Legal Ethics Challenges for the Mass Disaster Plaintiff's Lawyer

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In 1997, the American Bar Association (ABA) launched a project to review and reassess the 1983 ABA Model Rules of Professional Responsibility with the objective of recommending changes where needed and addressing issues raised by technological developments and their impact on the delivery of legal services. The resulting report was released to the ABA House of Delegates and the public in October 2000 and was debated in the ABA House of Delegates in the Summer of 2001. A revised and updated ABA Model Rules was later approved. A total of 41 states and the District of Columbia have adopted some version of the ABA Model Rules as their Rules of Professional Conduct. Other states, such as New York, are Model Code States, which, however, incorporate many of the provisions of the ABA Model Rules.

This paper will discuss those provisions of the current ABA Model Rules and New York's Code of Professional Responsibility which are of special interest to plaintiffs' lawyers involved in mass disasters. Reference will also be made to various state ethics opinions and case law interpreting these rules. The reader is cautioned that this paper is only a summary discussion, and the reader must conduct research of his or her own state's rules or code provisions and relevant case law and ethics opinions for appropriate guidance. This paper does not constitute legal advice.

1. Responsibility of Law Firms to Ensure Lawyers' Conformity With Rules

In 1999, New York became the first state to adopt a disciplinary rule requiring that law firms, as an entity, make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules. This rule is embodied in Disciplinary Rule (hereafter "DR") 1-104A. A law firm that has no measures in place to ensure compliance with the disciplinary rules is in violation of this rule. The ABA's new Model Rule 5.1(a) similarly imposes on law firms the obligation to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct, and imposes this obligation on the partners of a law firm and other lawyers in the firm who have "comparable managerial authority." The comment to the proposed rule stated that firms should establish policies and procedures for detecting and resolving conflicts of interest, managing accounts for client funds, ensuring proper supervision of inexperienced lawyers, and requiring continuing legal education in professional ethics, and, in large firms, that thought should be given to establishing a procedure for junior lawyers to make confidential referrals of ethical problems to a designated partner or special committee.

2. Contingency Fees and Sharing of Fees

Contingency fees continue to be allowed in tort cases under ABA Model Rule 1.5(c). They are still prohibited in domestic relations and criminal cases. One new change to Model Rule 1.5 is to explicitly require that the contingency fee retainer be reduced to a writing signed by the client. The retainer must, as has been the law, state the method by which the fee is to be determined, including whether the fee varies in the event of settlement, trial or appeal, and whether expenses are to be deducted before or after calculation of the fee. Another new change is to require that the written agreement clearly notify the client of any expenses for which the client is liable, whether or not the client prevails. Upon conclusion of the contingent fee matter, the lawyer must provide the client with a written statement explaining the outcome and, if there is a recovery, showing the method of distribution of the collected funds.

Subsection (e) of Model Rule 1.5 simplifies the previous rule regarding division of fees between lawyers who are not in the same firm. Under the prior rule, a division of fees was proper only if the division was in proportion to the services performed by each lawyer, or if by written agreement with the client, each lawyer assumed full, joint responsibility for the case. Under the new rule, the joint responsibility obligation is dropped, and a division of fees not linked to the proportion of services performed can occur as long as the client agrees in writing "(1)...to the participation of all lawyers involved, including the share each lawyer will receive; and (2) the total fee is reasonable." The comment to the new rule explained that a division of fees is appropriate when neither lawyer alone could serve the client as well as the association of the two lawyers. The comment presupposes, then, that in a referral situation the referral lawyer is still providing valuable service to the client and is referring the case to one with more specialized experience. The comment explained that the elimination of the "joint responsibility" obligation was justified by the fact "that it is unrealistic to expect that lawyers who are not themselves competent to handle the matter can adequately supervise the lawyer performing the work, as seems to be the current interpretation of what joint responsibility entails.

The applicable New York Code rule, DR2-107, continues to be more stringent. A division of fees is allowed only after full disclosure to the client and the division is in proportion to the respective services performed or, in a writing to the client, the lawyers assume joint responsibility. Moreover, DR2-103A(2)(e) prohibits a lawyer from sending a written solicitation to a prospective client when the lawyer "intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel." The reader should be reminded that each state may interpret these rules on division of fees differently and courts may scrutinize the division of fees and the total fees very closely when minors are involved. *See, e.g., Estate of Brandon*, 902 P.2d 1299 (Alaska Sup. Ct. 1995) (in wrongful death settlement involving minor distributee Supreme Court remanded to trial court to review both the division of fees among counsel in light of the services performed and the total fees charged).

