STATE OF CONNECTICUT

JUDICIAL BRANCH

REPORT OF COMMITTEE ON LAWYER ADVERTISING

PREFACE

The Lawyer Advertising Committee was established by Chief Justice William J. Sullivan of the Connecticut Supreme Court to address concerns regarding inappropriate lawyer advertisements. At an organizational meeting in September, 2004, Chief Justice Sullivan designated as chairman of the Committee the Honorable C. Ian McLachlan of the Connecticut Appellate Court, and named an additional 20 members, all of whom are members of the Connecticut Bar.

The Committee membership includes lawyers from large plaintiff and defense firms, small firm practitioners, lawyers with special expertise in first amendment law and consumer protection as well as lawyers from the Judicial Branch and Superior Court judges. (Appendix 1) The diverse membership brought a wide range of opinions and perspectives to the Committee and the manner in which it addressed the issue of print, radio, television and internet advertisements.

Since September, 2004, the Committee has met almost monthly, both as a full group and in separate subcommittee meetings, to discuss specific concerns about lawyer advertising and proposed remedies. Additionally, the Committee has scheduled a public hearing for January 2006 where the public and the bar are invited to comment on the proposed changes generated by the Committee.

The Committee's Final Report is comprised of four sections: (1) Section I sets forth the specific issues posed by Chief Justice Sullivan that steered the Committee's charge and provides background to its recommendations, including a discussion of the relevant legal framework; (2) Section II sets forth the current lawyer advertising rules (Appendix 2); (3) Section III discusses and sets forth the proposed recommendations to the rules; and (4) Section IV contains an outline of the recommendations.

The findings and recommendations contained in this Final Report do not reflect the views of all members of the Committee but they do represent the views of the overwhelming majority of its members.

TABLE OF CONTENTS

I. Legal Framework & Background to Committee's Recommendations

A. Background to Recommendations

At the September, 2004 organizational meeting, Chief Justice Sullivan expressed that his particular concern regarding lawyer advertising was the effect of inappropriate, sometimes misleading and sometimes offensive, lawyer advertising on the reputation of lawyers and the dignity of the legal profession in general. This concern and the issue of what, if anything, should and could be done to address it, would be deliberated by the Committee for the following 15 months, culminating in the recommendations set forth in this report.

In order to better understand the nature of these concerns, it was agreed in September, 2004, that the Committee should begin its work by compiling and reviewing television, print and radio advertisements that currently are being disseminated in Connecticut. It also was agreed that the Committee should consider existing advertising regulations in place in other jurisdictions and survey the extent to which lawyer advertising has emerged as a problem in these jurisdictions.

At the October, 2004 meeting, two special guests addressed the Committee: Attorney Mark Dubois, Disciplinary Counsel to the Connecticut Bar Association, and Attorney Daniel Horwitch, then counsel to the Statewide Grievance Committee. Both Attorneys Dubois and Horwitch remarked that their offices do not receive many complaints about the content of lawyer advertising and that, of the complaints they do receive, only a very small number result in some sort of discipline. Their comments prompted a discussion about the efficacy of existing enforcement mechanisms and whether, perhaps, the problem is not with the advertising rules themselves but with the lack of consistent enforcement. This question would continue to arise in subsequent meetings.

At the November, 2004 meeting, the Committee heard from Susan Noyes, Director of Sales Operations for SBC Yellow Pages and Smartpages.com. Ms. Noyes discussed the process of advertising in the Yellow Pages and the nature of oversight of advertising content. She stated that SBC only polices certain flagrantly inappropriate content such as profanity, sexually explicit language and images, and certain types of puffing and sensationalism. Beyond such blatantly offensive subject matter, Noyes noted, the advertiser is principally responsible for ensuring the veracity and appropriateness of content. In response to a question by a Committee member regarding the frequency of complaints regarding inaccurate or offensive content, Ms. Noyes noted that SBC does receive complaints about lawyer advertisements and routinely advises each complainant to take outside action, namely, reporting the advertiser to a professional regulatory body. She stated that only in a small fraction of these instance will SBC's General Counsel involve himself, which involvement would generally constitute alerting the sales force to types of statements that should not be permitted.

At the November, 2004 meeting, the Committee also viewed a videotape containing a compilation of ten lawyer advertisements that recently aired on Channel 8. Advertisers included Mark E. Salomone, the Law Offices of Mark E. Salomone and Morelli, Carter Mario, the Injury Helpline, Jacobs & Jacobs and Trantolo & Trantolo. Following the viewing, several Committee members expressed concern that certain of the advertisements appeared to violate existing advertising rules, including failing to identify an attorney responsible for content, using client testimonials, failing to indicate Bar admission and creating unjustified expectations in the consumer.

It was noted that numerous other advertisements by attorneys not admitted in Connecticut targeting a Connecticut audience are aired in Connecticut and that there should be some

mechanism by which these attorneys are held accountable for the content of their ads. Certain specific attorneys broadcast advertisements that do not comply with existing Connecticut rules.

In light of the apparent violations of the current rules observed on the tape, Committee members again questioned the efficacy of existing enforcement methods. It was suggested that perhaps all that is needed to curb inappropriate advertising is to institute better enforcement of existing rules.

At the December, 2004 meeting, attorneys who advertise addressed the Committee regarding the procedures their offices employ for screening the content of their television advertisements before dissemination. One attorney stated that he starts with a "model" commercial provided by an advertising agency, fine-tunes the language and appears in the commercial when it is filmed. He also informed the Committee that he meets with a representative from his ad agency twice a year with other agency clients, also lawyer advertisers from other states. The group then views and reacts to various advertisements and discusses relevant rules and whether content appears acceptable. He remarked that this method ensures a rigorous check on his advertisements and keeps him abreast of emerging issues and new regulations in other states.

