

**REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION  
IN SUPPORT OF THE PROPOSED  
REVISIONS TO THE LAWYER'S CODE OF  
PROFESSIONAL CONDUCT ON LAWYER ADVERTISING**

The proposed amendments to the sections of the Disciplinary Rules of the Code of Professional Responsibility governing advertising and solicitation by attorneys contain welcomed (and in some cases long-overdue) changes to our existing Code. The proposed changes are thoughtful and carefully take into account the realities of modern-day law practice. Most importantly, the proposed changes appear, in large part, to achieve the goal of protecting the client's interests and expectations

The Commercial and Federal Litigation Section has reviewed the proposed revisions and, with the exceptions noted below, endorses the changes. The Section would respectfully request that the Office of Court Administration take into account the following comments as to several of the proposed changes:

(1) **Section 1200.6(d)(1)**: The proposed change prohibits "an endorsement of, or testimonial about, a lawyer or law firm from a current client". This raises some concern that such a prohibition, while understandable in its goal, could be unnecessarily broad in application. Specifically, application of the rule would have the effect of treating lawyers in different practice areas differently. There are some practice areas where clients typically hire a lawyer for one particular transaction or event (*e.g.*, real estate closing, wills, estate planning, etc.), while there are other areas where longstanding and institutional clients form the basis of the practice (*e.g.*, corporate, intellectual property, banking, etc.). Under the proposed rules in the former practice

areas, one could have a testimonial or endorsement of a lawyer or law firm from a former client. In the latter practice areas, one could not have a testimonial or endorsement from that lawyer's long standing existing clients. As such, we recommend that the Section oppose the proposed rule that prohibits an endorsement of, or testimonial about, a lawyer or law firm from a *current* client. As long as the lawyer or law firm is in compliance with all other applicable advertisement or solicitation rules, then the distinction between "current client" and one that is not should not matter. The proposed rule also raises a question about law firms that list "current clients" on their websites and marketing materials, including responses to RFPs. Would such lists be considered an "endorsement" of the lawyer or law firm? Is a lawyer prohibited from obtaining a letter of recommendation or reference from an existing client even if requested by a prospective client?

(2) **Section 1200.6(t)(1)**: The proposed rule requiring that all advertisements or solicitations should include a disclosure that the client will remain liable for any costs, disbursements and other expenses incurred, regardless of the outcome of the matter, should be reconsidered. While the proposed rule is consistent with DR5-103(B), which requires clients to remain "ultimately liable" for litigation costs and expenses, the Committee on Standards of Attorney Conduct ("COSAC") has recommended a comprehensive revision of New York's disciplinary rules, including adoption of Model Rule 1.8(e). The latter rule allows a lawyer to advance court costs and other expenses of litigation, "the repayment of which may be contingent on the outcome of the matter." By report of the Class Action Committee, the Commercial and Federal Litigation Section has endorsed that change. The reasons advanced in that report, echoing those articulated by the great majority of states that have adopted Model Rule 1.8(e),

demonstrate that, unlike most of the other proposed amendments to the rules governing advertising of legal services, adoption of Section 1200.6(t)(1) would be inconsistent with the goal of protecting the client's interests and expectations.

First, while under the current rule clients must assume the theoretical liability for costs regardless of the outcome of the case, there is no disciplinary requirement that counsel sue their clients to collect this sum in the event the case is lost. Indeed, many states recognize a "universal practice" by contingent litigation firms of not doing so. *See Dinter v. Sears, Roebuck & Co.*, 278 N.J. Super. 521, 531, 651 A.2d 1033, 1038 n. 9 (Sup. Ct. N.J. 1995) ("The change was apparently motivated by the universal practice by which an attorney, who represents a client on a contingent-fee basis, declines to sue his client for reimbursement of advanced expenses."); *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 642-43 (N.D. Cal. 1991) (noting that prior to the Model Rules, "most contingent fee lawyers had long since given up pressing clients for repayment of expenses if no recovery was obtained"). Thus, requiring that an advertisement for legal services warn about liability that, in practical terms, will never be incurred is misleading in terms of client expectations. The misimpression that would be created would have material, adverse consequences, related to another reason states have adopted the Model Rule on this matter, discussed below.