While states have rules which establish a maximum contingency fee that may be charged (e.g. 33 1/3% under New York rules), the fee must independently be reasonable in light of the difficulty of the work and the risks and uncertainties of eventual compensation. This author's firm, for example, will charge significantly less than a one-third fee in mass aviation disasters that involve international

travel. Under the Montreal or Warsaw Convention rules which are applicable to such litigations, the carrier is presumed liable for a passenger's injury or death and to be exonerated the carrier bears the burden of proving its nonnegligence. The applicable substantive law significantly eases the plaintiff's burden, and therefore, this author's firm believes that a reasonable contingency fee in such a case must be significantly less than the standard one-third.

It is noteworthy that numerous state bar ethics committees have rendered advisory opinions concluding that a contingency fee is inappropriate for services rendered in a "no fault" insurance benefits claim. These opinions note that a contingency fee is appropriate only when there is a realistic risk of nonrecovery. If the right to the benefits is uncontested, a contingency fee is not appropriate. *See, e.g.*, Utah Ethics Opinion 114, 1992 WL 685248 (Utah St. Bar, Feb. 20, 1992); State Bar of Georgia Opinion 32 (ABA/BNA Jan. 20, 1984); South Carolina Bar Opinion 853 (ABA/BNA undated); *Pops & Estrin P.C. v. Reliance Ins. Co.*, 562 N.Y.S.2d 914, 915 (N.Y. Civ. Ct. 1990)

Mass disasters often result in suits filed in a state other than where the plaintiff resides or other than where the plaintiff's lawyer practices law. Courts hold that the contingency fee cannot exceed the maximum fee allowed in the state in which the action is to be tried, regardless of where the attorney practices law. *See* State Bar of Michigan Opinion RI-122, 1992 WL 510814 (Mich. Comm. Prof. Jud. Eth. March 10, 1992). Also, where there is a division of fees, the total contingency fee charged may not exceed the maximum allowed in the state in which the action is pending. *Id*.

3. Conflicts of Interest When Representing Multiple Plaintiffs

Borrowing the doctrine of "informed consent" from medical malpractice law, the ABA proposed a new procedure in Model Rule 1.7 for resolving concurrent conflicts of interest when representing co-clients. A concurrent conflict of interest exists when representation of one client will be directly adverse to a co-client, or there is a "significant risk" that the representation of one or more clients will be "materially limited by the lawyer's responsibilities to another client...." In plaintiffs' aviation litigation, the potential for concurrent conflicts of interest exists when there is the prospect of representing both flight crew and passengers. In aviation and other mass disaster cases there may be the potential for concurrent conflicts when an attorney represents several unrelated plaintiffs from one accident who, however, disagree over litigation strategies, as, for example, conflicts of law positions. And, in wrongful death cases, there may be a conflict, or the potential for one, when one attorney represents the personal representative of the estate (who under most state laws is the only person with the statutory authority to bring suit) jointly with the statutory beneficiaries.

ABA Model Rule 1.7(a) provides that, unless Rule 1.7(b) is complied with, a lawyer shall not represent a client if the representation involves a "concurrent conflict of interest," as defined above. Under Model Rule 1.7(b), the lawyer may represent the co-clients only if (1) each affected client gives written "informed consent;" the lawyer reasonably believes he/she can provide competent representation to each affected client; the representation is not prohibited by law; *and* the representation will not involve the assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal. "Informed consent" is familiar to most tort lawyers from medical malpractice law, but is a new concept in professional responsibility rules.

"Informed consent" as defined by Mode Rule 1.0(e) "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

In wrongful death litigations, it is becoming increasingly common to encounter conflicts of interest among the surviving relatives of a decedent. Consider the conflicts of interest arising from the death of a divorced decedent where the second spouse, who is likely to be the Estate Personal Representative and the person with authority to sue for wrongful death, exhibits hostility to her deceased spouse's children from a prior marriage and wants to minimize their share of a settlement. Another potential conflict may be that dependent step-children of the deceased may recover wrongful death damages under one jurisdiction's damages law, but not under another potentially applicable law, and the plaintiff-personal-representative demands application of the law that deprives the step-children of recovery. The conflict of interest may not potentiate until time of settlement, when suddenly there is intense disagreement over who is a beneficiary or the fair apportionment of damages, all of which may be further complicated by the fact that the court has not selected the applicable damages law.