Another attorney stated that he also works with an advertising agency that is staffed in part by attorneys who are well-versed in the American Bar Association code and who are up-to-date on advertising regulations. He also stated that he measures his advertisements against the regulations of states like Florida, which have significantly more stringent rules than Connecticut, and if the content appears to comply with those heightened standards he is comfortable disseminating it in Connecticut. He also meets with agency representatives to view and discuss various advertisements with other agency clients.

A committee member raised a concern, echoed by other Committee members, about a particular advertisement airing in Connecticut that features a Massachusetts attorney soliciting Connecticut clients who asks for a 45% fee. While the Committee's main focus has been on Connecticut lawyers advertising in Connecticut, the Committee agreed that our rules should be broad enough to address the content of advertisements run by lawyers admitted in other jurisdictions but disseminated in Connecticut. Several members questioned whether such activity by attorneys not admitted in Connecticut constitutes the unauthorized practice of law.

At the February, 2005 meeting, Professor Paul Berman of the University of Connecticut School of Law, addressed the Committee concerning lawyer advertising on the internet. Professor Berman offered several options to consider for formulating internet advertising rules. One approach, based upon the ABA Model Rules, provides that an advertiser would be bound by the advertising rules of any state where the effects of his or her conduct are felt. Another approach, favored by Professor Berman, requires advertisers to comply with the rules of the state where the individual principally practices law. He did warn, however, that this approach may be problematic because an advertiser may have considerable effect in a state without "principally" practicing in that jurisdiction. There was a consensus among Committee members that internet advertising will only increase in frequency and importance in coming years and that it should be addressed in the Committee's recommendations.

At its March, 2005 meeting, the Committee considered various options in light of the information gathered over the past six months. The Committee thought it prudent to address internet advertising specifically. Although the Committee was in agreement that internet advertising should be addressed, there was less accord respecting precise recommendations. Judge McLachlan suggested that a subcommittee should be formed to consider various

approaches including but not limited to adopting specific internet regulations or, in the alternative, amending the language of existing rules to incorporate internet advertising. Judge McLachlan also suggested that the subcommittee, when formed, should examine the regulatory scheme in Florida, which has a section of its advertising regulations dedicated to the internet, and the scheme in Mississippi, which, by contrast, merely added language to existing regulations to incorporate internet advertising.

Turning to the issue of enforcement of rules, the Committee devoted considerable discussion to the persistent issue of whether the existing enforcement mechanisms are effective. Attorney Fitzmaurice noted that attorneys often are to reluctant to report their colleagues and suggested that the Committee consider creating a body to review advertisements periodically. In this regard, Attorney Knox raised the possibility that the Statewide Bar Counsel's office could be vested with the power to examine attorney's advertisements on their own initiative on either a regular or sporadic basis.

Also at the March, 2005 meeting, the Committee addressed for the first time the issue of voluntary pre-screening of advertisements, prior to dissemination, for compliance with the rules. The Committee examined and discussed regulations from other jurisdictions, including Texas and North Carolina, each of which provide advertisers the opportunity to have their advertisements pre-screened for content. A favorable review would give rise to a presumption of compliance with the rules if the advertiser is later the subject of a complaint or grievance action for the advertisement. The administrative burden of such a system was discussed and it was suggested that the Statewide Bar Counsel's office might be considered to undertake the screening.

Several committee members again raised a concern about television commercials that direct viewers to attorneys not admitted in Connecticut. There was a consensus among members that the Committee should consider methods for holding these attorneys accountable.

At the conclusion of the March, 2005 meeting, Judge McLachlan created three subcommittees to address specific areas of concern and formulate recommendations for the Committee at large to consider at the May, 2005 meeting.

The Subcommittee on Enforcement Mechanisms was charged with developing specific proposals to ensure better compliance with the rules. The Subcommittee is left to consider in its discretion whether existing rules simply should be fine-tuned or whether new rules should be adopted. The Subcommittee also was charged with considering the option of pre-screening advertisements. Appointed as chair of the Subcommittee was Attorney Knox; other members include Attorneys Mario, Fitzmaurice and Davis and Judge Rogers. This Subcommittee also was charged with specifically addressing the issue of television commercials run by lawyers not admitted in Connecticut.

The Subcommittee on Internet Advertising, chaired by Judge Quinn, was tasked to address various specific internet issues including whether new rules are needed or whether existing rules can simply be modified. Also serving on this subcommittee are Attorneys Neigher and Cimmino.

The Subcommittee on General Revisions, chaired by Judge McLachlan, includes as additional members Attorneys McDonough and Testo. This Subcommittee was charged with examining the advertising regulations of the Rules of Professional Conduct generally, in view of ABA Ethics 2000 Rules and Connecticut Bar Association Recommendations and Comments. The Subcommittee was to examine whether other revisions should be made to the ABA Ethics

2000 proposal, paying particular attention to the question of whether rules specific to television and radio advertisements are necessary, leaving to Judge Quinn's subcommittee the issue of internet advertising.

Each subcommittee was asked to meet, and did meet as needed over the coming weeks, and to be prepared to present specific recommendations and proposals to the Committee for discussion at the May meeting.

