TANGLING UP THE WEB FOR LAWYERS

Some Comments on the Proposed Lawyer Advertising Rules,
Mostly as They Apply to Websites and Email

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(PERSONALLY AND NOT ON BEHALF OF ANY ORGANIZATION)

SUBMITTED TO:
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These comments are submitted both on paper and as an interactive PDF file on CD-Rom. Insert the CD-Rom into a CD-Rom drive. It should "launch" automatically. If it doesn't, double-click the file on the CD-Rom called "Tangling Up the Web for Lawyers.pdf." Within the PDF file, most cross-references are "clickable" hyperlinks, just like on the web. These "clickable" hyperlinks, mostly underscored, include web addresses, table of contents entries, bookmarks in the left margin, section numbers, footnotes, citations, and internal cross-references. When the PDF cursor rolls over any "clickable" reference, the usual "hand" image will change to extend its index finger. Click to follow the reference. Press ALT-Left-Arrow to go back. This demonstrates use of PDF as an accessible and user friendly format to present organized bodies of information, such as legal material or commentary. (It also demonstrates the imperfections of PDF: These clickable cross-references don't work when they go to or from text in footnotes.) If this submission is posted online, the writer recommends posting the interactive PDF file instead of scanning the paper submission. The interactive PDF file is also available on www.real-estate-law.com under "Legal Practice/Ethics."

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Some Comments on the Proposed Lawyer Advertising Rules,
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July 18, 2006

Joshua Stein[2]
(Personally and Not on Behalf of Any Organization)

Legal ethics rules scheduled to become effective this fall would impose tremendous burdens on lawyers who use websites and email to communicate with their clients and prospective clients. Most of these burdens would produce no corresponding benefits to actual or potential clients, the public, or the legal profession. In this submission, I will explain my concerns about the proposed new rules, and recommend specific changes that would resolve my concerns without interfering with the overall goals of the Rules.

I. INTRODUCTION AND OVERVIEW

In June 2006, the New York State Office of Court Administration ("OCA") posted on the Internet a set of proposed changes to the Lawyer's Code of Professional Conduct that would limit lawyer advertising in New York (the "Rules"),[3] effective as of November 1, 2006. The Rules would, among many other things, limit how lawyers[4] can use websites to communicate anything about themselves or the areas of law in which they work (the "Website Rules").

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[3] OCA's posting appears at http://www.nycourts.gov/rules/proposedamendments.shtml. The Rules were also posted, in a consolidated format, at this address: http://www.nylawyer.com/adgifs/decisions/061506rules.pdf.

[4] When I say "lawyer," I mean a New York lawyer. Although the Rules assert tremendous jurisdictional scope – they seem to apply to any lawyer anywhere who operates any public website on any area of law – the "choice of law" provisions mitigate this breadth.

The Rules would interfere with benign and reasonable website and email communications by lawyers. The Rules would unnecessarily frustrate lawyers' efforts to disseminate truthful and useful information about the law and themselves, ultimately hurting consumers of legal services.

I will summarize the Rules that concern me; explain my basis for each concern; and recommend a specific change, often minor, to solve each problem. I will address these matters in descending order of importance, as I see them.

I summarize my concerns and recommendations in Exhibit A: Summary of Concerns and Recommendations, which is preceded by an Index of Defined Terms. For convenience, I include in Exhibit B: Selected Rules35F copies of each Rule I cite, captioned using my defined terms.[5]

Almost ten years ago, I established a website called www.real-estate-law.com, which I have now developed extensively and still operate. My website offers copies of dozens of my articles about real estate law and information about four law books I've written, my law practice, and other matters. I believe my website is tasteful, informative, accurate, ethical, and useful for both lawyers and nonlawyers.[6]

If the Website Rules take effect as written, my website and most other lawyers' and law firms' websites will at a minimum require significant reprogramming to comply. But nothing on my website, or most of the other suddenly noncompliant websites, will pose any threat to any client, potential client, or the public, or otherwise create any true ethical issue. Conclusion: the Website Rules go too far and create compliance issues, and a burden on lawyers' websites, where none should exist.

I hope OCA will consider the concerns I express here, and in response adopt enough of my recommendations so the Rules will not interfere unnecessarily with legitimate and appropriate use of websites and email by lawyers and law firms.

This submission reflects only my own views, not those of any law firm or other organization with which I am affiliated.

See Rules § 1200.5-a. Also, for convenience and to prevent distraction, I use masculine pronouns throughout. I recognize, once, that many lawyers and judges are "she."

[5] In the interactive PDF version of this submission, if you click on any Rule number (except in a footnote), you will jump to the relevant language from that Rule in the Exhibit containing extracts from the Rules. Press ALT-Left-Arrow to go back.

[6] If my website already violates any ethical rules, this was unintentional. I will fix it promptly. I am reminded of a quotation from Cardinal Richelieu: "If one would give me six lines written by the hand of the most honest man, I would find something in them to have him hanged." I hope he was wrong about my website.

II. OVERBROAD DEFINITIONS

As their starting point – and the starting point for many of their problems – the Rules include extremely overbroad definitions for three crucial terms: "advertisement," "solicitation," and "computer-accessed communication" (collectively, the "Regulated Communications"). The Rules apply to most Regulated Communications, so the definitions of those terms form the foundation for the Rules. I will present the definition of each term in order, then show why each captures too much.