It is generally agreed that there is no *per se* rule against the same attorney representing the personal representative of the estate (in both his or her representative capacity and as a claimant) jointly with the other wrongful death claimants, and earning a fee on the total net recovery. *See, e.g., Holmes v. McClendon*, 765 S.W.3d 836, 843 (Ark. Sup. Ct. 2002); *Brewer v. Lacefield*, 784 S.W.2d 156, 159-60 (Ark. Sup. 1990); *Hurt v. Supr. Ct. of State of Arizona*, 601 P.2d 1329, 1334 (Ariz. Sup. 1979).

The Personal Representative under most state laws, is the person with authority to sue and contract for the services of an attorney. Because the personal representative is the statutory trustee for all of the wrongful death next-of-kin, his attorney has the obligation to protect the interest of all next-of-kin. *Leyba v. Whitley* 907 P.2d 172, 180 (N.M. Sup. 1995); *Jenkins v. Wheeler*, 316 S.E.2d 354, 357 (N.C. Ct. App. 1984); If the attorney is representing all claimant's interests fairly, and the individual beneficiaries still desire independent representation, the general rule is that the attorney for the estate representative is entitled to his full fee and the individual beneficiaries bear the cost of their separate representation. *Holmes, supra*, 76 S.W.2d at 843; *Brewer, supra*, 784 S.W.2d at 159.

Where, however, the attorney for the estate representative either fails to present or include the claim of a statutory beneficiary or, at his client's behest, adopts a claim that conflicts with the claim of an individual wrongful death beneficiary or estate heir, then the attorney may no longer represent the other wrongful death beneficiaries, and his fee will be reduced. At this point, the attorney's duty is to disclose the conflict and advise the individual claimants to obtain independent representation. *See Holmes, supra*, 76 S.W.2d at 843; *Estate of Catapane*, 759 So.2d 9, 11-12 (Fla. Ct. App. 2000); *Estate of Brandon*, 902 P.2d 1299, 1316-17 (Alaska Sup. 1995); *McTaggart v. Lindsey*, 504 N.W.2d 881, 884 (Mi. Ct. App. 1994); *Adams v. Montgomery, Searcy & Denney, P.A.*, 555 So.2d 957, 958 (Fla. Ct. App. 1990); *Johnson v. Village of Libertyville*, 502 N.E.2d 474 (Ill Ct. App. 1986).

In continuing to represent the estate representative and the wrongful death claimants in the face of a conflict, the attorney subjects himself to an action for malpractice. *Leyba v. Whitley*, *supra*, 907 P.2d at 181; *Estate of Brandon*, *supra*, 902 P.2d at 1315-16; *Jenkins v. Wheeler*, 316 S.E.2d 354 (N.C. Ct. App. 1984).

In wrongful death cases, the interests of all wrongful death claimants and the plaintiff-personal representative are typically one and the same – obtaining the largest recovery possible – and it is not until the apportionment of a settlement and payment of fees that those interests may diverge, requiring separate counsel. *See* Michigan Ethics Opinion R-10, 1991 WL 519849 (Mich. Prof. Jud. Eth. April 9, 1991) (the attorney for the personal representative must advocate the apportionment proposed by his client and advise nonconsenting beneficiaries to obtain independent counsel); *See also Floyd v. Shaw*, 830 S.W.2d 564 (Mo. Ct. App. 1992). In *Floyd*, the court noted that a fee-sharing agreement among multiple attorneys representing the wrongful death beneficiaries may be set aside when a conflict arises regarding apportionment, for otherwise an attorney, who believes that his fee is fixed, "may be less motivated to seek the largest possible share for his client." If, however, the personal representative, the adult beneficiaries and the guardian of any infant beneficiary all consent to a proposed apportionment, after full disclosure of any potential conflicts, the same attorney may continue to represent all. *See, e.g., Guardianship of Lauderdale*, 549 P.2d 42, 45 (Wash. Ct. App. 1976). The court, however is not bound to follow the plaintiff's proposed apportionment of a settlement. *See Baugh v. Baugh*, 973 P.2d 2020 (Kansas Ct. App. 1999).