At the May meeting, the subcommittee chairs reported their recommendations to the Committee at large. The Subcommittee on Enforcement Mechanisms reported that it considered various options for a more effective enforcement procedure and ultimately developed proposed amendments to Practice Book § 2-33 that included the addition of a filing requirement. The Committee reviewed and discussed the filing requirement and agreed that the rule would not only provide the Grievance Committee the data it needs to decide whether to initiate proceedings against an advertiser but also have the added benefit of causing advertisers to be more cautious when developing advertisements. Several Committee members made language suggestions and raised matters to be considered by the Subcommittee.

The Committee also discussed at length the issue of pre-screening advertisements. There was a consensus that a pre-screening option should be available to advertisers. The Subcommittee agreed that prior to the June meeting, it would revise the recommendations to reflect the opinions and concerns addressed.

The Subcommittee on Internet Advertising reported its conclusion that while existing rules do not specifically address internet advertising, most attorneys likely assume that such activity is covered by general advertising rules and, therefore, it is not necessary to amend the language of existing rules. Judge Quinn further reported that the Subcommittee addressed the

issue of attorneys not admitted in Connecticut who advertise in the state. In particular, the Subcommittee addressed concerns about the difficulty of regulating and enforcing our advertising rules against out-of-state attorneys who maintain websites that do not directly target Connecticut residents but are readily accessible to them. The Subcommittee concluded that the advertising rules should make clear that out-of-state attorneys can be sanctioned in their home states for improper advertising activity in Connecticut. To this end, the Subcommittee proposed the adoption of a new rule which the Committee at large reviewed and discussed.

The Subcommittee on General Revisions reported that it generated several recommendations for revisions to the advertising rules in general. Specifically, the Subcommittee proposed amending Rules 7.1, 7.2 and 7.3 and distributed photocopies of its recommendations to the Committee. Upon review and discussion, the Committee agreed that the amendments strengthened the Rules.

At the June meeting, the Committee considered the revised recommendations of the Subcommittees and made further language changes. The recommendations are set forth in section III of this report.

B. Legal Framework

To guide the Committee's consideration of the issues and to ensure that any recommendations formulated by the subcommittees did not run afoul of constitutional and other legal considerations, Judge McLachlan distributed a memorandum examining leading United States Supreme Court cases concerning lawyer advertising as well as relevant Connecticut case law. A brief summary of this legal framework follows.

1. Federal Court Cases

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), the United States Supreme Court extended first amendment protections to lawyer advertising and held that while such advertising cannot be subjected to blanket suppression, reasonable restrictions may be imposed on the time, place and manner of the advertising. The Court also made clear that advertising that is false, deceptive or misleading is not constitutionally protected. Id., 383.

In *Central Hudson Gas and Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Court articulated the following four-part test for regulating the content of commercial speech in a case that did not involve lawyer advertising:

> In commercial speech cases, then, a four-part analysis has developed. At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In the years following *Central Hudson*, the Supreme Court has considered several cases concerning lawyer advertising. In *In re R.M.J.*, 455 U.S. 191 (1982), a lawyer was reprimanded for violating Missouri's rule regulating lawyer advertising. The relevant rule in effect allowed areas of practice to be listed in an advertisement by using one or more of a list of 23 areas of practice, and the precise wording stated in the rule must be used to describe the area. The lawyer was said to have violated the rule because his advertisement used the term "real estate" instead of "property law" as specified by the rule. The advertisement stated that he practiced in the areas of "contracts" and "securities," which areas are not listed in the rule at all. The Court held the regulation invalid because the state failed to show that the advertisement was misleading in any way. The Court stated that the state must demonstrate how the challenged advertisement was

deceptive; the mere assertion that the ad was potentially misleading was insufficient to justify the restriction.

In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court held that the states cannot ban the use of illustrations or pictures in advertisements that provide accurate information, even if they may be thought by some to be in poor taste. The Court also stated that the states may require an advertiser to provide disclosures or warnings as long as the disclosure requirements are reasonably related to the state's interest in preventing consumers from being deceived. One of the lawyer's newspaper advertisements stated that, if there was no recovery, no fee would be charged. The Court found this to be misleading because the lawyer should have indicated that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful.

The Court held in *Shapero* v. *Kentucky Bar Association*, 486 U.S. 466 (1988), that a total ban on target, direct mail solicitations is not justified because the state can regulate potential abuses through less restrictive means. The Court allowed the state to require lawyers to file solicitation letters with a state agency, giving the state an opportunity to review mailings and penalize any actual abuse. "The States may not place an absolute prohibition on certain types of potentially misleading information --- if the information may also be presented in a way that is not deceptive, unless the State asserts a substantial interest that such a restriction would directly advance. Nor may a state impose a more particularized restriction without a similar showing." Id. 479.

Interestingly, the Court upheld a rule prohibiting lawyers in personal injury cases from sending a written communication to accident victims or their families within thirty days after the accident or other event causing an injury in *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618

(1995). The Court stated that the harm the government seeks to avert by regulating commercial speech must be real and not speculative or conjectural. The Court relied on the statistical *and* anecdotal evidence that the plaintiff submitted, which indicated that the Florida public viewed direct mail solicitation immediately after an accident in a very negative light and caused people to have a lower opinion of the legal profession.

The Court held that the regulations satisfied the *Central Hudson* requirement that the asserted government interest be substantial. In reaching this determination the Court noted empirical studies presented by the plaintiff about how direct-mail solicitations in the wake of accidents are perceived by the public as intrusive and tarnish the reputation of the legal profession. "The regulation, then, is an effort to protect the flagging reputations of the Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, 'is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.' . . . We have little trouble crediting the bar's interest as substantial." (Citation omitted.) Id., 625.

