocacy" and "Licensed: Illinois, Missouri, Arizona." At that time, Illinois did not have an approved certification process. The Illinois Lawyer Registration and Disciplinary Commission argued that advertising the certification was inherently misleading because the distinction between a "licensed" lawyer and "certified" lawyer was not obvious. The Court rejected this argument. The Court noted that certification by the National Board of Trial Advocacy was a verifiable fact, not an unverifiable opinion about the quality of the lawyer's work.³⁴ The Court also observed that disclosure of this kind of information on *Peel*'s letterhead served the public interest and encouraged the development of meritorious certification programs by lawyers.³⁵

(viii) *Went For It*: 30-Day Restriction on Targeted Direct Mail Approved

In 1995, in *Florida Bar v. Went For It, Inc.*,³⁶ the Supreme Court, in a five to four decision, upheld a Florida Bar rule that prohibited lawyers from sending a targeted, direct-mail solicitation related to causes of action for personal injury or wrongful death to

³³ 496 U.S. at 91 (1990).

³⁴ *Peel*, 496 U.S. at 101.

³⁵ *Peel*, 496 U.S. at 111.

³⁶ 515 U.S. 618 (1995).

accident victims or their families within thirty days of an accident or disaster. While the Court recognized a lawyer's right to engage in non-misleading, truthful advertising, it found that Florida had demonstrated a substantial state interest in banning such advertising for a period of time following an accident. The Court found that the 30-day moratorium was narrowly tailored to advance the substantial state interests of protecting the privacy of persons following an accident or disaster and maintaining public respect for the legal profession. After *Went For It*, Congress addressed well publicized solicitation abuses of aircraft accident victims' families with the passage of the Aviation Family Disaster Act of 1996, 49 U.S.C.A. §1136(g)(2), which proscribes unsolicited communications by attorneys of personal injury or wrongful death claims within 45 days following an aircraft accident.

(ix) Conclusion:

The foregoing cases reflect that the Court will protect the rights of lawyers and the consumers of legal services against efforts to prohibit the free flow of information regarding the availability of legal services and the terms on which they may be obtained, provided the information is truthful and not misleading. The Court will generally permit states to impose reasonable time, place and manner restrictions on lawyer advertising and solicitation. The Court has not addressed the issue, first raised in *Bates*, of the permissible scope of regulation of claims regarding the quality of legal services. Another open issue is when advertising truthful information crosses the line and becomes misleading and, thus, subject to restriction or prohibition. A blanket prohibition on statements deemed to be inherently misleading [e.g., a prophylactic rule similar to the ban on in-person solicitation.] may raise serious First Amendment concerns as a restriction on content as opposed to a reasonable time, place and manner restriction. This constitutional

framework must be kept in mind when crafting rules regulating the scope of permissible lawyer advertising and solicitation.

B. MISLEADING AND DECEPTIVE WEBSITES

As a major area of concern of the Task Force, the Internet/Website/Out-of-State Advertising Sub-Committee focused on websites by lawyers and law firms that are intended to attract prospective clients with personal injury claims, such as asbestosis or mesothelioma. A review of the websites reveals that they do not comply with the requirements of the Pennsylvania Rules of Professional Conduct, and likely do not comply with the ethical rules of the jurisdictions where the lawyer or law firm claims to have a principal office. *See*, for example, the following websites:

www.mesotheliomacenter.org, www.mesothelioma-lawsuits-asbestos.com, www.mesolink.org and www.mesothelioma-help.com. Typically these websites prominently tout recoveries they claim to have obtained on behalf of clients. For example, the www.mesathelioma-help.com website states: “Over 1,250 of our mesothelioma clients awarded **monetary** compensation,” “Our Mesothelioma clients have been awarded over **\$1 Billion** for their injuries.” and lists “Our Top Mesothelioma Settlements”. (Emphasis in the original). Each of these websites was returned as a top search result in response to a Google search with “asbestos” as the search term.

With respect to these websites, the following areas of concern are evident:

- (a) The websites are deceptive and misleading;
- (b) The websites create unjustified expectations that the same results may be obtained for other clients;
- (c) The websites do not clearly identify the lawyer or law firm responsible for the website’s content;

- (d) The websites do not disclose the geographical location where the lawyer or lawyers who will be providing legal services are admitted to practice;
- (e) The websites do not disclose whether or not they are being operated as a form of lawyer referral service;
- (f) The websites do not comply with the prohibitions and requirements governing lawyer advertising and solicitation under the Pennsylvania Rules of Professional Conduct; and
- (g) The websites may not be posted by lawyers located in Pennsylvania or admitted to practice in Pennsylvania.

The Task Force believes that consumers of legal services located in Pennsylvania may be harmed as a result of selecting counsel based upon deceptive and misleading websites. The Task Force is also of the view that this type of website reinforces a negative public perception of lawyers to the detriment of lawyers and the administration of justice. To the extent a lawyer practicing in Pennsylvania, or admitted to practice in the state, advertises by means of a website that violates the Pennsylvania Rules of Professional Conduct, that lawyer should readily be subject to discipline if the ODC elects to pursue the matter.

These websites represent a growing trend in lawyer advertising on the Internet which raises concerns regarding consumer protection and complex questions regarding compliance with legal ethics rules, disciplinary enforcement and jurisdiction. These later issues were first highlighted in a Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion No. 98-85 dated July 24, 1998

entitled: Lawyers Webpages: Disciplinary Authority, Choice of Law and Jurisdiction. This Informal Opinion preceded, and in several respects anticipated, the amendments to the rules governing lawyer advertising and solicitation, included among the recent amendments to the Pennsylvania Rules of Professional Conduct (with an effective date of January 1, 2005). The Informal Opinion contains an extensive discussion of personal jurisdiction caselaw in the context of personal jurisdiction over an out-of-state defendant based upon the defendant's contacts with the forum state through the medium of an Internet website.

The Internet is a global network of connected computer systems. It is not limited by geographical or jurisdictional boundaries. Anyone, anywhere in the world with a computer and Internet connection can access Internet web pages through the medium of the Internet. In contrast, the practice of law in the United States is, in large part, regulated on a state-by-state basis. Regulation of the legal profession, reflected principally through admission requirement and ethics rules, varies from state to state. In Pennsylvania, the regulation of the practice of law is vested with the Pennsylvania Supreme Court under the Pennsylvania Constitution. *In re: Shigon*.³⁷

With respect to the rules governing lawyer advertising, some states have adopted the ABA Model Rules of Professional Conduct, others have adopted modified versions of the ABA Model Rules, and others are still working under the Model Code of Professional Responsibility. Pennsylvania has adopted an amended version of the ABA Model Rules of Professional Conduct. These different sets of rules establish different and often conflicting standards of conduct.