While the attorney for the estate personal representative has an ethical duty to protect the interests of all potential statutory beneficiaries, when the plaintiff-personal representative can demonstrate that joint representation with other next-of-kin will harm plaintiff's case, the trial court may excuse the plaintiff's attorney from his duty to represent the interests of all next-of-kin and may even require separate trials for the next of kin. *See Roberts v. Gateway Motel of Grand Rapids, Inc.*, 377 N.W.2d 895, 898-99 (Mi. Ct. App. 1985) (the attorney for the plaintiff-personal representative, who was the mother of the decedent, was not obligated to represent the interests of decedent's father when the father's character was so unsavory and his relationship with decedent so minimal that his inclusion in the case was likely to harm plaintiff's claim for wrongful death damages).

The wrongful death lawyer must be ever vigilant against concurrent conflicts and err on the side of complete disclosure of any potential conflicts and suggesting independent representation whenever a potential conflict arises.

4. Lawyer Advertisements and Solicitations

Since 1977, there has been nothing short of a sea change in the business of the practice of law with the seminal decision *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), holding that lawyer advertisements are protected commercial speech. A year later, in *In re Primus*, 436 U.S. 412 (1978), the Court held that written solicitations in cases involving political or ideological issues were permissible. But, in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the same court ruled that sufficient state interests existed to justify a state's prohibition of in-person solicitations. In 1985, the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), upheld as permissible commercial speech a printed advertisement by a lawyer soliciting product liability Dalkon Shield cases. Finally, in 1988, the view that targeted mailed solicitations were still unprotected commercial speech was knocked down in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

a. Timing of Direct Mail Solicitations

In a widely publicized decision, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Supreme Court, in a close 5 to 4 decision, upheld the Florida State Bar rule adopting a 30-day wait period after

an accident or injury before a lawyer can send an unsolicited written communication to a victim. The rationale for upholding the rule was the "erosion of confidence in the profession that advertising of this kind engenders."

Under federal law, 49 U.S.C. §1136(g)(2) prohibits lawyers from sending unsolicited written communication to a victim of an aviation disaster or the or victim's relative until 45 days following such air carrier accident. This statute applies to interstate or foreign air transportation involving U.S. carriers and to an aviation accident in the United States involving a foreign carrier. The idea of unsolicited, targeted mailings still remains deeply offensive to many lawyers and potential clients. But, they are protected commercial speech.

It is noteworthy that New York has a much more restrictive rule on targeted mailings. Under DR2-103A(2)(d), a lawyer may not send to a potential client an unsolicited written communication if "[t]he lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer." New York legal ethics experts have already opined that unsolicited mailings to mass disaster accident victims "are now as effectively prohibited as traditional ambulance chasing," since the lawyer can indeed reasonably expect that the "physical, emotional or mental state of the recipient" will indeed be vulnerable. *See* "Code changes that will most affect New York Practitioners," *New York Law Journal*, Sept. 9, 1999, p. 3. *See also The New York Professional Responsibility Report*, June 1998, p. 6.

b. In Person Solicitations and Some Written Solicitations are Still Prohibited

New ABA Rule 7.3 continues to prohibit in-person and telephone solicitations. Also prohibited are written communications to a person who has indicated that he or she does not welcome solicitations, as well as written solicitations that involve coercion, duress or harassment. Rule 7.3 adds a new prohibition against direct solicitation by means of a "real-time electronic contact," such as the unsolicited contact of a prospective client in an Internet "chat-room." A "chat-room" involves immediate, real-time communication between the lawyer and the prospective client and is, therefore, likened to a prohibited telephone call solicitation. Such a lawyer is classified as a "predator."

