***How Far is Too Far: Ethical Issues in Attorney Advertising and Solicitation***

By Lynda J. Grant[1]

As private attorneys general, plaintiffs' class action attorneys work on split second timing. They may have only days to seek injunctive relief before the closing of an unfair deal to a target company's shareholders. They may be responsible for recovering tens of millions of dollars for shareholders who suffered a catastrophic market loss when a company's stock collapses overnight upon the sudden disclosure of adverse information that the company's executives had been concealing or misrepresenting.

While larger plaintiffs' law firms engage in "beauty contests" or the request for proposal process, becoming the preferred provider for large institutional clients such as state pension and union funds, the remainder of class action law firms must rely upon their own creativity within the bounds of attorney advertising. Given this rough and tumble world and the rapidity with which it moves, imaginative plaintiffs' counsel seeking retention are sometimes faced with the issue of "how far is too far"—when does their advertising cross the line into prohibited solicitation. When is their commercial speech no longer protected by the First Amendment?

There is little doubt that plaintiffs' counsel has been aided by the recent liberalization of attorney advertising rules and courts' acknowledgement that attorneys, like other professionals, have the right to earn a living. New York courts in particular have been loath to limit attorney advertising, recently striking a number of prohibitions, including some as frivolous as using actors to portray judges, as constituting unreasonable prior restraints on speech. *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010). Nonetheless, the average plaintiffs' attorney continues to be faced with the issue of whether his retention efforts fall within ethical parameters based upon codes which cannot keep pace with Wall Street or technology.

This article will address a few examples of advertising techniques employed by plaintiffs' counsel and the ethical conundrums they may present.

***Basic Principles***

The primary sources for ethical rules on attorney advertising are the ABA Model Code[2], which sets forth aspirational principles, and the state code of a practitioner's particular jurisdiction.[3] For New York lawyers, that code is the recently adopted New York Lawyer's Code of Profession Responsibility (the "New York Code").

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[2] The ABA Model Rules serve as models for state codes of ethics.

[3] For New York lawyers, the Judiciary Law further governs attorney conduct. N.Y. Jud. Law §§460, *et seq.* (McKinney 2010).

The applicable ABA Model Rules are Rules 7.2 and 7.3, which govern advertising and solicitation, respectively.[4] Rule 7.2, aptly entitled "Advertising." provides that "a lawyer may advertise services through written, recorded or electronic communications, including public media." It defines advertising as any communication which generally informs potential clients about the law firm, its credentials, legal and non-legal education and degrees. *Id.* Advertising, of course, cannot be misleading or violative of any disciplinary rule, and a lawyer disseminating advertising may pay advertising fees notwithstanding the proscription that attorneys cannot pay for referrals. *Id*.

Rule 7.3, entitled "Direct Contact with Prospective Clients," governs solicitation. It prohibits an attorney from soliciting clients "in-person, [through] live telephone or [with] real-time electronic contact" when "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." There is an exception to the prohibition when the person contacted is an attorney, a family member or person close to the attorney. Of course no contact is permissible if the prospective client has made known that he does not want to be solicited or if the solicitation is coercive or harassing.

Those engaged in proper solicitation are governed by Rule 7.3 (b) and (c), which provide that "[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter should include the words 'Advertising Material' on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication."

The New York Rules adopt the Model Rules in large part, but both expound upon them in commentary and limit them in certain ways.[5] Under the New York Rules, almost all communications with a potential client aimed at obtaining that client's business are considered advertising. Rule 7.1, comment 6 [6] ("all communications made by lawyers about the lawyer or the law firm's services are advertising," the primary purpose of which is the retention of the lawyer or his firm.).[7] As such, those communications must be labeled "attorney advertising." Rule 7.1(f). The exceptions to this Rule are communications whose purpose is to educate the public about legal matters or to inform the public about its rights, under the premise that their primary purpose is not to generate business. Rule 7.1(f). Consequently, topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are not considered attorney

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[4] The overarching rule applicable to any client solicitation or advertising is embodied in Model Rule 7.1, which provides that communications should not be false or misleading. ABA Model Rule 7.1.

[5] New York attorneys are also governed by the New York Judiciary Law, including Section 479, which provides in relevant part that it is unlawful "for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly, legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement, authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainer or agreements."

[6] All advertisements must be retained for a period of not less than three years after initial dissemination or, if appearing on a web site, not less than one year. *Id*. at (k).