Advertisement. The Rules define "advertisement" to mean "any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services." Rules § 1200.1(k). This definition might, for example, turn all these communications into Regulated Communications:

- If a real estate lawyer publishes an article on how he negotiates ground leases.
- If a lawyer maintains a website and includes his biography (or other information about himself) in the website.
- If I write an article about the activities of the NYSBA Real Property Law Section and mention particular individual lawyers.
- If I submit comments to OCA and say anything about myself (e.g., this submission).
- If a lawyer writes a letter to the editor of *The New York Sun* saying he thinks Dick Parsons, a lawyer, is doing a good job or a bad job running Time Warner.
- If a lawyer operates a website with information about legal developments in a particular practice area.
- If a lawyer circulates a memo to his clients about a legal development and how it affects closing procedures and documents for transactions of the type(s) he handles.

These examples demonstrate that the definition of "advertisement" in the Rules goes far beyond any normally accepted or intuitively reasonable definition of that term. The bloated scope of this term captures a wide variety of communications that have absolutely no ethical implications, and for which no government agency (even a well-meaning one) should have any oversight or monitoring role whatsoever.

Solicitation. The Rules define "solicitation" to mean "any advertisement or other communication directed to or targeted at a specific recipient or group of recipients, including a prospective client . . . concerning the availability for professional employment of a lawyer or law firm." Rules § 1200.1(l). This definition might, for example, turn all these communications into Regulated Communications:

- If a lawyer sends an email message to a present or potential client, asking what they are working on and reminding them that the lawyer handles a particular kind of work, or telling them about some recent legal development in that area.

- If a lawyer publishes an article that mentions his expertise in a particular area of real estate, implicitly reminding readers of his availability to do that kind of work.

- If a client asks a lawyer whether he can handle a transaction, and the lawyer writes an email to confirm he can, or writes the same client an email to "check in" about a possible engagement that the client had previously mentioned.

- If a client asks a lawyer to recommend four possible lawyers to handle a transaction that the law firm cannot handle, and the lawyer sends an email with these names.

- If a law firm sends Christmas cards (or "eholiday ecards" by email) or a seasonal report to its clients, and mentions areas of practice or recent closings.

- If a group of lawyers in a maintain an email "listserv" or "forum," and through that medium exchange information about lawyers who may be looking for jobs.

- If a lawyer sends an email message to 1700 other lawyers seeking referrals.

Each of these examples may fall within "solicitation" as the Rules define it. Therefore, if one reads the Rules literally, every one of these communications may become a Regulated Communication. That just makes no sense.

Computer-Accessed Communications. The Rules define a "computer-accessed communication" as an advertisement or solicitation (each very broad) that is "disseminated through the use of a computer or other electronic device, including, but not limited to, web sites or pages, search engines, electronic mail, banner advertisements, pop-up advertisements, chat rooms, list servers, instant messaging, domain names, or other internet presences, and any attachments or links related thereto." Rules § 1200.1(m).

The definitions of Regulated Communications assure that almost any public web-based communication by a lawyer, and almost every private email communication that bears directly or indirectly (or even subtly) on engagement of a lawyer to perform legal services, might be deemed a Regulated Communication. The problem lies in the definitions of "advertisement" and "solicitation," though – not in the definition of "computer-accessed communication," which simply extends these overbroad definitions to computerized communications media.

The overbroad definitions of Regulated Communications, combined with the excessive requirements in the Rules, will impose a tremendous and unnecessary burden on the legal profession and its regulators, particularly as the Rules apply to websites and email.

More realistically, though, the Rules will impose no burden at all, because they go so far that no one will believe them or take them seriously. But bad laws that cannot be enforced tend to reduce the authority of all laws and the legal system, and are therefore not a good idea.

I recommend that OCA trim the definitions of Regulated Communications substantially, both by limiting their scope and, for clarity, perhaps listing communications that fall outside their scope. Even if any communications by lawyers are not Regulated Communications, of course, the Rules should always require that they not be false, deceptive, misleading, exploitative, deceitful, or otherwise in violation of some specific disciplinary rule (collectively, "Unethical"; and the opposite being referred to as "Ethical").

Based on the preceding discussion, I recommend changes such as these in the definitions of Regulated Communications:

- If a lawyer communicates about another lawyer (not in their own firm), this should categorically not constitute Regulated Communication.

- Limit Regulated Communications to communications whose primary and direct purpose and effect relate to engagement of counsel by persons other than the following ("Existing Contacts"): (a) past or present clients; and (b) others who have an existing business or personal relationship with the lawyer.

- Regulated Communications should include only email[7] that meets conditions like these (an "Email Campaign"): (a) the lawyer sends the same email to more than, say, 50 recipients substantially simultaneously; (b) the recipients are not all Existing Contacts; and (c) the email directly or primarily invites the recipient to hire the lawyer to perform legal services (as opposed to being primarily informational).

- Expressly exclude any communications that primarily inform the recipient about the law or legal developments, including articles, legal brochures, and legal updates.

- Expressly exclude any communications sent only to other lawyers.

- Given that the Rules seem primarily concerned about protecting consumers from overly aggressive lawyers seeking business, limit Regulated Communications to cover only communications to individuals (except Existing Contacts) about their household, consumer, personal, or family legal affairs.[8]

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[7] This submission focuses on email. Similar concepts would make sense for "snail mail" and other forms of mass communication.