³⁷ 462 Pa. 1, 329 A.2d 235 (1974).

What ethics rules apply to a lawyer's or law firm's website? How does a lawyer insure that the lawyer's website complies with the rules governing lawyer advertising? Is a lawyer's website subject to the ethics requirements of some or all of the 50 states? Are lawyers who are not admitted to practice in Pennsylvania subject to Pennsylvania rules governing lawyer advertising and solicitation? How are jurisdictional and choice of law issues to be resolved?

The rules currently in force provide little guidance for resolving these questions because they are premised on a geographical jurisdictional model that the Internet does not follow. Courts, especially the federal courts, in recent years have only just begun to struggle with the questions of jurisdiction and venue created by the Internet, primarily in the context of claims involving business torts, intellectual property disputes, contracts and securities violations. The seminal decision in this area containing the sliding scale analysis developed by District Court Judge Sean J. McLaughlin of the United States District Court for the Western District of Pennsylvania, is *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,³⁸ discussed at length below. Under the *Zippo* sliding scale analysis, the courts look to the nature and scope of the activity conducted over the Internet to determine whether the court can constitutionally exercise personal jurisdiction over a non-resident defendant.

The Pennsylvania Rules of Professional Conduct contains provisions, modeled on the ABA Model Rules, in particular, Rule 8.5, which address disciplinary authority and how potential conflicts may be resolved between differing ethical obligations that may be imposed by different jurisdictions. Rule 8.5(a) states the fundamental rule that, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of

³⁸ 952 F. Supp. 1119 (W.D. Pa. 1997).

this jurisdiction, regardless of where the lawyer’s conduct occurs.” Rule 8.5(a) also recognizes that a lawyer may be subject to the disciplinary authority of more than one jurisdiction: “A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.” The recognition that a lawyer may be subject to the disciplinary authority of more than one jurisdiction creates the possibility of conflicting ethical standards and obligations.

As part of the recent amendments to the Rules of Professional Conduct, the following sentence was added to Rule 8.5(a): “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” This addition was intended to extend the reach of the Rules of Professional Conduct to a lawyer not admitted to practice in Pennsylvania “who provides or offers to provide any legal services in this jurisdiction.”

However, before a court sitting in a particular state may exercise personal jurisdiction over a person, the due process clause of the United States Constitution requires that there be “minimum contacts” between the person and the forum “such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*.³⁹ Moreover, the person’s “conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*;⁴⁰ *see also Hanson v. Denckla*⁴¹ (There must be “some act by which the defendant purposefully avails itself of

³⁹ 326 U.S. 310, 316 (1945).

⁴⁰ 444 U.S. 286 (1980).

⁴¹ 357 U.S. 235, 253 (1958).

the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”).

In order to establish personal jurisdiction over a non-resident consistent with federal constitutional due process, the non-resident must either have (1) a “substantial, continuous and systematic” presence in the forum state which would give the court general jurisdiction over the person, or (2) certain “minimum contacts” with the forum state such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” The former confers general jurisdiction: the latter specific jurisdiction. *See Burger King Corp. v. Rudzewicz*.⁴² In *Burger King*, the United States Supreme Court stated that jurisdiction could not be avoided because “the defendant did not physically enter the forum state.”⁴³ The Court noted: “[I]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted.” *Id.*

In recent years, there have been a number of federal court decisions which have considered the question of the circumstances which permit a forum state to exercise personal jurisdiction over an out-of-state defendant based upon the defendant’s contacts with the forum state through the medium of an Internet Web site. *See Inset Systems, Inc. v. Instruction Set, Inc.*;⁴⁴ *Compuserve, Inc. v. Patterson*;⁴⁵ *Maritz, Inc. v. Cybergold, Inc.*;⁴⁶ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*;⁴⁷ *Cybersell, Inc. v. Cybersell, Inc.*;⁴⁸ *Bensusan Restaurant Corp. v. King*.⁴⁹

⁴² 471 U.S. 462, 472-73 (1985).

⁴³ 471 U.S., at 476.

⁴⁴ 937 F. Supp. 161 (D. Conn. 1996).

⁴⁵ 89 F.3d 1257 (6th Cir. 1996).

⁴⁶ 947 F. Supp. 1328 (E.D. Mo. 1996).

⁴⁷ 952 F. Supp. 1119 (W.D. Pa. 1997).

In *Birbrower, Montalbano, Condon & Frank, P.C., v. The Superior Court of Santa Clara County*,⁵⁰ in which the California Supreme Court voided part of the defendant law firm's fee agreement with a California based client because it engaged in the unauthorized practice of law in that state, the California Supreme Court stated:

Our definition [of unauthorized practice] does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider...but it is by no means exclusive. For example, one may practice law in the state in violation of section 5125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means.

Birbrower shows that courts are willing to consider computer-based access and contacts in the context of unauthorized practice claims.

In their analysis of Internet based jurisdictional issues, the courts have created a sliding scale analysis that looks to the nature and scope of the activity conducted over the Internet. Acknowledging that the development of case law concerning these issues was in its infancy, in *Zippo*, District Court Judge Sean J. McLaughlin of the United States District Court for the Western District of Pennsylvania stated:

⁴⁸ 130 F.3d 414 (9th Cir. 1997); *Webber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

⁴⁹ 126 F.3d 25 (2nd Cir. 1997).

⁵⁰ 17 Cal.4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304, *cert. denied*, 525 U.S. 930 (1998).

Our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. E.g., *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the

level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).⁵¹

The federal courts have identified three general categories of contact in evaluating whether a forum state may properly exercise personal jurisdiction over a non-resident based upon Internet related activity. The first type of contact is when a party clearly does business over the Internet, such as entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet. Here, courts have concluded that personal jurisdiction exists. *See Zippo; Compuserve*. The second type of contact occurs when a user can exchange information with the host computer. In these cases, the exercise of personal jurisdiction is determined by examining the level of inter-activity and commercial nature of the exchange that occurs through the Web site. *See Maritz*. The third type of contact merely involves the posting of information or advertisements on a Web site that is accessible to users in foreign jurisdictions. *See Bensusan; Cybersell; Weber*. In this latter case, federal courts have held that personal jurisdiction is not properly exercised in these circumstances because “a finding of jurisdiction . . . based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction of anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law. . . .” *Weber*.⁵²

⁵¹ 952 F. Supp., at 1124.

⁵² 977 F. Supp. at 333 (quoting *Hurst Corp. v. Goldberger*, 197 W.L. 97097, at *1 (S.D.N.Y. February 27, 1997)).