At least one court, the 10th Circuit Court of Appeals, has cited *Went For It* for the proposition that maintaining the public's respect for the legal system constitutes a substantial public interest. In *Revo* v. *Disciplinary Board of the Supreme Court of the State of New Mexico*, 106 F.3d 929 (10th Cir. 1997), cert. denied, 521 U.S. 1121 (1997), a challenge was brought to the constitutionality of New Mexico's blanket ban on direct mail advertising. The court affirmed the district court's holding that the ban was an unconstitutional violation of first amendment and equal protection rights. In determining that the blanket prohibition withstood the *Central Hudson* substantial interest requirement, the court stated: "[t]he Board asserts that it has a substantial interest in maintaining the public's respect for the legal system - respect which may

be eroded by personal injury solicitation letters. The Supreme Court found this interest substantial in *Went For It,* 115 S.Ct. at 2376." Id., 933.

It is important to note, however, that in both *Went For It* and *Revo,* damage to the dignity of the legal profession was not the only proffered justification for the regulations at issue. In both cases, the courts also found that there existed a substantial interest in protecting the privacy of accident victims and potential clients. Undecided is whether standing alone, protecting the dignity of the legal profession would be sufficient to satisfy *Central Hudson.*

While the *Bates* and *Central Hudson* decisions leave no doubt that lawyer advertising is commercial speech that may be regulated only where necessary to serve a substantial government interest, considerable controversy remains regarding the scope of permissible restrictions that states can impose.

2. Connecticut Cases

Although controversies concerning lawyer advertising have not often reached Connecticut courts, there are several cases that warrant mention.

In *Grievance Committee* v. *Trantolo*, 192 Conn. 15 (1984), the plaintiff filed a complaint in Superior Court alleging that the rules concerning lawyer advertising in effect at that time prohibited lawyers from advertising on television. The court held that the rules did not contain such a prohibition, and, if they did, such a complete ban on electronic advertising would violate the freedom of commercial speech guarantees of the constitutions of Connecticut and the United States.

In *Grievance Committee* v. *Trantolo*, 192 Conn. 27 (1984), the court held that a blanket ban on mailing solicitations to third parties was unconstitutional. The defendants had mailed

announcements to approximately 25 realtors inviting them to the opening of their law office. A brochure also was sent describing the types of matters they handled and a schedule of fees.

Haymond v. *Statewide Grievance Committee*, 45 Conn. Sup. 481, aff'd, 247 Conn. 436 (1999), involved an appeal by the plaintiff lawyer from the trial court's judgment dismissing his appeal from a reprimand received from the defendant. The plaintiff was reprimanded for an advertisement that appeared in a yellow pages telephone directory and on a television station located in Massachusetts. The telephone directory advertisement included statements saying: "We are a team of fourteen lawyers with nearly 200 years combined experience," and "Licensed in Massachusetts and Connecticut." The television advertisements contained the following statements: "At the law offices of John Haymond, we protect the rights of accident victims and their loved ones"; "For accident claims call the Law Offices of John Haymond"; and "I'm Attorney John Haymond . . ."; "The Law Offices of John Haymond works for you and keeps on working"; and "I'm John Haymond and that's my promise." The plaintiff was a member of the Connecticut bar but was not a member of the Massachusetts bar at the time and only 4 lawyers in his firm were admitted to the Massachusetts bar. The plaintiff's support staff worked out of offices located in Connecticut and a Massachusetts office was used as needed for meetings with clients. The Supreme Court affirmed the judgment of the trial court. This case also held that Connecticut has jurisdiction over out-of-state advertisers aimed at the residents of another state.

Both the United States Supreme Court and Connecticut cases demonstrate that the permissible scope of oversight of lawyer advertising remains a persistent source of debate.

3. Recent Developments in Other States

On September 19, 2005, the Supreme Court of Missouri adopted amendments to the Rules of Professional Conduct that strictly regulate advertising by lawyers. These rules are

effective January 1, 2006 and are available from the Missouri Supreme Court website at www.missourisupremecourt.org. and then click on Orders/Rules. On November 17, 2005, the Supreme Court of Florida decided the case of *The Florida Bar* v. *Robert Pape* in which it held that television ads from a Florida law firm which depicted a fierce-looking pit bull in a spike collar and highlighted the firm's toll-free number 1-800-PIT-BULL was improper. The court held that "`This court would not condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar or harm the opposing party,' Justice Barbara Pariente wrote. `Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system.'" The citation of the case is ---FL---SC04-40.

II. Current Lawyer Advertising Rules and Limitations

A. Connecticut Rules of Professional Conduct § 7.1

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:

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

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

(3) Compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

(P.B. 1978-1997, Rule 7.1.)

COMMENTARY: This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in subdivision (2) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such

information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

B. Connecticut Rules of Professional Conduct § 7.2

(a) Subject to the requirements set forth in Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for three years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Advertisements on the electronic media such as television and radio may contain the same factual information and illustrations as permitted in advertisements in the print media.

(e) Every advertisement and written communication that contains information about the lawyer's fee, including those indicating that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of a recovery, or that the fee will be a percentage of the recovery, shall disclose whether and to what extent the client will be responsible for any court costs and expenses of litigation. The disclosure concerning court costs and expenses of litigation shall be in the same print size and type as the information regarding the lawyer's fee and, if broadcast, shall appear for the same duration as the information regarding the lawyer's fee. If the information regarding the fee is spoken, the disclosure concerning court costs and expenses of litigation shall also be spoken.

(f) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(g) Any advertisement or communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

(h) No lawyers shall, directly or indirectly pay all or part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(i) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of Rule 7.3, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm."

(2) Date of admission to the Connecticut bar and any other bars and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the state or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer practices or is designated, subject to the requirements of Rule 7.4, or is certified pursuant to Rule 7.4A.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Fee for initial consultation and fee schedule.