[8] The Rules assume: (a) anyone who might hire a lawyer is helpless, incompetent, and unable to exercise any judgment (effectively a stupid child); and (b) lawyers are evil opportunists obsessed at all times with tricking clients into hiring them. I question both assumptions, even among consumers and the lawyers they hire. But even if these assumptions are sometimes accurate, I question whether they are accurate enough often enough to justify the tremendous burdens the Rules (with or without my suggested changes) would impose on the entire legal profession. Unfortunately, the Rules are accompanied by no comparison of burdens versus benefits.

One could probably suggest dozens of possible changes along similar lines. Any such narrowing of the definitions would bring them more closely to whatever problems may merit regulatory intervention. For example, I might suggest these definitions of "advertisement" and "solicitation" (along with a couple of other related definitions to prevent repetition):

- "Advertisement" means any promotional communication: (a) directed primarily to consumers; (b) communicated to the public, not specific identifiable consumers; and (c) for which a lawyer or law firm pays consideration to an advertising medium (such as a newspaper, magazine, or search engine) in exchange for disseminating such promotional communication.

- "Consumer" means an individual or a natural person.

- "Promotional communication" means any communication (in any medium), initiated by or on behalf of any lawyer or law firm, that: (a) directly and substantially promotes the legal services of such lawyer or law firm; and (b) as its primary purpose, encourages consumers to engage such lawyer or law firm to perform legal services of particular type(s) for such consumers' personal, family, or household affairs.

- "Solicitation" means any promotional communication dispatched by or on behalf of any lawyer or law firm, substantially simultaneously, to ___[9] or more specific identifiable consumers (other than past and present clients) with whom the lawyer or law firm does not have an existing business, personal, or family relationship.

I am sure that greater minds can improve or fine-tune these definitions, perhaps with help from the Federal Trade Commission's regulations on telemarketing and junk faxes. I offer these definitions as a starting point for an approach that I think would make much more sense.

III. POP-UP BAN

The Website Rules prohibit any lawyer from using "a pop-up advertisement in connection with computer-accessed communications" (the "Pop-Up Ban"). Rules § 1200.6(i). Given the breadth of these terms, as discussed in Section II, the words of the Website Rules effectively ban all use of pop-up windows by all lawyers.

This prohibition was, no doubt, motivated by the annoying pop-up ads that some website advertisers use. It goes much further, though. In web parlance, a "pop-up" means any process where a website launches a new browser window to display new information. Website programmers use pop-up windows as a design element all the time. Often they are inoffensive.

As a particularly ironic example, the New York State Unified Court System (the "Court System") website uses pop-up window technology to display the Rules.[10] If any web user tries to

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[9] Fill in whatever number makes sense. I would suggest 50, but others may differ.

[10] Start here: http://www.nycourts.gov/rules/proposedamendments.shtml. Click on any individual link for particular Rule(s) (such as "1200-1").

view the Rules with their pop-up blocker on, they won't be able to, because the Rules appear in a new browser screen – the essential characteristic of a pop-up window – and that "pop-up" will get blocked.

On my own website, I use pop-up technology every time a user clicks on a link to read an article. Each article opens in a new browser window – a "pop-up window" -- without closing the web page the user previously visited. If the user closes the new pop-up window, they can still go back to the previous web page. This reduces the likelihood the user will get lost, frustrated, or confused. That's probably why the Court System uses pop-up technology to display the Code.

Because many pop-up windows are perfectly unobjectionable, the Website Rules should, at most, prohibit only objectionable pop-up windows. For example, the Website Rules might prohibit only a pop-up window that: (a) launches on its own initiative, not in response to a user's clicking a link (sometimes called an "unrequested pop-up"); (b) cannot be easily closed; (c) launches when the user closes some other pop-up window; (d) moves around the screen; or (e) makes noise. These are the essential characteristics of objectionable pop-up windows.[11]

This is not the end of the discussion, though. "Bad" pop-up windows are annoying. Does that make them a violation of legal ethics? I submit not. If some lawyer wants to market himself by annoying his prospective clients, why can't he? The only appropriate question to ask is whether a lawyer's advertising is Ethical or Unethical. If it is Ethical but obnoxious or stupid, I see no basis to ban it. And I cannot imagine that the Constitution would allow any governmental authority to ban any speech – even speech by lawyers -- merely because it is annoying.

I favor removing any prohibition on pop-up windows.[12] As a possible intermediate measure, I suggest banning only "bad" pop-up windows, such as those I've tried to describe above.[13] I would not, for example, want to ban pop-up windows like the one the Court System uses to display the Rules on its own website.

Finally, I have referred throughout this Section III to pop-up windows within a lawyer's own website. The Website Rules may seek merely to prohibit lawyers from establishing pop-up windows in any website that is not their own (for example, an ad for Joe Lawyer that suddenly

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[11] There are also "pop-under" windows, which secretly and gratuitously open "behind" the browser screen presently open. When the user closes that browser screen, the "pop-under" window displays itself in full useless glory, usually with many characteristics of "bad" pop-up windows as summarized in text. The website www.foxnews.com, for example, often inflicts "pop-under" ad windows when a user closes a Fox News web page other than the home page. Any prohibition on "bad" pop-up windows might also extend to "pop-under" windows, which are almost universally "bad." As noted later in text, however, I oppose any prohibitions on pop-up windows.

[12] Of course, the general prohibition on Unethical conduct should always apply to pop-up windows, just like most other actions of a lawyer. Must the Rules say this again?