In *Inset Systems*, a Connecticut corporation sued a Massachusetts corporation in the District Court of Connecticut for trademark infringement based on the use of an Internet domain name. The Massachusetts corporation's contacts with the forum state, Connecticut, consisted solely of the posting of a Web site that was accessible to approximately 10,000 Connecticut residents who had Internet connections and maintaining a tollfree number. The Connecticut District Court concluded that advertising on the Internet constituted the purposeful doing of business in Connecticut because "unlike television and radio advertising, the advertisement is available to any Internet user." *Inset Systems*.⁵³ The District Court decided, therefore, that the exercise of personal jurisdiction was proper.

In *Bensusan*, the District Court for the Southern District of New York, applying New York's long-arm statute, reached an opposite conclusion based upon a similar set of facts. The operator of a New York jazz club sued the operator of a Missouri jazz club for trademark infringement. The Missouri jazz club's Web site contained general information about the club, a calendar of events and ticket information. The Web site was not, however, interactive. To obtain tickets to the club, a user would have to call or visit a ticket outlet and then pick up the tickets at the club on the night of the show. The District Court concluded that the Missouri jazz club's activity was not a tortious act within the state of New York, and thus it was not subject to personal jurisdiction in New York.

In *Cybersell*, the Ninth Circuit held that although creating a Web site may be felt nationwide or even worldwide, without more, it is not an act purposefully directed toward a particular forum. In *Cybersell*, an Arizona corporation that advertised for commercial

⁵³ 937 F. Supp. at 165.

services over the Internet under the service mark “Cybersell” filed an infringement action in Arizona District Court against Cybersell, Inc., a Florida corporation that offered Web page construction services over the Internet. There was very limited interactivity between the Florida defendant and Arizona Internet users, which included receiving the browser’s name and address as well as an indication of interest. Those who were interested in getting on the World Wide Web were encouraged to e-mail the defendant to learn how. Signing up for the Cybersell service in Arizona, however, was not an option, nor did anyone from Arizona do so. The District Court observed that Cybersell did not encourage people in Arizona to access its site, it entered into no contracts in Arizona, made no sales calls in Arizona, received no telephone calls from Arizona, earned no income from Arizona, sent no message over the Internet to Arizona, and that no money changed hands on the Internet from or through Arizona. The Ninth Circuit concluded that Cybersell’s contacts with Arizona were insufficient to establish “purposeful availment.”

Maritz is a case involving a higher degree of interactivity through an Internet Web site, in which the Missouri District Court concluded that the exercise of personal jurisdiction was proper. In *Maritz*, Cybergold had established a Web site promoting its coming Internet service. The service consisted of assigning users an electronic mailbox and forwarding advertisements for products and services that matched the user’s interests to those mailboxes. Users were encouraged to add their e-mail address to a mailing list to receive updates about the service. Cybergold argued that it was not subject to the personal jurisdiction of the Missouri District Court arguing that its Web site was a “passive Web site.” The District Court rejected this argument and held that Cybergold’s

activity constituted “active solicitations” and “promotional activities,” thus subjecting it to the personal jurisdiction of the court.

Compuserve involved yet a higher level of interactivity and involved the transaction of business through the Internet. In *Compuserve*, the defendant, a Texas resident, entered into a contract to distribute shareware through Compuserve’s Internet server located in Ohio. From his computer in Texas, the defendant electronically uploaded thirty-two master software files to Compuserve’s server in Ohio. When the defendant threatened to sue Compuserve, Compuserve filed a preemptive action in the Southern District of Ohio. The Texas defendant filed a motion to dismiss for lack of personal jurisdiction. This motion was granted by the District Court. Compuserve appealed. The Sixth Circuit reversed the District Court holding that the defendant had purposefully directed his business activities toward the forum state, Ohio, by knowingly entering into a contract with Compuserve, an Ohio resident, and then transmitting files to Ohio.

Zippo, another case in which a District Court found the exercise of personal jurisdiction to be proper based upon contacts through an Internet Web site, represents an increasingly common form of Web site interactivity. In *Zippo*, Zippo Manufacturing Corporation, located in Bradford, Pennsylvania, filed a lawsuit against Zippo Dot Com alleging trademark dilution, trademark infringement, and false designation under the Federal Trademark Act. Dot Com is a California corporation with its principal place of business located in Sunnyvale, California. It operated an Internet Web site and an Internet news service and had obtained exclusive rights to use the domain names “zippo.com,” “zippo.net” and “zipponews.com” on the Internet. Dot Com’s Web site contained information about the company, advertisements and an application for its

Internet news service. The news service consisted of three levels of membership. To use the service, a customer was required to fill out an on-line application that asked for a variety of information including the person's name and address. Payment was made by credit card over the Internet or the telephone. After the application was processed and a subscriber assigned a password, the subscriber was permitted to download Internet newsgroup messages stored on Dot Com's server in California.

Dot Com had approximately 3,000 paying subscribers located in Pennsylvania. In addition, Dot Com had entered into agreements with seven Internet access providers in Pennsylvania to permit their subscribers access to Dot Com's news service. Two of the Internet service providers were located in the Western District of Pennsylvania. Based on these contacts, the District Court concluded that it could properly exercise personal jurisdiction over Dot Com and that Zippo's cause of action had arisen out of Dot Com's forum-related conduct in the case. The *Zippo* sliding scale analysis continues to be used by the courts as a framework for analyzing personal jurisdiction issues in the Internet context.

The foregoing cases indicate that a lawyer or law firm may be subject to the jurisdiction of another state based upon Internet related activities. Assuming sufficient contacts exist for the exercise of personal jurisdiction by a state, a state may take civil, criminal action or even disciplinary action against a lawyer or law firm for unauthorized practice of law or improper solicitation of prospective clients as defined by that state's laws based solely upon Internet contacts.

SUMMARY

The Task Force recognizes that there are serious constitutional issues in attempting to enforce Pennsylvania's legal ethics rules on lawyers who do not practice,

and who are not admitted to practice, in Pennsylvania. These issues include due process personal jurisdiction issues and First Amendment commercial speech issues. It remains to be seen how far revised Rule 8.5 may reach to a non-resident lawyer where the principal contact with the state is through a website.

In the absence of sufficient contacts necessary to satisfy the Constitution, there may not be a meaningful means of compelling compliance with Pennsylvania's rules governing lawyer advertising by out-of-state lawyers who advertise through websites given the global nature of the Internet and the geographical limitations on the regulation of the practice of law. However, where there are sufficient contacts in Pennsylvania – particularly where such websites are successfully soliciting cases of Pennsylvania residents or to be handled in Pennsylvania courts – the lawyers who do comply with Pennsylvania's rules of ethics are substantially disadvantaged and the rules intend to protect the public against misleading advertising are flaunted. The Task Force recommends that the Disciplinary Board actively pursue those offenders and test the courts' willingness to subject them to proper rules of conduct.