(9) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(10) Nothing in this Rule prohibits a lawyer or law firm from permitting the inclusion in the law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(P.B. 1978-1997, Rule 7.2.)

COMMENTARY: To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and

payment and credit arrangements; whether and to what extent the client will be responsible for any court costs and expenses of litigation; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising. Subsection (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer. A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Subsection (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

C. Connecticut Rules of Professional Conduct § 7.3

a) A lawyer shall not initiate personal or live telephone contact, including telemarketing contact, with a prospective client for the purpose of obtaining professional employment, except in the following circumstances:

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization;

(4) If the prospective client is a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.

(b) A lawyer shall not contact, or send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm, partner, associate or any other lawyer affiliated with the lawyer or his or her firm, a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer,

(2) It has been made known to the lawyer that the person does not want to receive such communications from the lawyer,

(3) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence,

(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter, or

5) The written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the mailing of the communication.

c) Every written communication used by a lawyer for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter, must be clearly and prominently labeled "Advertising Material" in red ink on the first page of the communication and the lower left corner of the outside envelope. If the written communication is in the form of a self-mailing brochure or pamphlet, the label "Advertising Material" in red ink shall appear on the address panel of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain such mark. Every communication by audio or video recording or other electronic means must be clearly and prominently labeled "Advertising Material" on the container and at the beginning and ending of the communication. No reference shall be made in the communication to the communication having any kind of approval from the Connecticut bar. Written communications mailed to prospective clients shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

(d) The first sentence of any written communication concerning a specific matter shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

e) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

(f) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

(g) Written communications shall be on letter-sized paper rather than legal-sized paper and shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(h) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the client.

(i) Notwithstanding the prohibitions in subsection (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(P.B. 1978-1997, Rule 7.3.)

COMMENTARY: Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States supreme court.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to a third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false

and misleading.

In determining whether a contact is permissible under Rule 7.3(b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2. Subsection (i) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan.

D. Connecticut Practice Book § 2-33

(a) The judges of the superior court shall appoint twenty-one persons to a committee to be known as the "statewide grievance committee." At least seven shall not be attorneys and the remainder shall be members of the bar of this state. The judges shall designate one member as chair and another as vice-chair to act in the absence or disability of the chair.

(b) All members shall serve for a term of three years commencing on July 1. Except as otherwise provided herein, no person shall serve as a member for more than two consecutive three year terms, excluding any appointments for less than a full term; a member may be reappointed after a lapse of one year. If the term of a member who is on a reviewing committee expires while a complaint is pending before that committee, the judges or the executive committee may extend the term of such member to such time as the reviewing committee has completed its action on that complaint. In the event of such an extension the total number of statewide grievance committee members may exceed twenty-one. The appointment of any

member may be revoked or suspended by the judges or by the executive committee of the superior court. In connection with such revocation or suspension, the judges or the executive committee shall appoint a qualified individual to fill the vacancy for the remainder of the term or for any other appropriate period. In the event that a vacancy arises in this position before the end of a term by reasons other than revocation or suspension, the executive committee of the superior court shall fill the vacancy for the balance of the term or for any other appropriate period. Unless otherwise provided in this chapter, the committee must have at least a quorum present to act, and a quorum shall be eleven. The committee shall act by a vote of a majority of those present and voting, provided that a minimum of six votes for a particular action is necessary for the committee to act. Members present but not voting due to disqualification, abstention, silence or a refusal to vote, shall be counted for purposes of establishing a quorum, but not counted in calculating a majority of those present and voting.

(c) In addition to any other powers and duties set forth in this chapter, the statewide grievance committee shall:

(1) Institute complaints involving violations of General Statutes § 51-88.

(2) Adopt rules to carry out its duties under this chapter which are not inconsistent with these rules.

(3) Adopt rules for grievance panels to carry out their duties under this chapter which are not inconsistent with these rules.

(4) In its discretion, disclose that it or the statewide bar counsel has referred a complaint to a panel for investigation when such disclosure is deemed by the committee to be in the public interest.

(P.B. 1978-1997, Sec. 27G.)

III. Recommendations

Recognizing the limitations imposed by *Central Hudson*, the committee has sought to develop proposed rules that are tailored to address, in a manner no more extensive than permitted, the specific concerns identified. In formulating the following recommendations, the Committee considered also the recommendations of the Connecticut Bar Association, which was asked in 2003 by the Superior Court Rules Committee to examine the Rules of Professional Conduct and develop suggested revisions.

RULE 7.1
COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it~~: (1)~~ contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading~~;~~

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

~~(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.~~

COMMENTARY: This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them ~~should~~ must be truthful. ~~The prohibition in subdivision (2) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.~~

Statements even if literally true that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

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

See also Rule 8.4(5) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

LAC COMMENTARY: The above changes have been taken from the Connecticut Bar Association's recommendations concerning the American Bar Association's revisions to the Rules of Professional Conduct. The intention is to strike a balance between free-speech interests

and the need for consumer protection. As to these recommendations, the Subcommittee on General Revisions recommended that the proposed revisions of the Connecticut Bar Association be adopted. The whole committee accepted these recommendations and made no further changes.

RULE 7.2
ADVERTISING

(a) Subject to the requirements set forth in Rules 7.1 and 7.3, a lawyer may advertise services through ~~public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written or recorded communication.~~ written, recorded or electronic communication, including public media.