[13] "Pop-under" windows constitute particularly inviting candidates for prohibition, although as noted in text I do not think the Website Rules should worry about any of this.

pops up when a web user visits their favorite pornographic website). If that is what the Rules intend, then that is what they should say.

Even then, however, a prohibition on pop-up windows seems unnecessary, unless (perhaps) it is clearly limited to "bad" pop-up windows or association with "bad" websites. What if a local bar association's referral website uses ordinary ("good") pop-up technology to display information about lawyers who have signed up for the service? What if a chamber of commerce does that for a local lawyer? What if Joe Lawyer in the last paragraph represents pornography companies or defends pornography viewers? Or what if Joe has learned that patrons of a particular pornographic website have backgrounds and characteristics that make them perfect prospective clients? Why shouldn't he be allowed to reach those potential clients through pop-up advertisements on a pornographic website?[14]

I don't see why the Rules should get involved with any of this. I am not sure any concern about the ethical distinctions between "good" and "bad" pop-up windows (or "good" and "bad" host websites) justifies any effort to define the gradations. I would simply allow lawyers to use pop-up ads and pop-up windows as long as they are Ethical.

IV. RETENTION REQUIREMENT

The Rules require lawyers to retain copies of Regulated Communications, including copies of websites (the "Retention Requirement"). More specifically, the Rules require:

> A copy[15] of all written advertisements and solicitations and computer-accessed communications shall be retained[16] for a period of not less than three years following their dissemination, except that in the case of an internet web site a printed copy of each page shall be retained for a period of not less than one year from its first publication or modification.

Rules § 1200.6(n). A Retention Requirement makes sense. The Website Rules should, however, take into account some special characteristics of websites.

A website changes constantly, perhaps daily. On my own website, for example, I might myself at any time post an article, add an "item" about something, change some explanatory comments about an old article, or create a new subject category in my main menu. The ability to

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[14] The answer may be that it's "undignified," and there is still some dignity left to the legal profession. I don't disagree. The Rules should perhaps limit lawyer advertising to "dignified" websites, with definitional assistance from Justice Brennan. Whether or not lawyers must limit their advertising to "dignified" websites, it is hard to see how pop-up advertisements are a problem but banner advertisements are okay, which is the only line the Website Rules actually draw in this wretched little corner of the law.

[15] In 2006, "copy" probably includes a machine-readable copy, e.g., a PDF file or a copy of an email in an Outlook folder. The Rules might clarify/confirm this point.

[16] The Rules speak in the passive voice, perhaps leaving some question about who must actually do the retaining (or face sanctions for failure to do so). I assume the lawyers.

change a website at any time is part of its essential character and what makes it so valuable. Lawyers who operate a "blawg"[17] carry this process to an extreme, updating their "blawg" at least daily with new comments.

Aside from changes I can make myself in the substantive contents of my website, I can also control how the website operates (and the text it generates) by giving new specifications to my web programmers at Suntec Web Services Pvt. Ltd. in New Delhi, India ("Suntec").[18] I update those specifications at will through an administrative interface I specified for my website. For example, I recently gave Suntec over a dozen minor repairs and improvements for my website. Suntec will accomplish them at various time(s) within the next few weeks. I typically won't even know when each has been done, though I will eventually receive an email when they have all been done. By then I will probably have requested more changes.

When Suntec or I change anything on my website, is that a new "advertisement" or "modification" requiring me to keep a new archival copy of my "advertisement" or its "modification"? I submit not. Others might argue otherwise. Usually the more conservative viewpoint wins in any discussion of legal ethics. In that case, I might need to keep a copy of my entire website every time Suntec or I change anything in it – a burdensome requirement.

I suggest a change in the Retention Requirement for websites. The Website Rules should require a lawyer to keep a copy of his entire website, updated quarterly at most. If a lawyer intends to change his website's overall appearance or function, or to remove significant content previously online, he should keep an archival "snapshot" of the website just before the major change. This would move the Website Rules to a reasonable middle ground.

The Retention Requirement requires the lawyer to retain "a printed copy of each page" of his website. Does this require a paper printout? Or do the Website Rules allow use of more technologically advanced (and appropriate) storage media, such as a CD-Rom, a hard drive, or a separate archival folder[19] elsewhere within the same website? These high-tech alternatives seem appropriate, because anyone who can set up a website should also be able to figure out how to set up automatic backups. As a variation, OCA or some other regulatory authority (or a subcontractor, such as Suntec) could easily establish an online "repository service" to maintain

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[17] Just as it speeds up communications, the Internet speeds up evolution of language. A few years ago, people began to post on the web a "log" of their musings, allowing readers to comment and react online. This became a "weblog," soon abbreviated to "blog." When a lawyer maintains such a thing, it becomes a "blawg." Millions of blogs now constitute the "blogosphere." An active "blogger" typically updates his blog at least daily.

[18] For more information, visit www.suntecindia.com.

[19] For example, visit www.real-estate-law.com/2005-files/index.htm, which gives you a snapshot of my website before Suntec rolled out the current SQL-server edition. In this archive, most internal links still work. In any mandatory archive, of course, all internal links should always work. My hosting service (www.1and1.com) offers enough capacity to maintain over 100 such archival copies of my website, all for $9.95 a month in total.

the required website copies automatically, and make them available whenever needed. I would be happy to pay to use such a service.[20]

If it is truly important to keep a central archive of lawyers' websites, any legal ethics authority that cares could at trivial cost create an automated system to keep these copies as often as the authority saw fit. An automatic copying function could save an image of every publicly available page of every lawyer's website. [21] This would avoid any need to require anyone to do anything. It would require no policing or enforcement. Its cost would be less than the cost of a single full-time enforcement person.