[7] Communications to existing clients are excluded from the definition of advertising. Rule 7.1, comment 6.

advertising requiring the advertising disclaimer. Rule 7.1(f). Similarly, communications which from their context are obviously advertising, such as radio and television ads, billboards, and newspaper or website ads, are exempt from carrying the attorney advertising disclaimer. *Id*.[8]

Whereas all communications whose primary purpose is to secure business constitute advertising, not all advertising constitutes a solicitation. Like the ABA Model Rules, the New York Code makes clear that solicitation is a subset of attorney advertising because it is aimed at getting the attorney retained by a specific group of clients for a specific purpose. Rule 7.3, comments 1 and 2. Specifically, a solicitation is any advertisement which: (a) is initiated by the attorney; (b) for the purpose of getting retained; (3) motivated by the attorney's financial gains; and, most importantly, (d) is directed to or targeted at "a specific recipient or group of recipients." Rule 7.2, comment 2. "Directed" and "targeted" are defined in Rule 7.3, comment 3, as communications made in-person, by telephone, or by mail addressed to the specific target and, in the case of computerized communications, those made through interactive sites or in real time, such as instant messaging, chat rooms and other conversational computer-accessed communications. Rule 7.3, comment 3.[9] These solicitations are thus prohibited unless made to a client, friend or relative. Rule 7.3, comments 3 and 9.

Direct mail solicitations, emails or express packages designed to be received by specific recipients are acceptable forms of solicitation. However, they must first be filed with and reviewed by the appropriate attorney disciplinary committee of the judicial department where the firm maintains its principal place of business. Rule 7.3(a) and (b). Further, these solicitations must disclose the attorney's name, the name of the firm, its address and telephone number, and must carry the "attorney advertising" disclaimer. Rule 7.3(h). If the solicitation contains a sample retainer agreement, it must make clear that such agreement is only a sample. Rule 7.3(f). Additionally, the law firm must retain the solicitation for a period of not less than three years. Rule 7.3(c)(3).

Advertisements in the public media, such as newspapers, television, billboards and websites, while generally not requiring the attorney advertising disclaimer, will be considered solicitations and are subject to the solicitation rules if they "make reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement makes reference." Rule 7.3, comment 1.[10]

In short, attorney advertising which is targeted or directed to a specific person or audience and arises out of a specific event, such as a plane crash or perhaps a merger, constitutes solicitation and must conform to the solicitation rules.

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[8] Of course these communications must be truthful, not coercive, and cannot be made to someone who does not want to be contacted or cannot exercise reasonable judgment because of his circumstances (e.g., the family of an accident victim). Rule 7.2(a)(2). Moreover, no solicitation can be made where the attorney intends, but fails to disclose, that the matter will be handled by another, unaffiliated attorney. Rule 7.3(a)(2)(iv).

[9] Close friends, existing business relations and the like are excluded from this limitation.

[10] This is particularly relevant to personal injury and wrongful death incidents. *See* Rule 7.3, comment 5.

***Examples from the Trenches***

While the New York Code seems straightforward, its application can be dicey and can raise issues for plaintiffs' lawyers.

***Press Releases***

As every defense counsel and many savvy shareholders know, an announcement of a stock drop in a Fortune 500 company or a merger can bring an onslaught of Business Wire press releases from enterprising plaintiffs' firms seeking to educate the public about their rights. Many of these press releases contain a description of a newly announced merger, takeover or stock drop, followed by a tag line that "ABC Law firm is presently investigating whether the approval of the Merger constitutes a breach of the Board's fiduciary duties to its shareholders" and an invitation to the recipient to contact the firm for more information. For those firms who are late to the party, these press releases sometimes announce that a shareholder case has already been filed (by another firm) and that any interested shareholder should contact the disseminating firm.

While these press releases have become commonplace, they raise a number of issues. The first is whether they constitute educational material. They clearly serve the public interest by raising shareholder awareness of the circumstances of a particular company, yet their underlying purpose is to incite shareholder interest in a class action suit in order for the firm to get retained.

Notably, the Code contains a somewhat circular and nebulous definition of educational material, explaining that it is material whose primary purposed is to educate and inform rather than attract clients. Rule 7.1, comment 9. A press release which seeks to inform the public about shareholders' rights with respect to a particular incident might well be considered educational. The educational purpose of the release is undercut to some extent when it invites shareholders to contact the disseminating firm to discuss its investigation with the goal of having that shareholder eventually retain the firm to commence an action. It moves further into solicitation territory when it includes a blurb touting the experience of the firm and the settlement amounts which the firm has recovered over the years for shareholders.[11] *See* NYSB Op. No. 918 (noting that a communication constitutes solicitation when its main purpose is to attract clients, especially when the material contains statements or suggestions that the recipients should retain the firm, discusses the lawyer's skills, or gives other reasons to hire that lawyer.). It may also be viewed as suggesting to shareholders that a class action constitutes a general solution applicable to all apparently similarly situated individuals when that may not be that client's best course of action. Rule 7.1(r).