The same "chat room" prohibition applies under New York's DR2-103(A)(1) and it applies in several other states as a matter of state bar ethics opinions. *See, e.g.*, Utah State Bar Ethics Advisory Committee Opinion No. 97-10 (1997) (chat rooms are analogous to a personal conversation due to its direct confrontational nature and the difficulty of monitoring and regulating the contact); *see also* State Bar of Michigan Opinion R.I.-276 (1996) (lawyer may not initiate, without invitation, an interactive electronic conversation). *But see* Philadelphia Bar Association Professional Guidance Committee Opinion No. 98-6 (1998) (no *per se* prohibition, but in particular situations, an electronic conversation can evolve into an "in-person solicitation"); State Bar of Arizona Committee on Rules of Professional Conduct Opinion No. 97-04 (1997) (lawyer can *respond* to general questions in a chat-room, but should not answer any fact specific questions, because risk of conflict of interest is unknown). California State Bar Standing Committee on Professional Responsibility and Conduct Opinion 2004-166, 2004 WL 3079031 (Cal. 2004) (attorney's communication with a prospective fee-paying client in a mass disaster victims' Internet chat room was not a prohibited solicitation under the

California Rules, but it was presumptively prohibited as a communication that was intrusive and likely to cause duress and emotional distress).

ABA Rule 7.3 does create four exceptions to the prohibitions against in-person solicitations. A lawyer may conduct in-person solicitations of other lawyers, personal friends, relatives and prior clients of the lawyer. *See also* DR2-103(A)(1).

c. Regulation of Written Communications

Written advertisements and solicitations, including the targeted mailings to prospective clients involved in accidents, and recorded communications which may be mailed or autodialed, are otherwise allowed under Model Rules 7.1, 7.2 and 7.3, provided they are not "false or misleading," the intended recipient has not made known to the lawyer a desire not to be solicited, and the solicitation is not coercive or over-reaching. A communication is "misleading" if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misreading." Model Rule 7.1. Model Rule 7.1 does away with the blanket prohibition on communications which create expectations about legal results, leaving the propriety of such statements to be judged by whether they are false or misleading. The same is true for communications that compare the lawyer's services to another lawyer's services. Model Rule 7.3 specifically provides that the mode of the advertisement may be "through written, recorded or electronic communication, including public media." Even written communication soliciting professional employment shall include the words "advertising material" on the outside envelope, if any, and at the beginning or end of the communication. Model Rule 7.3(c).

Whether a state can and will discipline an out-of-state lawyer who violates any of these restrictions is currently a hot issue. Some authorities have suggested that states do have the requisite jurisdiction and state interest to regulate out-of-state lawyers who advertise within the state, but do not follow state's rules applicable to lawyers licensed in the state. *See* "Ethics and Etiquette of Lawyering on the Internet," *New York Law Journal*, July 3, 2000, p. 3. Some states have already taken the step to regulate the advertising of out-of-state lawyers in their state. The motivation for this action has been the rising incidence of targeted written solicitations by out-of-state lawyers following mass disaster incidents. In 1999, South Carolina, for instance, adopted Appellate Court Rule 418, "Advertising and Solicitation by Unlicenced Lawyers." Rule 418 permits the South Carolina courts to impose penalties on out-of-state lawyers for violation of the state's rules on advertising.

States can, of course, discipline members of their bar for violating the ethics rules of another state. *See*, Ohio Board of Commissioners on Grievances and Discipline Opinion No. 2002-6, 2002 WL 1426122 (Ohio June 14, 2002) (Opinion concluded that an Ohio attorney could be disciplined in Ohio for violating the anti-solicitation rules of another state).

d. Regulation of Internet Advertising

ABA Rule 7.3 expressly adds "electronic communication" as a permitted form of advertisement. Numerous state ethics opinions have already concluded that electronic communications are permitted, but are subject to the relevant disciplinary rules regarding advertisement and solicitations.

It is generally regarded today that a law firm's website, if it contains more than just a Martindale-Hubbell type of listing, is an advertisement for the offering of services, although it is not necessarily a

direct solicitation for services, especially if it basically consists of an electronic version of the firm's brochure. Rules prohibiting false, deceptive or misleading communications, rules against claims of "specialization," rules regarding the posting of attorney fees and clients' rights, and the rules on retention of copies of advertisements are, therefore, applicable to the firm's website. *See, e.g.*, Arizona Opinion No. 97-04, *supra*; Connecticut Bar Association Informal Opinion 97-29 (1997); Utah Opinion No. 97-10, *supra*; New York State Bar Association Opinion No. 709 (1997); Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion No. 99-F-144 (1999).

If a firm's website or other use of the internet constitutes an actual direct, written solicitation of services, it must then comply with the relevant rules on written solicitations, such as the rule that the words "Advertising Material" appear at the end and beginning of the communication. ABA's Model Rule 7.3(c) makes this an explicit requirement for electronic solicitation communications.