If the Retention Rules do require a lawyer to maintain a paper printout of his website, this requirement will become burdensome in itself for any large website.[22] That becomes particularly true if the Website Rules require the lawyer to save multiple copies of his website (e.g., every time the lawyer makes a change, or even once a month).

To summarize, I recommend these changes in the Retention Requirement for websites:

- Clarify that a lawyer must retain a copy of his website only every quarter or just before making a major change, as defined in some reasonable way.

- Confirm that the copy need not be maintained on paper, but instead on a hard drive, CD-Rom, or website.

- Consider establishing an automated archiving system.

V. FILING REQUIREMENT

The Rules require lawyers to file copies of almost all their advertisements and solicitations with their local disciplinary committee (the "Filing Requirement"). More specifically, the Rules provide in part as follows:

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[20] I would even be happy to invest the time, money, and effort to oversee the design, development and implementation of such a service, if it were mandatory and I could keep the user-fee revenue.

[21] Until early 2005, www.archive.org performed this function, automatically every few days, for most public websites. Visit www.archive.org; find the "Take Me Back" box; and type in www.real-estate-law.com. www.archive.org will report that it took an automatic snapshot of my website every few days from 1999 until March 2005. Much of that accumulated information now seems lost. I mention www.archive.org only to show what could be (and once was) done with ordinary web programming. The "frequently asked questions" on www.archive.org suggest some limits on its archiving powers, even before it stopped working. Any program to maintain online copies of lawyers' websites would face similar limits, which any archiving rules would need to consider.

[22] My website, for example, contains the equivalent of up to 500 paper pages of material in over 100 data files. This is much larger than most individual lawyers' websites (other than very active bloggers), but tiny compared to many law firms' websites.

> All advertisements or solicitations other than those appearing in a telephone directory which are utilized by a lawyer or law firm seeking to be retained by a client in this State shall also be subject to the following provisions: (1) A copy of each advertisement or solicitation shall at the time of its initial dissemination be filed[23] with the attorney disciplinary committee of the appropriate judicial department. A filing shall consist of: . . . for mailed or computer-accessed communications, a copy of the document sent with any enclosures and sample envelope if utilized[.]

Rules § 1200.6(o). The broad scope of Regulated Communications means that the Rules would require lawyers to file with the disciplinary committee a copy of every lawyer's website and every email from a lawyer to anyone (even just one person!) about doing legal work.[24]

If lawyers read the Rules literally and try to comply, the unfortunate disciplinary committees should face a flood of copies of all kinds of communications by lawyers, most of no danger to the public whatsoever and of no interest to anyone except (maybe) the sender and the recipient. Do the disciplinary committees really need all this information? Can the State budget afford the payroll and fringe benefits necessary to hire people to process all this stuff, and all the supervisors, support staff, office space, and office furniture they will need?

The Filing Requirement also raises some of the same questions as the Retention Requirement. If an attorney changes or updates his website, is that a new "computer-accessed communication" requiring a new filing? I would think not, because it's not an "initial dissemination." It's not clear, though, and one errs on the conservative side in legal ethics.

Maybe I am needlessly overwrought about the Filing Requirement. Maybe I take the Rules too literally. Maybe they weren't really intended to require as much filing as I fear. I hope that's true, but if so I encourage OCA to trim the Rules to clarify exactly what OCA really intends, starting with the definitions of Regulated Communications. Of course, I would prefer to eliminate a Filing Requirement entirely, relying instead on a narrower Retention Requirement.

If a Filing Requirement remains, then I recommend at least these changes:

- For websites, OCA should adopt some of the same mitigation measures I suggested in Section IV for the Retention Requirement.[25]

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[23] Again, the passive voice hides who must actually do the filing. Presumably the lawyers.

[24] The same definitions apply for the Retention Requirement. There, however, they are benign (except as they apply to websites). A requirement for lawyers to keep copies of things they send out is much like a requirement that they wake up in the morning. This assumes mere retention will satisfy the Retention Requirement, as opposed to maintaining or organizing separate files or records.

[25] Some of my technology-based suggestions would, for websites, combine the Filing Requirement and Retention Requirement into a single requirement that could function

- For email communications, OCA should require filing only for an Email Campaign.

These measures would clarify the Filing Requirement while limiting it to the few cases that might conceivably justify such a requirement. I would still favor eliminating it.

VI. IDENTITY REQUIREMENT

If a lawyer's website uses a domain name (like mine) that doesn't include the lawyer's name, the Website Rules require that "all pages of the web site include the actual name of the lawyer or law firm in a type size as large as the largest type size used on the site." (the "Identity Requirement"). Rules § 1200.7(e)(1).

An Identity Requirement seems unobjectionable. It also conforms to what most lawyers would do anyway to promote or market themselves. As with some other Website Rules, though, the Identity Requirement does not adequately consider the practicalities of websites.

Any significant website will contain many words, in many sizes of type. On my website, for example, I include reprints of many articles. The headlines in those articles often appear in "display" size type. Here is an example from my website:[26]

Writing Clearly

These words appear in approximately 42-point type. In contrast, the body of this submission uses 12-point type.