III. CONCLUSIONS AND RECOMMENDATIONS OF THE TASK FORCE

The Task Force proceeds from the proposition, well supported by the many oral and written communications received from PBA members across the state and the public, that there is widespread disappointment with the current state of attorney advertising, particularly television advertising, and that the organized bar should support reforms designed to both restore some measure of dignity and professionalism to such advertising, and also serve to bring the regulation of lawyer advertising current with modern computer-based means of client solicitation. There also is a perception among lawyers that there is no point in reporting apparent violations of the present advertising

rules because the disciplinary authorities lack either the resources or the resolve to pursue them absent clear and demonstrable client injury. At the same time, the Task Force is fully cognizant of the judicially recognized constitutional protections afforded commercial speech, including the fact that the ethics rules are not designed to force lawyer advertisements or solicitations to be “dignified.”

As part of its due diligence, the Task Force has examined various proposed and recently enacted lawyer advertising rules in other states. We note that the Pennsylvania rules governing attorney advertising already contain restrictions that have been the topic of discussion and recent rule additions in other states. For example, this state’s version of Rule 7.2 prohibits advertisements where a non-client portrays a client, advertisements that re-enact events or pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization. Similarly, endorsements by celebrities or public figures are prohibited, as are paid endorsements absent disclosure that the endorsee is being paid. The rule also prohibits the use of non-lawyers to portray lawyers. Fictitious entities cannot be used to portray law firms, nor may a fictitious name be used to falsely suggest that lawyers are associated together in a law firm when in fact they are not.

However, the Task Force, during its discussions, came to the conclusion that Rule 7.1, which was simplified in 2005 to conform to the ABA Model Rule, may have been rendered too vague and fails to provide meaningful guidance beyond the fundamental prohibition against false or misleading advertising. Because the previous form of Rule 7.1 provided more specificity, the Task Force recommends a return to the earlier version of Rule 7.1. The Task Force wishes to emphasize, however, that the examples of statements

that may be misleading in Rule 7.1(b) are illustrations only and are not intended to be a per se or prophylactic ban on such statements.

The Task Force also believes it would be useful to practitioners and provide greater protection to the public to adopt additional guidance under Rule 7.2 (Advertising) that will help to minimize the incidence of false or misleading advertising, and suggests consideration of the following specific prohibitions that have been adopted in other jurisdictions:

() No advertisement or public communication shall include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;

() No advertisement or public communication shall include the portrayal of a judge;

() No advertisement or public communication shall be made to resemble legal documents;

() No advertisement or public communication shall utilize a nickname, moniker, motto, domain name or trade name that misleadingly implies ability to obtain favorable results in a matter.⁵⁴

⁵⁴ Without limiting the questionable nicknames that this amendment would attempt to address, other states have frowned upon, for example, advertisements touting the “Pit Bull Lawyers”. A court challenge to the New York rule amendments is being mounted by a law firm that solicited cases by calling themselves “the Heavy Hitters”.

1. Comparative and Superlative Advertising

There has been substantial controversy, particularly in New Jersey, over what has been referred to as “comparative” or “superlative” advertising.⁵⁵ Such advertising typically consists of ratings and quasi-awards ranging from those peer review designations traditionally issued by Martindale-Hubbell to *The Best Lawyers in America* and more recently, “*Super Lawyers*,” an annual listing of lawyers appearing in a publication by Law & Politics, a division of Key Professional Media, Inc.⁵⁶

In July 2006, the New Jersey Supreme Court Committee on Attorney Advertising concluded in Opinion 39 that lawyers could not advertise their selection by publications such as *Super Lawyers* on the ground that such designations are inherently misleading to the public. The Committee opinion prohibited lawyers from advertising in ratings publications predicated upon peer review surveys, such as *The Best Lawyers in America* and *Super Lawyers*, which the Committee concluded publish ratings “designed for mass consumption” that can create an unjustified expectation of results for potential clients. According to the Committee, they target consumers directly with, in effect, comparative advertising of lawyers presented in a faux journalistic style that can be misleading.

The Task Force notes that bar ethics committee opinions in Pennsylvania and elsewhere have concluded that peer review ratings are not inherently misleading to consumers, if the advertisements fairly and accurately reflect the process by which the ratings are generated, and lawyers touting their appearance in such ratings do not misstate or inflate their significance in a manner that would amount to a false or misleading

⁵⁵ “The Ratings Game,” *ABA Journal* at 27 (Jan. 2007).

⁵⁶ According to *Super Lawyers*, the publication employs a multi-step peer review selection process “evaluating quality in the most objective possible terms and verifying and validating its data. The only way a lawyer can be listed in a *Super Lawyers* magazine is through this selection process. The determination of whether a lawyer will be placed on the *Super Lawyers* list is independent of advertising or any other payments.”

communication within the meaning of Rule 7.1. As of the submission of this Report, the New Jersey ethics opinion is unique and the subject of a vigorous federal court challenge.⁵⁷

Subsequent to the issuance of Opinion 39, New York incorporated into its disciplinary rules, effective February 1, 2007, an allowance for advertising of “bona fide professional ratings.”⁵⁸ The Task Force endorses such a clarification to the advertising rules, with the explanatory comment that comparative advertising of this sort cannot be contingent upon a lawyer or lawyer firm’s payment for advertising space in the publication or other financial contribution. Thus, under proposed amended Rule 7.1(c), an advertisement or public communication may contain statements that compare a lawyer’s services with the services of other lawyers so long as the comparison can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated. The new proposed supporting Comment language follows:

New Comment []: While comparative advertising, such as peer ratings, may be useful to consumers of legal services, such advertising is misleading if the rating is contingent, in whole or in part, upon financial contributions or other illegitimate means. In addition, there is concern that such ratings may be misleading if based upon purely subjective criteria. This concern is reduced where the advertising discloses in plain terms the criteria employed and selection process. The attorney who employs such

⁵⁷ See ABA/BNA Lawyers’ Manual on Prof. Conduct, Vol. 23, No. 4 at p. 89 (Feb. 21, 2007).

⁵⁸ “Superlawyers, Best Lawyers Buoyed by N.Y. Advertising Rule,” *The Legal Intelligencer Online* (Jan. 11, 2007).

advertising must be prepared to fully support the statements with the material underlying facts relied upon to draw the comparison.

2. Application to Foreign Lawyers Soliciting Residents of Pennsylvania

The Task Force recommends that foreign lawyers who actively solicit Pennsylvania residents via legal advertising be subject to the same restrictions imposed upon Pennsylvania lawyers. This requirement is consistent with the obligations imposed by Rule 8.5 (Disciplinary Authority: Choice of Law) as amended.