~~(b) A copy or recording of an advertisement or communication shall be kept for three years after its last dissemination along with a record of when and where it was used.~~

(b)(1) A copy or recording of an advertisement or communication shall be kept for three years after its last dissemination along with a record of when and where it was used. An electronic advertisement or communication shall be copied once every three months on a compact disk or similar technology and kept for three years after its last dissemination.

(2) A lawyer shall comply with the mandatory filing requirement of Practice Book Section 2-28A.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable cost of advertisements or communications permitted by this Rule; ~~and may~~

(2) pay the usual charges of a not-for-profit or qualified lawyer referral service ~~or other legal service organization~~. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.

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

~~(g)~~(d) Any advertisement or communication made pursuant to this Rule shall include the name of at least one lawyer admitted in Connecticut responsible for its content.

~~(d)~~(e) Advertisements on the electronic media such as television and radio may contain the same factual information and illustrations as permitted in advertisements in the print media.

~~(e)~~(f) Every advertisement and written communication that contains information about the lawyer's fee, including those indicating that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of a recovery, or that the fee will be a percentage of the recovery, shall disclose whether and to what extent the client will be responsible for any court costs and expenses of litigation. The disclosure concerning court costs and expenses of litigation shall be in the same print size and type as the information regarding the lawyer's fee and, if broadcast, shall appear for the same duration as the information regarding the lawyer's fee. If the information regarding the fee is spoken, the disclosure concerning court costs and expenses of litigation shall also be spoken.

~~(f)~~(g) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a

shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(h) No lawyers shall, directly or indirectly pay all or part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(i) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of Rule 7.3, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, fax numbers, website and e-mail addresses and domain names, and a designation such as "attorney" or "law firm."

(2) Date of admission to the Connecticut bar and any other bars and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the state or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer practices or is designated, subject to the requirements of Rule 7.4, or is certified pursuant to Rule 7.4A.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Fee for initial consultation and fee schedule.

(9) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(10) Nothing in this Rule prohibits a lawyer or law firm from permitting the inclusion in the law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

COMMENTARY: To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; whether and to what extent the client will be responsible for any court costs and expenses of litigation; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television

advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

RECORD OF ADVERTISING

Subsection (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

PAYING OTHERS TO RECOMMEND A LAWYER

~~A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not for profit lawyer referral programs and pay the usual fees charged by such programs. Subsection (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.~~

A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

LAC COMMENTARY: The above changes are based on the Connecticut Bar Association's recommendations concerning the American Bar Association's revisions to the Rules of Professional Conduct and include further revisions proposed by the Committee on Lawyer Advertising.

In recognition of the many technological advances that have been made, including the increasing use of the internet, the changes to subsection (a) make it clear that lawyers may advertise through the new electronic media and that such advertisements are subject to the Rules of Professional Conduct.

The change to subsection (d) will assist disciplinary authorities in identifying the individuals responsible for an advertisement in order to protect the public against misleading advertisements.

RULE 7.3
PERSONAL CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not initiate personal, ~~or~~ live telephone, or real-time electronic contact, including telemarketing contact, with a prospective client for the purpose of obtaining professional employment, except in the following circumstances:

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization;

(4) If the prospective client is a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.

(b) A lawyer shall not contact, or send, [or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm, partner, associate or any other lawyer affiliated with the lawyer or his or her firm,] a written or electronic communication to, a prospective client for the purpose of obtaining professional employment if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer,

(2) It has been made known to the lawyer that the person does not want to receive such communications from the lawyer,

(3) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence,

(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter, or

(5) The written or electronic communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the mailing of the communication.

(c) Every written communication, as well as any communication by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter, must be clearly and prominently labeled "Advertising Material" in red ink on the first page of any ~~the~~ written communication and the lower left corner of the outside envelope or container, if any, and at the beginning and ending of any communication by audio or video recording or other electronic means. If the written communication is in the form of a self-mailing brochure or pamphlet, the label "Advertising Material" in red ink shall appear on the address panel of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain such mark. ~~Every communication by audio or video recording or other electronic means must be clearly and prominently labeled "Advertising Material" on the container and at the beginning and ending of the communication.~~ No reference shall be made in the communication to the communication having any kind of approval from the Connecticut bar. Written communications mailed to prospective clients shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

(d) The first sentence of any written communication concerning a specific matter shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

(e) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

(f) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

(g) Written communications shall be on letter-sized paper rather than legal-sized paper and shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(h) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the client.

(i) Notwithstanding the prohibitions in subsection (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENTARY: Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.

The use of general advertising and written, ~~and~~ recorded and electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, ~~or~~ live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 ~~are~~ can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, ~~or~~ live telephone, or real-time electronic conversations between a lawyer to a prospective client can be disputed and are not subject to a third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

In determining whether a contact is permissible under Rule 7.3(b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2. Subsection (i) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan.

LAC COMMENTARY: The above changes have been taken in part from the Connecticut Bar Association's recommendations concerning the American Bar Association's revisions to the

Rules of Professional Conduct and include revisions proposed by the Committee on Lawyer Advertising. These changes update the Rule to reflect current technological advances.

RULE 8.5 ~~JURISDICTION~~
DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, ~~although engaged in practice elsewhere~~ regardless of where the lawyer's conduct occurs. 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. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENTARY: ~~In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.~~

~~If the Rules of Professional Conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.~~

~~Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.~~ **Disciplinary Authority.** It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See* Rules 6 and 22, ABA *Model Rules for Lawyer Disciplinary Enforcement.* A lawyer who is admitted pursuant to Practice Book Sections 2-16 or 2-17 et seq. is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) and appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law. A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice

in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

Subsection (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

Subsection (b) (1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provides otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, subsection (b) (2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

LAC COMMENTARY: The above changes have been taken from the Connecticut Bar Association's recommendations concerning the American Bar Association's revisions to the Rules of Professional Conduct.