Taken literally, the Identity Requirement requires me to include my name in 42-point type on every page of my website. If any article anywhere on my website has even larger headlines, I'd have to use that even larger type size for my name on every page of my website.

This all seems excessive and unnecessary. The Rules say generically: "Any words or statements required by this rule to appear in an advertisement or solicitation must be clearly legible and capable of being read by the average person, if written[.]" Rules § 1200.6(l). If the Rules require a lawyer's name to appear on every page of his website, the quoted language would require the name to be reasonably clear and visible – an appropriate and adequate requirement. There is no need to require a huge type size just because that huge type size happens to appear somewhere else on the same web site.

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with no human intervention. This would, among other things, dramatically reduce the cost of the Website Rules to the State of New York or the legal profession.

[26] To view this article online, start at www.real-estate-law.com. Then click "Better Documents," and finally "Writing Clearly and Effectively – How to Keep the Reader's Attention." If your pop-up blocker intervenes, adjust it appropriately.

Therefore, I favor eliminating the type size requirement entirely. As a possible intermediate measure, I suggest requiring, for example, use of 12-point or larger type.[27]

Any Identity Requirement will not work with certain types of web pages, though. Some web pages are just not conducive to an Identity Requirement. For example, if my website offers a full-screen photograph of a building or a "PDF" file with a copy of the Rules, it is not easy (and often not appropriate) for me to include my name on that particular page of my website.[28]

Therefore, I suggest the Rules limit the Identity Requirement to any web pages that include textual content coded by or for the lawyer as part of the website programming. This would, for example, cover any web page coded in "HTML" code, with Perl scripts, or using any other tool that allows a website owner to control textual content that will appear on the website.

Drawing the line may be as simple as saying that if a web page includes any text (as opposed to graphics) generated by the website, the Identity Requirement applies.

VII. WARNING REQUIREMENT

The Rules require lawyers to include certain warning flags in any email or website that could be a Regulated Communication. Here is the requirement (the "Warning Requirement"):

> Every written advertisement or solicitation, including computer accessed communications, other than those appearing in a radio or television advertisement or in a telephone directory, newspaper, magazine or other periodical, or made in person pursuant to section 1200.8(a)(1) of this Part, shall be labeled "Attorney Advertising" on the first page. . . . In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING".

Rules § 1200.6(h). I realize the Warning Requirement may track similar requirements in other states.[29] It is hard for me to see, though, why lawyers in any state should be forced to demean

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[27] The Identity Requirement might also require that the lawyer's name appear somewhere in the top half of the reader's computer screen when the reader opens each affected web page. Otherwise, a lawyer who wants to hide could include his name only at the bottom of a very long web page. On the other hand, the Identity Requirement probably does not add enough value to justify a single layer or nuance of interpretational detail.

[28] A programming technology called "frames" can solve the problem by displaying a photograph or "PDF" file as less than a full screen, using the rest of the screen to display text (e.g., the lawyer's name) in a separate box. "Frames" are tedious to program and use. They can impair a site's functionality and usability. I would not require them.

[29] The Warning Requirement also tracks our national tendency to add warning labels to all kinds of things, sometimes to identify risks that seem humorously obvious or incomprehensible. Our propensity for warning labels has, appropriately, become a bit of a joke. *See, e.g.*, the "wacky warning labels" annual contest described at www.mlaw.org/wwl/index.html. If the Rules are adopted as is, New York's "Attorney Advertising" warning flags could win future "wacky warning label" contests.

themselves by identifying their client-relations communications as advertising. No other profession to my knowledge faces such a burden. I would argue that recipients of email or other communications, or website visitors, should be able to figure out whether a communication is advertising (just like one trying to sell a magazine subscription, a public relations consultant, an air conditioner, a diamond ring, or the services of a local dentist). The Warning Requirement insults not only the legal profession but also anyone who receives any Regulated Communication from any member of that profession.

I can understand having warning labels for poisons, airbags, flammable clothing, dangerous intersections, or hazardous waste. But I cannot see why attorney advertising falls in a similar category. Are even the worst members of our profession that evil or dangerous? Really?

As its main practical effect, any Warning Requirement will simply increase the likelihood that people who receive communications from lawyers will discard or delete them without reading them. The phrase "Attorney Advertising" is like saying: "Please Delete Me as Soon as Possible." Why should lawyers bear that burden?

By encouraging recipients to delete without reading any email messages they receive from lawyers, the Warning Requirement interferes with educating the public about the law. Suppose, for example, that a lawyer wants to notify his clients and prospective clients of New York's newly "improved" LLC publication requirements.[30] He wants to send these notices both to keep people out of trouble and to keep people coming into the sender's office.

If the messages are marked "Attorney Advertising," the recipients are far less likely to read them, and hence far less likely to know about the need to comply with New York's publication law. Does this serve any public purpose? Or, to the contrary, does it disserve the public purpose of informing the public about the law?

Given the huge scope of Regulated Communications, the Warning Requirement would apply to all kinds of perfectly routine and innocent email messages. The Warning Requirement should apply at most only to Email Campaigns. It should not apply to ordinary email communications that might relate directly or subtly to the possibility of engaging a lawyer to perform legal services, including email messages that distribute information, reports, or articles.

If an attorney sends a promotional email that is Unethical (e.g., an urgent entreaty that looks like the recipient must sign and return some document, but is really just an attempt to sign up clients), his deception will already violate the Rules.