The provisions of this rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who actively solicit retention by residents of this State. Current Rule 8.5 extends jurisdiction over out-of-state lawyers to the extent that is practicable and probably constitutional, and the Task Force recommends that it be preserved in its current form and more vigorously enforced.

3. Matters Considered But Not Recommended

In view of the attention given to recent amendments to the New York advertising rules,⁵⁹ it should be noted that the Task Force considered but does not recommend imposing the requirement that every advertisement other than those appearing in a radio

⁵⁹ See N.Y.C.R.R. Sec. 1200.1, et seq. The complete text of the New York rules can be found at the web site of the Office of Court Administration: http://www.nycourts.gov/rules/attorney_ads_amendments.shtml, both in a “clean” version as well as a redline version that shows changes from the draft previously circulated for public comment. See “Appellate Divisions Release New Lawyer Advertising Rules,” *New York Law Journal*, Jan. 22, 2007. The New York rules originated from a New York State Bar Association Task Force on Lawyer Advertising, and were supported by, among other the New York Academy of Trial Lawyers. “New York Trial Lawyers’ Bar Backs Tougher Rules for Attorney Ads,” 185 N.J. L.J. 255 (July 24, 2006); “Lawyers advertising: Rules change, debate continues,” *Bar Leader*, July-August 2006 at 6. The proposals were thereafter substantially revised following a comment period. “Attorney Ad Rules Spark Unusual Collaboration Between Judges, Bar,” *The Legal Intelligencer Online* (Jan. 30, 2007).

or television ad be labeled “Attorney Advertising” on the first page, or on the home page in the case of a Web site. Such a requirement would, in the Task Force’s view, present problematic First Amendment issues, since other service providers are not subject to any such mandate and those who seek out attorney Web sites are necessarily seeking information about the lawyers or law firm in question.

The Task Force notes that New York also adopted a new definition of advertising, as follows:

“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.”

The Task Force is of the view that a definition of advertising might be helpful as a foundation for application of the rules in this area. However, it cannot endorse at this time a wholesale exception for communications to existing clients, because such communications should generally conform to the same standards as those employed to solicit new or former clients.

In addition, the Task Force considered but does not endorse at this time a general prohibition or “blackout” on the solicitation of personal injury or wrongful death cases for thirty (30) or more days following the incident giving rise to the claim, as well as a corresponding moratorium directed to lawyers or firms representing actual or potential defendants or entities that may defend and/or indemnify defendants. Not only do such prohibitions present problematic First Amendment issues, they also potentially conflict with the obligations of insurance providers to provide prompt claims handling and

funding for covered health care expenses and property losses. The Task Force instead urges that the organized Bar and the Office of Disciplinary Counsel be vigilant in their adherence to, and enforcement of, Rule 7.3 (Direct Contact with Prospective Clients), which provide as follows:

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

- (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;
- (2) the person has made known to the lawyer a desire not to receive communication from the lawyer, or
- (3) the communication involves coercion, duress, or harassment.

While an arbitrary no solicitation period would likely reduce unwanted and distasteful post-accident solicitation practices, there are many occasions where clients and their personal representatives will desire to act promptly to secure counsel to ensure either the preservation of evidence at an accident scene, the investigation of the facts and circumstances underlying the accident or to confirm interim provisions for funding of medical care. Moreover, the efforts to “level the playing field” by applying the no contact period to lawyers and their agents on the defense side would not encompass or extend to preclude claims adjustors who are nonlawyers from engaging in such activity because the Rules of Professional Conduct do not regulate their independent conduct.

Accordingly, the Task Force makes no recommendation concerning a moratorium on unsolicited communications with personal injury claimants or their representatives following an accident, but rather urges more vigilant efforts to mandate compliance with Rule 7.3(b).

The Task Force also considered lawyer advertising rule provisions in other states that prohibit the portrayal of a judge. The commonly expressed concerns about the portrayal of a judge in television advertising is that it may be presented in an undignified manner or mislead the viewer into thinking that the courtroom setting is a real proceeding and the actor portraying the judge is a real judge. This concern is perhaps enhanced in a jurisdiction, such as Pennsylvania, where cameras are not allowed in the courtroom. Recognizing that such portrayals may present these and other valid concerns, the Task Force cautions that their use presents the potential for rule violation, but does not recommend a general prohibition. Lawyer advertising that includes a courtroom setting, including the portrayal of a judge, may help to showcase and inform the public concerning the practice areas and talents of lawyers who wish to emphasize their trial skills, without running afoul of the general guidance in the advertising rules.

The Task Force also focused on various problems presented by lawyer advertising designed for the sole objective to solicit clients for referral to other lawyers for purposes of actually handling the matter. Such advertising is especially troublesome under circumstances where the advertising lawyer lacks competence in the field or is not authorized to practice in the jurisdiction where the retention is solicited, or both. The Pennsylvania version of Rule 7.2(k) provides, unlike the ABA Model Rule, that “A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising

to other lawyers.” The Task Force urges that this prohibition on solicitation solely as a pretext for referral be maintained and enforced more rigorously.

4. Conclusions and Recommendations

After due deliberation, the Task Force on Lawyer Advertising makes the following recommendations, subject to the approval of the Board of Governors and of the House of Delegates of the Pennsylvania Bar Association, and to be forwarded to the Supreme Court of Pennsylvania for consideration:

Changes in Rules of Professional Conduct Governing Lawyer Advertising

1. Rule of Professional Conduct 7.1 (Communications Concerning a Lawyer’s Service) shall be amended to read as follows:

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:

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

(b) is likely to create an unjustified expectation about results the lawyer can achieve, such as the amount of previous damage awards, the lawyer’s record in obtaining favorable verdicts or client endorsements, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated as of the date on which the advertisements is published or disseminated; or

(d) contains subjective claims as to the quality of legal services or a lawyer's credentials that are not capable of measurement or of verification.

New Comment to support amended paragraph (c) above:

[] While comparative advertising, such as peer ratings, may be useful to consumers of legal services, such advertising may be deemed misleading if founded upon purely subjective criteria or where the rating is contingent, in whole or in part, upon financial contributions or other illegitimate means. This concern is reduced where the advertising discloses in plain terms the criteria employed and selection process. The attorney who employs such advertising must be prepared to fully support the statements with the material underlying facts relied upon to draw the comparison.

2. Rule of Professional Conduct 7.2 (Advertising) shall be amended to include the following paragraphs:

() No advertisement or public communication shall include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;

() No advertisement or public communication shall be made to resemble legal documents.

() No advertisement or public communication shall utilize a nickname, moniker, motto, domaine name or trade name that implies ability to obtain favorable results in a matter.