[11] Such statement may further create an expectation of the firm's performance, as recognized in Rules 7.1(d)(1) and (2), which must then be supported by fact. Under these circumstances, the law firm is well-advised to add the disclaimer "Prior results do not guarantee a similar outcome." Rule 7.1, comment 11.

The issue becomes more complicated when the press release is disseminated through a means which the lawyer is aware will target a specific audience. Press releases are generally disseminated through Business Wire, which distributes them in a number of fora, including the Internet. These press releases are then picked up by other outlets such as Yahoo! Finance[12] and appear in the "Headlines" section of that site for a particular company. Yahoo! Finance is the Internet site used by many shareholders to quickly find information about a company in which they are invested and is sure to be visited by the company's shareholders after a significant announcement. Although the press release arguably may not have been a solicitation initially, the fact that it appears in Yahoo! Finance which is used by a far more targeted audience - the company's shareholders - could move the release over the line into solicitation. The more targeted the dissemination of information on the Internet, the closer it comes to solicitation.

Another issue arises when attorneys eliminate the use of Business Wire entirely and post their release directly onto Yahoo! Finance or other message boards pertaining to a particular company. This type of targeting, despite that the posting is purportedly for educational purposes again would appear to move it over the line into a targeted solicitation. However, a counter-argument could be made that the message board is not limited to shareholders of the company at issue and, therefore, that the posting is not targeted.

New York courts and the New York State Bar Association have not yet addressed whether these communications constitute something more than attorney advertising. However, these communications walk a fine line and present ethical issues with which plaintiffs' law firms must grapple.

***Direct Mail Solicitation***

Plaintiffs' attorneys often engage in direct mail solicitations. This commonly occurs in the securities arbitration field where hundreds or thousands of cases can arise from the widespread sale of a defective or high risk and unsuitable financial product by brokers throughout the country. In such instances, many plaintiffs' attorneys turn to direct mail to secure retention. It would seem apparent that such direct mail efforts would constitute solicitation and that adherence to the solicitation rules, including prior submission of the solicitation letter to the appropriate disciplinary association, would be necessary.[13] However, the dissemination of such letters may not be quite that simple. Often these direct solicitations are sent to potential clients in multiple jurisdictions. This raises the issue of whether the solicitation must conform to and be approved by the governing authorities for each state to which the solicitation is sent. If the solicitation is directed at New York recipients, the communication must follow New York rules

[12] Yahoo! Finance allows computer users to find a number of categories of information about a company by searching its symbol. The search accesses several pages of information on a public company, including its most current headlines and an interactive message board.

[13] Notably, the rules are more liberal in class actions after the firm has been retained by one client. *See* New York State Ethics Op. 876 (1995).

regardless of where the disseminating attorney practices. Rule 7.4, comment 8 (entitled "Extraterritorial Application of Solicitation Rules"). Other states are not as strict.

Although the actual solicitation may be appropriate, follow-up communications may present ethical issues. In-person contacts, especially telephone calls, constitute prohibited solicitation. Rule 7.3(f). Although reason would suggest that once an attorney has properly contacted a potential client, that attorney should be able to follow up, at least one court in a different jurisdiction has held otherwise. *See Barnwell v. Corrections Corp. of Am.*, 2008 U.S. Dist. LEXIS 104230 (D. Kan. Dec. 9, 2008) (an FLSA case in which the court prohibited follow up with potential class members after the initial notice was disseminated).

***Soliciting Clients Once Retained: The Stalking Horse Filing***

Another way plaintiffs' class action attorneys seek to get retained is by filing a "stalking horse" complaint. The clients with the largest loss will eventually be appointed as lead plaintiff by the court and their attorneys will be appointed as lead counsel in many types of cases. In order to attract a large client and one more likely to become lead plaintiff, some plaintiff's attorneys file an initial lawsuit in a potentially large and well-publicized situation with a small shareholder plaintiff, as a stalking horse, reasoning that since they have already been retained, they can now contact other members of the putative class or send out a press release in the hope of attracting a client with a larger stake in the litigation. After retention by the bigger stakeholder, the initial client will usually be added into a consolidated amended complaint or eliminated in a future, amended filing.[14]