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[30] New York is one of only three states that require limited liability companies to publish notices of formation. Earlier this year, the Legislature tightened the publication requirements. The exercise serves no purpose when anyone can find out about any New York limited liability company, 24 hours a day, at http://dos.state.ny.us/. The OCA's Rules and New York's nearly unique LLC publication rules have one thing in common: They suggest that New York doesn't really understand or appreciate the Internet. This is odd for a state that typically prides itself on being in the forefront.

I favor removing the Warning Requirement entirely. As a possible intermediate measure, I suggest applying the Warning Requirement only to communications that are truly advertising (e.g., an Email Campaign), and not to any and all communications that merely discuss or provide information about legal issues in a way that may subtly suggest engagement of the lawyer. (This is a tough line to draw, I recognize. I would avoid the problem by dropping the Warning Requirement. People are smarter than such a requirement assumes.)

As another possible alternative measure for email messages that might arguably merit a warning flag, OCA could require such a flag to appear within the first few lines of text of the email message, as opposed to the subject matter line. This way, the warning flag would achieve whatever protective purpose OCA has in mind, but would not assure immediate deletion.

VIII. COURT BAN

The Rules say that any lawyer's advertisement or solicitation shall not "depict the use of a courtroom or courthouse" (a "Court"). Rules § 1200.6(d)(5).

I do not display Court images (or images of anyone using a Court) on my own website. As a deal lawyer, I take pride in minimizing any association between my work product and the litigation process. Many perfectly legitimate websites, advertisements, and brochures for attorneys do, however, use Court images. And the logo of the New York State Bar Association itself consists of a stylized courthouse. (See www.nysba.org.)

The Rules bar only depiction of the "use" of a Court, so perhaps a Court devoid of people (i.e., anyone "using" it) satisfies the Rules. But I can certainly see a whole series of interpretations to define the difference between a plain old Court (which is okay to display) and a Court that someone is "using" (which is not okay). As far as I can see, though, there is nothing undesirable or Unethical about displaying either a Court or the "use" of a Court.

A Court provides a perfect symbol of "the law" and therefore seems appropriate as a graphic element in Regulated Communications, whether or not anyone is "using" that Court, whatever that means. Many Courts are also architecturally striking and impressive, hence look good on websites and elsewhere. Moreover, in most areas of legal practice, strong graphic symbols are relatively few and far between. (What graphic symbols would suggest a lease, mortgage, life estate, or trademark; or shared custody?)

The Rules should not prohibit lawyers from using images of the use of a Court.

IX. SUBSTANTIVE REQUIREMENT

The Rules dictate the substantive content of lawyers' Regulated Communications (the "Substantive Requirement"), by saying it must: "be predominantly informational, and . . . designed to increase public awareness of situations in which the need for legal services might arise and . . . be presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm to provide such services." Rules § 1200.6(a) .

Although the Substantive Requirement sounds commendable, I question whether the Rules can or should impose any such constraint on how lawyers communicate about themselves. On my own website, for example, I have posted in an organized and accessible way dozens of legal articles I've written. I am not sure whether this amounts to an effort to make anyone aware of "situations in which the need for legal services might arise." Nor do I know whether this material provides "information relevant to the selection of an appropriate lawyer." I have simply posted information about real estate law in the form of copies of my own work. Maybe people will find these things interesting – even interesting enough to want to talk to or hire the author. That may represent a good or bad strategy for me, but it's harmless either way.

Under the Rules, it might be banned, if someone decides it doesn't fit into the box of the Substantive Requirement. Yet the information I have posted is perfectly Ethical. Other lawyers may have their own ideas about what to post on their websites. The range will probably be tremendous. It is inconceivable to me that any set of Rules can foresee and appropriately limit or define the scope of that material.

The Rules should prohibit Unethical conduct but should let lawyers decide how best to present themselves on the Internet and what they want to say about themselves and the law. Any Substantive Requirement that goes beyond prohibiting Unethical communications would probably raise constitutional issues as well. I will leave to others those issues, along with (m)any other constitutional issues the Rules raise.

X. OCA'S THOUGHT PROCESS?

After I reviewed the Rules on the Court System's website, I wanted to learn more about the thought process that went into them. I wanted to learn answers to some rather obvious questions about how OCA developed these rules. Specifically, I wanted to know:

- What problems motivated OCA to promulgate these Rules? In investigating those problems, how widespread and serious did OCA find them to be?

- If there is a lawyer advertising problem, does it arise in all practice areas or only in those targeted to consumers? Could the Rules solve the problems by limiting themselves to promotions targeted to consumers? Could OCA spare the rest of the legal profession from complying with Rules intended to solve a problem that does not exist outside "consumer"-oriented practice areas?

- Why did OCA think these Rules represented the right way to solve those problems while minimizing interference with freedom?

- What incremental burdens will these Rules impose on the legal profession, and how much incremental benefit will they produce for everyone else and the legal profession? Do the benefits justify the burdens?

- When OCA developed the Website Rules, which website operators and programmers did OCA ask to comment on the proposals? What did those people say?

- How does the United States Constitution limit OCA's ability to control Regulated Communications? Do the Rules conform to those limits?

I searched through OCA's website, looking for answers to my questions. I found none. I found no discussion about the context and thought process for the Rules. They seemed to have been announced with no explanation and no consideration of technological or other practicalities such as those this submission covers. As far as I could see, OCA wrote the Rules in a vacuum.