3. Rule of Professional Conduct 7.3 (Direct Contact with Prospective Clients) shall be amended to permit direct contact with another lawyer for the purpose of soliciting professional employment. In addition, the rule should include the following subparagraphs:

(c) The following language shall be clearly visible in the body of any targeted direct mail or electronic communication to a prospective client:

“The choice of a lawyer is an important decision and should not be based solely on advertisement.”

(d) A solicitation directed to a recipient in this State shall be subject to the following conditions:

(1) A true and correct copy of the solicitation shall be promptly filed with the Disciplinary Board of the Supreme Court of Pennsylvania, or with such other entity that is approved and sanctioned by the Supreme Court of Pennsylvania.

A filing shall consist of:

(i) A copy of the solicitation;

- (ii) A transcript of the audio portion of any recorded solicitation;
 - (iii) If the solicitation is in any language other than English, an accurate English translation;
- (2) Such solicitation shall contain no reference to the fact of filing.
- (3) If a solicitation is directed to a pre-determined 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 two 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 subdivision shall not apply to:
- (i) A solicitation directed or disseminated to another lawyer, relative, close friend, 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 a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant.

4. Enforcement of the Rules of Professional Conduct

In order to augment the enforcement of the Rules of Professional Conduct, the Task Force on Lawyer Advertising recommends that:

- a. Print, broadcast, or unsolicited direct mail, Internet or e-mail advertising shall be submitted or electronically filed in a central location designated by the Supreme Court of Pennsylvania.⁶⁰ If the advertising was issued in a foreign language, the submission shall include an English translation.
- b. There should be random sampling or audit of attorney advertisements for compliance with the Rules of Professional Conduct.
- c. The random sampling or audit shall be conducted by an organization or group approved by the Supreme Court of Pennsylvania. Such organization or group shall be authorized to refer instances of

⁶⁰ The Task Force understands that an across the board filing requirement would be both burdensome on lawyers and present a daunting task for a reviewing authority, and further recognizes that certain forms of advertising are more prone to present serious concerns under the governing rules. The Task Force therefore suggests crafting the scope of the filing requirement to exempt from filing any print or other advertisements that are identical in all material respects to previously filed advertising, as well as simple and routine announcements of, for example, the hiring and promotion of attorneys and the relocation of law offices, the content of which advertisements seldom gives rise to claimed violations of the lawyer advertising rules.

possible improper advertisement to the Disciplinary Board of the Supreme Court, for further investigation. Any disciplinary action would be the responsibility of the Disciplinary Board of the Supreme Court of Pennsylvania.

- d. The Pennsylvania Bar Association shall cooperate with the Supreme Court of Pennsylvania in the implementation of this proposal. In addition, local bars are encouraged to cooperate with and support this proposal.

5. Educational and Public Relations Activities

- a. That the PBA formulate and disseminate to its membership guidelines for proper and dignified advertising, such as adopted by the Monroe County (N.Y.) Bar Association.
- b. That the PBA conduct educational seminars at its various meetings and communicate through its publications information regarding the scope of advertising and solicitation that is consistent with the Rules of Professional Conduct.
- c. That the PBA present an award at the annual Conference of County Bar Leaders recognizing

legal advertising that both conforms to the Rules of Professional Conduct and also effectively promotes the legal profession in the eyes of the public.

Respectfully submitted,

Thomas L. Cooper - Co-Chair

H. Robert Fiebach - Co-Chair

Edgar M. Snyder - Vice-Chair

Subcommittee Chairs

Kevin M. French
Marvin J. Rudnitsky
Carol Ann Shelly
Thomas G. Wilkinson

Task Force Members

Karen M. Balaban
Timothy S. Burns
Alfred Jones, Jr.
Howard F. Messer
Hon. Joseph A. Del Sole
Robert H. Davis, Jr.
Daniel Joseph
Donald C. Nokes, Jr.
Donald J. Martin
James L. Rosenbaum
Craig E. Simpson
Andrew F. Susko

Biographies of Task Force Members

Thomas L. Cooper - Co-Chair

Mr. Cooper is a Past President of the Pennsylvania Bar Association, The Allegheny County Bar Association, and the Academy of Trial Lawyers of Allegheny County. For 20 years, he was Adjunct Professor of Law at the University of Pittsburgh School of Law, teaching trial advocacy. He is a Fellow of the American College of Trial Lawyers. He served on the Supreme Court of Pennsylvania's Civil Procedural Rules Committee, as well as its Continuing Legal Education Board. He has received the Pennsylvania Bar Medal, the highest achievement award given by the PBA. He also received the Judge Joseph Weis Distinguished Service Award from the Academy of Trial Lawyers of Allegheny County. He is the author of the publication, *Pennsylvania Civil Trial, Law, Tactics and Forms*.

Mr. Cooper is a *cum laude* graduate of Dartmouth College, and of the University of Pittsburgh School of Law, where he was Articles Editor of the Law Review. Mr. Cooper practices in Pittsburgh with the firm of Cooper & Ziegler.

Robert Fiebach - Co-Chair

Mr. Fiebach is a Past President of the Pennsylvania Bar Association, and has served as Chairman of its Professional Liability Committee and Bar Trust and Insurance Fund. He has served in various capacities with the Philadelphia and American Bar Association, including on the Board of Governors of the ABA from 1997-2000 and as Pennsylvania State Delegate from 2001-2007. He is a Fellow of the American College of Trial Lawyers. He served on the Pennsylvania Supreme Court Advisory Committee on Appellate Court Rules, as well as numerous other positions, with the state and federal court. He has written and lectured extensively on legal topics.

Mr. Fiebach received a B. S. Econ., Wharton School, University of Pennsylvania and an L. L. B., cum laude, from the University of Pennsylvania Law School, where he was research editor of the Law Review. He was a law clerk to Judge John Biggs, Jr., Chief Judge, United States Court of Appeals for the Third Circuit.

Mr. Fiebach is a senior member of the Commercial Litigation Department of Cozen O'Connor in Philadelphia.

Edgar M. Snyder - Vice Chair

Mr. Snyder is President of Edgar Snyder and Associates and is a graduate of Penn State University and the University of Pittsburgh Law School. Mr. Snyder is a member of the American Trial Lawyers, Pennsylvania Trial Lawyers, and Allegheny County Bar Association. He is a former member of the original Pennsylvania Advertising Task Force 1991.

Karen M. Balaban

Ms. Balaban is a sole practitioner who practices in Harrisburg, Pennsylvania. She is a graduate of Indiana University of Pennsylvania and of the Duquesne University School of

Law. She served as President of the Dauphin County Bar Foundation, and was a member of the Board of Governors of the Pennsylvania Bar Association. She is the President of the Pennsylvania Bar Foundation. Her areas of practice include administrative law, election law, zoning and workers' compensation defense.