One of the changes to this Rule is the addition of a provision that a local jurisdiction has authority over a foreign lawyer who does not comply with local rules if the impact of the lawyer's conduct is on the local jurisdiction. This provision will enhance the ability of disciplinary authorities to enforce the Rules of Professional Conduct against foreign lawyers who advertise or who engage in other ethical misconduct in Connecticut.

(NEW) Sec. 2-28A. Attorney Advertising; Mandatory Filing

(a) Any attorney who advertises services to the public through any media, electronic or otherwise, or through written or recorded communication pursuant to Rule 7.2 of the Rules of Professional Conduct shall file a copy of each such advertisement or communication with the statewide grievance committee either prior to or concurrently with the attorney's first

dissemination of the advertisement or written or recorded communication, except as otherwise provided in subsection (b) herein. The materials shall be filed in a format prescribed by the statewide grievance committee, which may require them to be filed electronically. Any such submission in a foreign language must include an accurate English language translation. The filing shall consist of the following:

(1) A copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, DVDs, audiotapes, compact disks, print media, photographs of outdoor advertising);

(2) A transcript, if the advertisement or communication is in video or audio format;

(3) A list of domain names used by the attorney, which shall be updated quarterly;

(4) A sample envelope in which the written communication will be enclosed, if the communication is to be mailed;

(5) A statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear, and the anticipated time period during which the advertisement or communication will be used.

(b) The filing requirements of subsection (a) do not extend to any of the following materials:

(1) An advertisement in the public media that contains only the information, in whole or in part, contained in Rule 7.2(i) of the Rules of Professional Conduct, provided the information is not false or misleading;

(2) An advertisement in a telephone directory;

(3) A listing or entry in a regularly published law list;

(4) An announcement card stating new or changed associations, new offices, or similar changes relating to an attorney or firm, or a tombstone professional card;

(5) A communication sent only to:

(i) Existing or former clients;

(ii) Other attorneys or professionals; and/or

(iii) Members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a attorney; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the attorney who is recommended, furnished, or paid for by the organization.

(6) Communication that is requested by a prospective client.

(c) If requested by the statewide grievance committee, an attorney shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written or recorded communications.

(d) The statewide bar counsel shall review advertisements and communications filed pursuant to this section that have been selected for such review on a random basis. If after such review the statewide bar counsel determines that an advertisement or communication does not comply with the Rules of Professional Conduct, the statewide bar counsel shall in writing advise the attorney responsible for the advertisement or communication of the noncompliance and shall attempt to resolve the matter with such attorney. If the matter is not resolved to the satisfaction of the statewide bar counsel, he or she shall forward the advertisement or communication and a

statement describing the attempt to resolve the matter to the statewide grievance committee for review. If, after reviewing the advertisement or communication, the statewide grievance committee determines that it violates the Rules of Professional Conduct, it shall forward a copy of its file to the disciplinary counsel and direct the disciplinary counsel to file a presentment against the attorney in the superior court.

(e) The procedure set forth in subsection (d) shall apply only to advertisements and communications that are reviewed as part of the random review process. If an advertisement or communication comes to the attention of the statewide bar counsel other than through that process, it shall be handled pursuant to the grievance procedure that is set forth in Sections 2-29 et seq.

(f) The materials required to be filed by this section shall be retained by the statewide grievance committee for a period of one year from the date of their filing, unless, at the expiration of the one year period, there is pending before the statewide grievance committee, a reviewing committee, or the court a proceeding concerning such materials, in which case the materials that are the subject of the proceeding shall be retained until the expiration of the proceeding or for such other period as may be prescribed by the statewide grievance committee.

(g) Except for records filed in court in connection with a presentment brought pursuant to subsection (d), records maintained by the statewide bar counsel, the statewide grievance committee and/or the disciplinary counsel's office pursuant to this section shall not be public. Nothing in this rule shall prohibit the use or consideration of such records in any subsequent disciplinary or client security fund proceeding and such records shall be available in such proceedings to a judge of the superior court or to the standing committee on recommendations for admission to the bar, to disciplinary counsel, to the statewide bar counsel or assistant bar counsel, or, with the consent of the respondent, to any other person, unless otherwise ordered by the court.

(h) Violation of subsections (a) or (c) shall constitute misconduct.

LAC COMMENTARY: This section is intended to enhance the ability of the statewide grievance committee to monitor attorneys' advertising practices and to provide a procedure for enforcing compliance with the Rules of Professional Conduct for the protection of the public.

(NEW) Section 2-28B. –Advisory Opinions

(a) An attorney who desires to secure an advance advisory opinion concerning compliance with the Rules of Professional Conduct of a contemplated advertisement or communication may submit to the statewide grievance committee, not less than 30 days prior to the date of first dissemination, the material specified in Section 2-28A(a) accompanied by a fee established by the Chief Court Administrator. It shall not be necessary to submit a videotape or DVD if the videotape or DVD has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes or DVDs, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement.

(b) An advisory opinion shall be issued, without a hearing, by the statewide grievance committee or by a reviewing committee assigned by the statewide grievance committee. Such reviewing committee shall consist of at least three members of the statewide grievance committee, at least one-third of whom are not attorneys.