Generally, class counsel can contact members of the putative class as long as such contacts are not misleading or confusing. *See, e.g.*, *Gordon v. Health*, 737 F. Supp. 2d 91 (W.D.N.Y. 2010) (an FLSA action in which the court allowed plaintiffs' counsel to communicate through follow up solicitation letters with putative members of a conditionally certified class with respect to claims which had not been conditionally certified). However, in NYSBA Opinion No. 499 ("Op. No. 499"), the New York State Bar Association has indicated that even a class action attorney who has been retained cannot send out a solicitation for the purpose of obtaining additional clients. Relying upon former DR 2-104(f), Op. No. 499 specifically deals with the issue of whether a retained class action attorney can disseminate to other potential class members a notice offering to "swap information of possible mutual benefit regarding [a specific] class action." Although the presumptive motive for the dissemination of the notice was to garner information about the client's case and thus to strengthen his client's position, Op. No. 499 reasoned that there is an opportunity for abuse and that "it is essential to a finding of ethical propriety that the contact be made for the purpose of advancing a legitimate interest of the lawyer's client and not for the purpose of gaining additional

[14] Under the Private Securities Litigation Reform Act of 1995 or PSLRA, counsel are required to send out a notice that they have filed an action which commences a sixty day period in which others are invited to file actions. 15 U.S.C.§78j, *et seq.* Such notices do not constitute attorney solication.

clients for the lawyer." *See also* N.Y. Jud. Law §§479, 482.[15] Press releases disseminated to putative class members in the hope of being retained by a larger client would seem to present the same issue.[16]

***The Online Retainer Agreement***

Another, albeit less common, tactic used by some plaintiffs' law firms is to post on the law firm's website an announcement or discussion about a case, a copy of their already filed complaint, and an electronic retainer agreement. The obvious purpose is to attract an even larger client with the goal that this larger client will then become the lead plaintiff and the law firm will be appointed as the lead counsel. Although such material would appear to constitute an allowable communication with a potential class member, the issue may not be so simple. Generally, law firm websites are not interactive and thus are not considered a prohibited form of solicitation. Rule 7.3, comments 3 and 9.[17] This is particularly true given that the client is the one initiating the contact. *See also*, NYSB Opinion No. 899 ("Opinion 899") (which states in relation to cyberchatting that "if a potential client initiates a specific request to retain the lawyer during the course of permissible real-time cyberspace communications, then the lawyer's response to that person does not constitute impermissible solicitations.").

The New York City Bar Association considers this as targeting specific potential clients, namely the shareholders of the company at issue. Although the Code exempts law firm websites from restrictions on solicitations, the City Bar has opined that"[i]f a portion of a law firm's web site was designed to target a prospective client, then the lawyer must comply with the filing and list requirements. Rule 7.3(c)(5)(iii). For example, sections of a web site meant to attract potential class plaintiffs for a lawsuit the law firm has filed, or plans to file, would be a solicitation." New York City Bar: Commentary on New York Ethics Rules Governing Lawyer Advertising and Solicitation, at 56.

The online retainer agreement presents additional problems in that it appears to create an attorney-client relationship in which the client now expects that he or she is represented by the firm and will not be substituted for a larger client. Moreover, use of an online retainer agreement in which there is no two way dialogue between the firm and the client could result in a violation of Rule 7.1, comment 9, if it is interpreted as conveying a single resolution to a legal problem to every client (this is particularly true in securities litigation where a client might be better served by commencing an arbitration

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[15] The Manual for Complex Litigation, Fourth, §21.12, allows class counsel to make pre-certification contact with putative class members but notes that such conduct could lead to abuse and that judicial intervention may be necessary. *See also*, Fed. R. Civ. P. 23(g)(2)(4) (noting that "[c]lass counsel must fairly and adequately represent the interests of the class.").

[16] This raises another ethical issue, to wit: filing an action with a client with whom the attorney does not plan to proceed.

[17] If it was a solicitation, it would be governed by Rule 7.3(g), which provides that"[i]f a retainer agreement is provided with any solicitation, the top of each page shall be marked 'SAMPLE' in red ink in a type size equal to the largest size used in the agreement and the words 'DO NOT SIGN' shall appear on the client signature line."

against his broker rather than becoming a member of a class or even the lead plaintiff). The law firm may also be establishing an attorney- client relationship without having first performed a conflict check, in violation of Rule 1.7. In short, online retainer agreements create a host of ethical issues and are best avoided.

***Blogging and the Like***

Finally, there is the issue of blogging, the use of Twitter, Facebook, LinkedIn and similar online methods for obtaining clients. As a general proposition, the more targeted the audience and the more targeted the material, the more likely that such material will constitute restricted solicitation.

***Conclusion***

Although state codes of ethics, and the New York Code in particular, have become progressively more liberal in terms of allowable attorney advertising and solicitation, attorney advertising in the split second world of plaintiffs' class action work still raises issues that have not yet been resolved.

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