Timothy S. Burns

Mr. Burns is a sole practitioner in Ebensburg, Cambria County, Pennsylvania. His practice includes family law, municipal matters, civil litigation and criminal defense. He currently serves as Treasurer of the Young Lawyers Division of the Pennsylvania Bar Association and is Chair of the Young Lawyers Division of the Cambria County Bar Association.

Timothy Conboy

Mr. Conboy is the administrative partner in the firm of Caroselli, Beachler, McTiernan & Conboy. He received his B. S. in 1979 from Allegheny College in Meadville, Pennsylvania and his J. D. in 1982 from the University of Pittsburgh. Mr. Conboy is a former Allegheny County Assistant District Attorney. He is currently the Treasurer of the Pennsylvania Trial Lawyers Association, and former Chair of the Workers' Compensation Section. He is a former Chairperson of the Allegheny County Bar Association Workers' Compensation Section. He frequently lectures and writes on workers' compensation and personal injury issues to professional and lay groups.

Robert H. Davis, Jr.

Mr. Davis is in the solo private practice of law in Harrisburg, PA. His practice includes representation and advice to lawyer respondents, judicial officers, health professionals, government officers and others in Pennsylvania and West Virginia before professional and judicial discipline boards and the State Ethics Commission. He counsels law firms, lawyers, judges, government officials and employees and other professionals on questions of professional responsibility, ethics, malpractice avoidance and the law of lawyering.

Mr. Davis is an adjunct professor at the Widener University School of Law's Harrisburg Campus, teaching professional responsibility and an advanced ethics problems seminar. He is the 2004 recipient of the Adjunct Faculty Distinguished Service Award from Widener. He served as Deputy Chief and as Acting Chief Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania until August 1992. Prior to coming to Pennsylvania, he was counsel to the West Virginia State Bar and served as the first staff Assistant General Counsel for the State Bar of Georgia. He is a graduate of the University of Georgia School of Law (J. D. 1972) and Vanderbilt University (B.A. 1967).

Judge Joseph A. Del Sole (Ret.)

Joseph a. Del Sole was a Superior Court Judge from 1984 until September 1, 2006, and served as the Court's President Judge from 2001 to 2006. From 1978 until 1984, he was a Judge on the Allegheny County Court of Common Pleas. From 1965 until assuming the bench, he was in private practice specializing in civil litigation and is a member of the Academy of Trial Lawyers of Allegheny County.

He received his B. S. M. E. From Carnegie Institute of Technology (now Carnegie Mellon University), his LL.B from Duquesne University School of Law, and his LL. M. From University of Virginia School of Law. He has completed the National Judicial College's course on Civil Mediation and is an Adjunct professor at Duquesne University Law School teaching Pennsylvania Civil Procedure.

During his tenure on the bench, Judge Del Sole was the First Chair of the Judicial Conduct Board, and served on the Appellate Court Rules Committee. He was appointed Chair of the Supreme Court's Ad Hoc Committee reviewing post-trial practice in civil and criminal litigation, and the Court's Ad Hoc Committee establishing special procedures to resolve litigation resulting from silicone gel breast implants. He has lectured at the Pennsylvania School for New Judges and served as vice chair of the Supreme Court's Committee on Judicial Education.

Judge Del Dole is now "Of Counsel" to the Pittsburgh law firm Del Sole Cavanaugh Stroyd LLC.

Kevin M. French

Mr. French is a partner with Hartman Underhill & Brubaker LLP in Lancaster, Pa. He practices primarily in the field of litigation. Mr. French graduated with distinction from Pennsylvania State University and from the Dickinson School of Law. He is a member of the American, Pennsylvania and Lancaster Bar Associations. He has served as Co-Chair and Co-Vice Chair of the PBA Committee on Legal Ethics and Professional Responsibility. He was officially appointed to the Committee in 1986, and has continued to be very active with the Committee since. Mr. French is a contributing author to the Pennsylvania Ethics Handbook, and has written several articles and lectured extensively on legal ethics issues.

Alfred Jones, Jr.

Mr. Jones is a partner with Delafield, McGee, Jones & Kauffman, P.C., in State College, Pennsylvania. He practices in the areas of real estate, construction and development, commercial loans, business organizations and municipal law. He is a member of the Pennsylvania and Centre County Bar Associations. Mr. Jones is a past President of the Centre County Bar Association and the immediate past President of the Conference of County Bar Leaders, has served as Vice-Chairman of the Pennsylvania Bar Association Lawyer Assistance Committee, and is a member of its Real Estate Law, Business and Banking Law Sections. He currently serves on the Board of Lawyers Concerned for Lawyers, Centre County Community Foundation, Centre County United Way and the Community Help Centre of State College. He received a J.D. degree from the Duquesne University School of Law in 1970, and a B.A. from Dickinson College in 1965.

Daniel Joseph

Daniel Joseph, a partner in the New Kensington law firm of George & Joseph serves as secretary of the Pennsylvania Bar Association. A member of the PBA House of Delegates, Mr. Joseph has served on the PBA Board of Governors. Her serves on the PBA Legislative and Government Affairs and Judicial Independence committees.

Additionally he is on the board of directors of the PABAR-PAC. Mr. Joseph is a past president of the Westmoreland Bar Association and is President of the Westmoreland Bar Foundation.

Mr. Joseph served as chairman and as a member of the Pennsylvania Supreme Court Disciplinary Hearing Committee 4.13. He is a past member of the boards of directors of the Community Foundation of Westmoreland County and Laurel Legal Services. Mr. Joseph is a graduate of Mount Union College and Duquesne University School of Law.

Donald J. Martin

Mr. Martin is a sole practitioner in Norristown, Pa., where he has practiced in the fields of civil, criminal and administrative litigation since 1973. He received his B. A. in 1970 from the University of Pennsylvania, and his J.D. in 1973 from the University of Chicago Law School. Since 1979, Mr. Martin has limited his practice to appellate matters, motions and providing assistance to other attorneys in the preparation and trial of complex cases. Mr. Martin also serves the Court of Common Pleas of Montgomery County as Appointed Judicial Officer for Complex Litigation. He is a member of the Montgomery, Pennsylvania and American Bar Associations and has been a member of the House of Delegates of the Pennsylvania Bar Association since 2001. He served as Chair of the Solo and Small Firm Practice Section of the Pennsylvania Bar Association from 2002 to 2004.

Howard F. Messer

Mr. Messer is past president of the Pennsylvania Trial Lawyers Association; past president of the Academy of Trial Lawyers of Allegheny County; and past president of the Western Pennsylvania Trial Lawyers Association. He served as a member of the Board of Governors of the Association of Trial Lawyers of America from 1994-1997, and was a founding Master of Pittsburgh's first American Inns of Court.