(c) An advisory opinion issued by the statewide grievance committee or a reviewing committee finding noncompliance with the Rules of Professional Conduct is not binding in a disciplinary proceeding, but a finding of compliance is binding in favor of the submitting

attorney in a disciplinary proceeding if the representations, statements, materials, facts and written assurances received in connection therewith are not false or misleading. The finding constitutes admissible evidence if offered by a party. If a request for an advisory opinion is made within 60 days of the effective date of this section, the statewide grievance committee or reviewing committee shall issue its advisory opinion within 45 days of the filing of the request. Thereafter, the statewide grievance committee or reviewing committee shall issue its advisory opinion within 30 days of the filing of the request. For purposes of this section, an advisory opinion is issued on the date notice of the opinion is transmitted to the attorney who requested it pursuant to subsection (a) herein.

(d) If requested by the statewide grievance committee or a reviewing committee, the attorney seeking an advisory opinion shall promptly submit information to substantiate statements or representations made or implied in such attorney's advertisement. The time period set forth in subsection (c) herein shall be tolled from the date of the committee's request to the date the requested information is filed with the committee.

(e) If an advisory opinion is not issued by the statewide grievance committee or a reviewing committee within the time prescribed in this section, the advertisement or communication for which the opinion was sought shall be deemed to be in compliance with the Rules of Professional Conduct.

(f) If, after receiving an advisory opinion finding that an advertisement or communication violates the Rules of Professional Conduct, the attorney disseminates such advertisement or communication, the statewide grievance committee, upon receiving notice of such dissemination, shall forward a copy of its file concerning the matter to the disciplinary counsel and direct the disciplinary counsel to file a presentment against the attorney in the superior court.

(g) Except for advisory opinions, all records maintained by the statewide grievance committee pursuant to this section shall not be public. Advisory opinions issued pursuant to this section shall not be public for a period of 30 days from the date of their issuance. During that 30 day period the advisory opinion shall be available only to the attorney who requested it pursuant to subsection (a), to the statewide grievance committee or its counsel, to reviewing committees, to grievance panels, to disciplinary counsel, to a judge of the superior court, and, with the consent of the attorney who requested the opinion, to any other person. Nothing in this rule shall prohibit the use or consideration of such records in any subsequent disciplinary or client security fund proceeding and such records shall be available in such proceedings to a judge of the superior court or to the standing committee on recommendations for admission to the bar, to disciplinary counsel, to the statewide bar counsel or assistant bar counsel, or, with the consent of the respondent, to any other person, unless otherwise ordered by the court.

LAC COMMENTARY: This section gives attorneys the option of obtaining an advisory opinion concerning whether their advertisement conforms to the requirements of the Rules of Professional Conduct prior to disseminating the advertisement. An advisory opinion that finds that the advertisement complies with the Rules will be binding in favor of the submitting attorney in a disciplinary proceeding provided the statements, representations and materials submitted in connection with the advertisement are not false or misleading.

IV. **Summary of Recommendations**

For the convenience of the public, the following summary of the major changes being proposed to the Rules of Professional Conduct concerning lawyer advertising and a summary of

two new proposed Practice Book sections that are being recommended in connection with such advertising has been prepared.

1. In Rule 7.1, current subsections (2) and (3), which prohibit communications likely to create an unjustified expectation about results the lawyer can achieve and unsubstantiated comparisons of the lawyer's services with other lawyers' services, have been moved from the text to the Commentary where they are discussed as examples of communications that are prohibited because they are false or misleading.

2. Lawyers may use new electronic technology, including the internet, to advertise their services and such advertising is subject to the Rules of Professional Conduct. (Rule 7.2).

3. An electronic advertisement or communication must be copied once every three months and retained for three years after its last dissemination. (Rule 7.2).

4. A lawyer is only permitted to pay the usual charges of a not-for-profit or qualified lawyer referral service as defined in subsection (c) (2) of Rule 7.2.

5. An advertisement or communication made pursuant to Rule 7.2 must include the name of at least one lawyer admitted in Connecticut responsible for its content.

6. A lawyer who is not admitted to practice in Connecticut is subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. (Rule 8.5).

7. If a lawyer is subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct, and the conduct takes place in connection with a matter before a tribunal, the disciplinary rules of the jurisdiction in which the tribunal sits shall be applied. For any other conduct, the lawyer is subject to the rules of the jurisdiction in which the lawyer's conduct occurred or if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied. (Rule 8.5).

8. Lawyers who advertise must file a copy of their advertisement with the statewide grievance committee either prior to or concurrently with the first dissemination of the advertisement. The filing must be in the same form or forms in which the advertisement is to be disseminated. Several types of communication are exempted from this filing requirement. The statewide bar counsel shall review the material filed on a random basis and if he or she finds that the material violates the rules, shall attempt to resolve the matter with the lawyer. If the matter cannot be resolved, the statewide bar counsel shall forward the matter to the statewide grievance committee. If the statewide grievance committee determines that the material does not comply with the rules, it shall forward the matter to the disciplinary counsel with a direction to file a presentment against the lawyer in superior court.

9. A lawyer may request an advance advisory opinion concerning a contemplated advertisement's compliance with the rules from the statewide grievance committee. A fee

for the advisory opinion is to be established by the Chief Court Administrator. An advisory opinion finding noncompliance with the rules is not binding in a disciplinary proceeding, but a finding of compliance with the rules is binding in a subsequent disciplinary proceeding. If a lawyer disseminates an advertisement after receiving an advisory opinion finding that such advertisement violates the Rules of Professional Conduct, the statewide grievance committee, upon receiving notice of the dissemination, shall forward the matter to the disciplinary counsel with a direction to file a presentment against the lawyer in superior court.

Respectfully Submitted,

THE LAWYER ADVERTISING COMMITTEE
Dated: December 20, 2005

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