Second, the proposed warning will likely act as a disincentive for individuals and institutions to undertake litigation to recover losses that others wrongfully caused them to incur, thus improperly limiting access to the courts. *See, County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1414 (E.D.N.Y. 1989) ("We cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich"). Thus, such a warning hardly serves the interests of clients. When considering together the universal practice

of contingent litigation law firms of not suing their clients for advanced costs incurred in lost cases, and the harmful disincentives of giving potential clients the opposite impression, the proposed amendment to the rules on advertising is not warranted.

Third, the disciplinary rule is inconsistent with the purposes underlying class action litigation in federal court. Rule 23 of the Federal Rules of Civil Procedure exists in part to allow individuals to bring an action on behalf of a class of plaintiffs when those individuals would not have the funds to pay for the costs of pursuing complex litigation individually. Recognizing this, the United States District Court for the Southern District of New York held in In re WorldCom Sec. Litig., 219 F.R.D. 267 (S.D.N.Y. 2003), that “strong federal interests” require that New York’s rule on reimbursement of costs “be disregarded” because “[w]here the litigation is vast, even a pro rata share of the costs may discourage potential class representatives, and encourage selective filing in districts located in states with less restrictive local rules.” New York should not adopt an advertising rule that is inconsistent with the rules that federal courts in New York apply to the reimbursement of costs in class action litigation.

While DR5-103(B) remains, for the time being, a binding rule, that fact, by itself, is not a sufficient reason to build on that provision with another disciplinary rule relating to advertising. This is particularly so given that the COSAC has recommended the repeal of DR5-103(B) and adoption of Model Rule 1.8(e). To the extent that there may exist any contingent litigation firm that deviates from the “universal practice” of not seeking return of advanced costs to clients in cases that are lost, the interests and expectations of clients can best be protected by rules governing the content and form of retainer agreements. A new limitation on advertising inconsistent with actual practice, however, would be harmful and inconsistent with the goals of the disciplinary rules.

(3) *Section 1200.41-a*: The proposed prohibition on contacting potential plaintiffs in wrongful death and personal injury cases for at least thirty (30) days after the date of the incident is troublesome for several reasons. This rule, if adopted, would appear to leave an unsophisticated victim little time in which to receive and evaluate proposals from attorneys, and could be viewed as an impediment to the search for counsel. The effect of the proposed rule is likely to have an unintended consequence as well. That is, for a thirty-day period, victims who may not have personal lawyers, remain unrepresented and could very well be approached by the “defense” during that window in an attempt to compromise any potential claims. Finally, the proposed rule also may not adequately protect victims with potential claims where shortened notice provisions apply, such as against municipalities who might have to give notice within sixty (60) or ninety (90) days, or to insurance carriers.

One member of the Executive Committee dissented from this recommendation. The dissent noted that the Mass Disaster Committee had recommended the moratorium to prevent the flood of attorney advertising and the rampant direct attorney solicitation that typically follows mass disasters such as plane, train and ferry crashes. The dissent states that this brief time out is consistent with the 45 day window specifically provided by federal law for air disasters (which expressly prohibits any lawyer contact -- plaintiff or defense), and can be shortened to account for prompt filing requirements in the case of suits against municipalities (with 90 day notice requirements). We also note that the State Bar of Florida enacted a similar restriction following the ValuJet crash in the Everglades, and has not reported any problems in its implementation.

(4) **Section 1200.1(k)**: The proposed definition of “advertisement” would arguably include any comments made by an attorney not only in a brochure or website, but also in a news article or on television in which the attorney makes a statement about himself or herself. As attorneys are quoted in many news articles, sometimes about cases that they handle at other times about cases they are not handling, the proposed rule would seem to be implicated. As far as feature articles, attorneys often times write about past cases, motions, etc., which could arguably be prohibited as well. If such statements are within the meaning of "advertisement" under Section 1200.1(k), then the articles or stories would have to include the language prescribed in Section 1200.6(g) or (h), and also then be filed with the Attorney Disciplinary Committee as the rules contemplate.

## Conclusion

With the exception of the limited comments set forth above, the Commercial and Federal Litigation Section endorses adoption of the Office of Court Administration's proposed revisions to the Code of Professional Responsibility. The Section applauds the effort of the Task Force in attempting to formulate these rules.

Dated: July 25, 2006

This report originated with the Ethics and Professionalism Committee of the Section, James M. Wicks and Anthony J. Harwood, Co-Chairs.