It has been suggested that website "client targeting," the technical process by which a law firm's website is tailored to specific search engines to push up the firm's website before other websites when the potential client searches for particular words, may constitute a direct solicitation which triggers the ABA Rule 7.3(c) requirement that the communication contain the words "Advertising Material" at the beginning and end of the communication. Hazard and Hodes, *The Law of Lawyering*, Vol. 2, §56.3 (3d ed. 2001).

Another interesting question concerning websites is whether the domain name is regulated in the same way a firm name is. The ethics opinions view the domain name as the firm's address on the internet, not the firm name. While the regulation rules regarding firm names do not apply, the rules regarding lawyer communications do apply. The domain name, therefore, may not be false or misleading or imply a special competence or promise a certain result. *See* Supreme Court of Ohio Board of Commissioners on Grievances and Disputes Opinion No. 99-4 (1999) (domain name cannot be "willwineverycaseforyou.com" or "specialziedpesonalinjurylawyers.com").

In short, the entire text, including megatabs, of the firm's website must comply with the relevant lawyer communication and advertisement rules. Because websites are accessible from any state, special care must be taken, as with a firm letterhead, that the content of the firm's website not suggest that lawyers in the law firm are authorized to practice law other than where they are in fact licensed to practice law. This is especially important to mass disaster lawyers who regularly handle out-of-state claims on a *pro hac vice* basis and/or through association with outside local counsel. Merely representing on a website or in other advertisements that the law firm has brought suit in many U.S. jurisdictions, without, however, identifying the specific states in which the law firm has its offices or the states in which its attorneys are authorized to practice law could be considered misleading and deceptive and contrary to the ethical rules. *See, e.g.*, Arizona Opinion 97-04, *supra*; N.Y. Opinion 709, *supra*; South Carolina Bar Advisory Opinion No. 94-27 (1995) (content must clearly identify the geographic limits of a lawyer's practice); Utah Opinion 97-10, *supra*.

Similarly, if the state of license does not permit lawyers to claim that they are specialists (e.g. New York, Utah, Arizona), the website cannot misleadingly claim specialization, although such descriptions as "practice limited to personal injury law" are acceptable). *See* Utah Opinion 97-10, *supra*; Arizona Opinion 97-4, *supra*; Tennessee Opinion 99-F-144, *supra*; Ohio Opinion 99-4, *supra*.

Perhaps the most looming ethics concern that law firms should have about their websites and other communications which are accessible on an interstate basis is which state's laws apply. Is it only the state in which the law firm is authorized to practice, or are all states' ethics laws applicable because access to a firm's website or other advertisements are accessible in every state? When New York recodified its ethics rules in 1999, it added the following statement to Ethical Consideration 2-10: "A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state." Earlier in 1998, the New York State Bar Association, in Opinion 709, had declined to give an opinion "as to whether Internet advertising may also be subject to the rules regulating lawyer advertising of other jurisdictions in which the advertisement appears and from which potential clients are solicited." The more recent EC 2-10, however, indicates that the most prudent course of conduct is for the law firm to make sure that its website, advertisements and written solicitations conform to the most restrictive advertising rules in existence in any state. *See also* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion 98-85 (1998) (law firm should conform to the most restrictive rules).

In order to level the playing field against outside competition, at least two states, Florida and South Carolina, are prepared to discipline out-of-state lawyers who fail to adhere to the state's rules on advertising and solicitation. In *Florida Bar v. Kaiser*, 397 So.2d 1132, 1133 (Fla. 1981), a New York lawyer with a branch office in Florida that was headed by a Florida licensed partner, but who was not himself licensed to practice law in Florida, was held to be engaged in the unauthorized practice of law when his advertisements gave the impression that he was licensed to practice law in Florida. As noted above, South Carolina has adopted Appellate Rule 418 which provides that out-of-state lawyers may be disciplined for failure to adhere to South Carolina's rules on advertising and solicitations.

Conclusion

It is obvious that technological advances have outpaced the ability of the courts and state bar associations to concurrently analyze the impact of technology on the professional and ethical delivery of services. When it comes to issues such as lawyer communications and advertisements and the unauthorized practice of law, lawyers with interstate practices are well advised to be aware of and conform to rules out-of-state which may be more restrictive than the rules in which they predominantly practice law.