Mr. Messer was a professor of law in trial advocacy at the University of Pittsburgh School of Law from 1986 until 2005 and was instructor for the NITA Advanced Advocacy Seminar at the University of Pittsburgh School of Law. In May of 2002, Mr. Messer was appointed to the Commonwealth of Pennsylvania Patient Safety Authority which was created to promote the safety of all patients in the health care system in Pennsylvania. He is a Fellow of the American College of Trial Lawyers. In 2005, Mr. Messer was appointed by the Supreme Court of Pennsylvania to the Civil Procedural Rules Committee.

Donald Charles Nokes, Jr.

Mr. Nokes is a sole practitioner who practices in Johnstown, PA.

Vincent J. Quatrini, Jr.

Mr. Quatrini, a partner in the Greensburg firm of QuatriniRaffertyGalloway, concentrates his practice in the representation of claimants in workers' compensation cases. He is a past chairman of the Workers' Compensation Law Section of the Pennsylvania Bar Association. Since the late 1990s, he has served on the Workers' Compensation Rules

Committee, appointed by the Secretary of Labor and Industry. Mr. Quatrini is one of a statewide team of attorneys who co-authors (since 1992) the publication *Pennsylvania Workers' Compensation Practice & Procedure*. He is a member of the Westmoreland County and Pennsylvania Bar Associations, the Westmoreland County Academy of Trial Lawyers, and past president of the Westmoreland County Bar Association.

James J. Rosenbaum

Mr. Rosenbaum practices in Philadelphia, Pa. He graduated from the Wharton School, University of Pennsylvania in 1956 and the University of Pennsylvania Law School in 1959. He has extensive trial experience over the years having tried matters in many areas for injured plaintiffs, including medical malpractice, defective products and premises liability. His interest and involvement with lawyer advertising started in the early 1990's.

Marvin J. Rudnitsky

Mr. Rudnitsky is the managing partner of Rudnitsky & Hackman, L.L.P., in Selinsgrove, Pennsylvania. Mr. Rudnitsky was an honors graduate from Penn State in 1964. He was a member of the Law Review at the University of Pittsburgh School of Law. His experiences include serving as an Army lawyer and military judge, as an assistant attorney general for the Pennsylvania Department of Justice, and as Chief Counsel in the Pennsylvania Department of Commerce. He is the Immediate Past Chair of the Disciplinary Board of the Pennsylvania Supreme Court.

Mr. Rudnitsky is a Past Chair of the PBA Solo and Small Firm Practice Section, and is Immediate Past President of the Pennsylvania Bar Institute. He also served as chair of the Estates Law Committee of PBI providing curriculum input to its professional staff on needed courses.

Carol Ann Shelly

Carol Shelly has been with the law firm of Mellon Webster & Shelly (formerly Mellon Webster & Mellon) since June 4, 1990. She received her B.A. from Gettysburg College, majoring in Political Science, with an emphasis in Asian History. Ms. Shelly received her law degree from Widener University School of law in 1986. From law school, Ms. Shelly went directly to the Bucks County Public Defenders Office, where she tried numerous criminal cases to verdict, ranging from shoplifting charges to first degree murder cases. In 1990, Carol joined the Mellon firm. She specializes in plaintiff's personal injury cases, having tried numerous professional negligence cases to verdict. Ms. Shelly has lectured for the Pennsylvania Bar Institute and the Pennsylvania Trial Lawyers Association. Ms. Shelly is a member of the Bucks County Bar Association, the Pennsylvania Bar Association, the American Bar Association, the Pennsylvania Trial Lawyers Association and the American Trial Lawyers Association. Ms. Shelly is past chair of the Civil Litigation Section of the Bucks County Bar Association; Past President of the Bucks County Bar Association; a member of the House of Delegates of the Pennsylvania Bar Association; a former member of the Board of Governors of the Pennsylvania Trial Lawyers Association and a former member of the Board of the Pennsylvania Association of Criminal Defense Lawyers.

Craig Evan Simpson

Mr. Simpson is a graduate of Washington and Jefferson College, and earning his J. D. from Duquesne University School of Law. He served for two years as an Assistant District Attorney in the Trial Division of the Allegheny County District Attorney's Office, and was employed by the Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania for seven years. Since 1986, Mr. Simpson has been in private practice, concentrating in attorney ethics and disciplinary law. Mr. Simpson is a member of the Allegheny County Bar Association, the Pennsylvania Bar Association, the Association of Professional Liability Lawyers, and the Western Pennsylvania Trial Lawyers Association, and has served on the Pennsylvania Attorney Discipline Study Commission.

Thomas G. Wilkinson

Mr. Wilkinson is a member of Cozen O'Connor in Philadelphia, where he practices in the Commercial Litigation Department and Chairs the firm's ADR Practice Group. He is the PBA Zone I Governor and a past Chair of the Civil Litigation Section. He served as Chair or Co-Chair of the Legal Ethics and Professional Responsibility Committee from 1993-2004. He is the Secretary for the Philadelphia Bar Association State Civil Litigation Section and is an active member of the Professional Guidance and Professional Responsibility Committees.

Mr. Wilkinson serves as the Secretary of the Pennsylvania Bar Institute. He is the editor of the *Pennsylvania Ethics Handbook*. He authors and edits ethics opinion summaries for publication in *The Pennsylvania Lawyer and Pennsylvania Bar News*. He is a Lecturer in Law at Villanova Law School, where he teaches professional responsibility, and he has written and lectured extensively on civil litigation and professional responsibility topics.

Andrew F. Susko

Mr. Susko is a partner in the Litigation Department and chairs the Life, Health, and Disability and Insurance Fraud Practice Groups of White and Williams, L.L.P., in Philadelphia.

Mr. Susko is a former President of the Pennsylvania Defense Institute, and has a longtime commitment to the Pennsylvania and Philadelphia Bar Associations and the Philadelphia area *pro bono* community. He is currently President-Elect of the Pennsylvania Bar Association and will become President in June of 2007. He is a Past Chair and present member of the PBA House of Delegates, 1998-99, and a past Chair of the PBA's Young Lawyers Division, and is serving in his third term on the PBA's Board of Governors. He is also a past Chair of the Philadelphia Bar Association's Young Lawyers Section and later served as an elected member of the Philadelphia Bar's Board of Governors. Mr. Susko received his Bachelor of Science degree in Economics in 1978, graduating *summa cum laude*, from Florida State University. He received his J.D. From Villanova University School of Law in 1981 where he served as a member of the Law Review and was selected to its Board of Editors.