Without clues from OCA, I decided to take a look at NYSBA's recent report on lawyer advertising (the "NYSBA Report"),[31] which recommended rules in some ways rather similar to OCA's. The NYSBA Report didn't shed much light on my questions, either. The NYSBA Report did include a few pages reciting that attorneys sometimes publish misleading advertisements, which in many cases already violate existing rules.[32] The NYSBA Report also found that a substantial percentage of a random sample of lawyer advertisements did not comply with existing rules.[33] I could not find in the NYSBA Report any serious discussion of the scope of any problem or why it requires further regulatory action, as opposed to enforcement of rules that already exist.

Unlike the OCA Rules, the NYSBA Report included at least some recognition of technological issues I raise in this submission. Responses to the NYSBA Report from other bar groups discussed these issues further. As a result of the NYSBA Report and its responses, most of my points in this submission were already "on the radar screen" when OCA issued its Rules. But the OCA Rules disregard these issues and concerns entirely. It was as if the NYSBA Report and its responses were on one planet while the authors of the OCA Rules were on another planet, brainstorming by themselves to see if they could come up with some good ethics rules. I would be curious to understand why that "disconnect" happened. Was it deliberate? Did OCA intentionally ignore the issues raised in the NYSBA Report and its responses?

Going beyond the many concerns I express in this submission, I hope OCA will revisit and consider the NYSBA Report and its responses, particularly as they relate to the issues I address in this submission, and also offer the public a reasoned analysis of the basis and logic of OCA's Rules.

XI. CONCLUSION

The Website Rules impose unnecessary and burdensome rules on lawyers' websites, email communications, and other communications. The handful of changes I suggest above (and summarize in Exhibit A: Summary of Concerns and Recommendations) would solve the problems I have identified, while still allowing the Rules to achieve their goals. I encourage

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[31] That report appeared at: http://www.nysba.org/Content/ContentGroups/Reports3/Report_from_Task_Force_on_Lawyer_Advertising/LawyerAdvertisingReport.pdf. I chaired a Section of NYSBA while the NYSBA Report was being considered, though I was not involved in it.

[32] NYSBA Report at 5-6.

[33] *Id.* at 46-50.

OCA to consider the comments in this submission, and at a minimum change the Website Rules as I suggest.

Respectfully Submitted,

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Attached:

Index of Defined Terms
Exhibit A: Summary of Concerns and Recommendations
Exhibit B: Selected Rules

INDEX OF DEFINED TERMS[34]

[34] In the interactive PDF version of this submission, if you click on any defined term, you will jump to that definition, unless the definition resides in a footnote. You can press ALT-Left-Arrow to return to this index.

EXHIBIT A: SUMMARY OF CONCERNS AND RECOMMENDATIONS

Rule[35]	**Concern Raised**	**Recommended Change**	**Possible Intermediate Measure**
Overbroad Definitions	Definitions of Regulated Communications are far too broad.	Limit in accordance with ordinary definitions of "advertising," "solicitation," etc.	Exclude any email except Email Campaigns.
Pop-Up Ban	Pop-up windows are an extremely prevalent (and perfectly fine) programming technique.	Eliminate the ban.	Prohibit only "bad" pop-up windows. Prohibit only pop-up windows on third party websites.
Retention Requirement	Could require massive paper printouts every time anything on a website changes.	Require retention of "snapshots" only periodically and before major changes. Expressly allow electronic retention.	
Filing Requirement	Tremendously broad, tedious, and in large part pointless.	For websites, combine Filing with Retention Requirement, and automate both. For emails, eliminate Filing Requirement.	For emails, limit Filing Requirement to apply to, e.g., Email Campaigns.
Identity Requirement	Potentially requires use of huge type size. Impractical for non-text webpages.	Eliminate type size requirement. Impose Identity Requirement only on text webpages.	Require 12 point or larger type.

[35] In the interactive PDF version of this submission, if you click on any item in this column, you will jump to the corresponding discussion in this submission. Press ALT-Left-Arrow to go back to the table.

Rule[35]	**Concern Raised**	**Recommended Change**	**Possible Intermediate Measure**
Warning Requirement	Demeaning to both lawyers and the people they communicate with. Unnecessary. Overbroad.	Eliminate Warning Requirement.	Apply only to Email Campaigns and other pure advertising campaigns directed to consumers. Exclude informational communications.
Court Ban	These images are perfectly appropriate for a legal website.	Allow images of use of courthouses and courtrooms.	
Substantive Requirement	Requirements are hard to define or apply, overly narrow, unnecessary, and inappropriate.	Free speech for lawyers! (As long as it's Ethical.)	

EXHIBIT B: SELECTED RULES[36]

1200.1(k) – Definition of "Advertisement"

(k) "Advertisement" means any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services.

1200.1(l) – Definition of "Solicitation"

(l) "Solicitation" means any advertisement or other communication directed to or targeted at a specific recipient or group of recipients, including a prospective client, or a family member or legal representative of a prospective client, concerning the availability for professional employment of a lawyer or law firm.

1200.1(m) – Definition of "Computer-Accessed Communication"

(m) "Computer-accessed communication" means any advertisement or solicitation that is disseminated through the use of a computer or other electronic device, including, but not limited to, web sites or pages, search engines, electronic mail, banner advertisements, pop-up advertisements, chat rooms, list servers, instant messaging, domain names, or other internet presences, and any attachments or links related thereto.

1200.5-a – Disciplinary Authority and Choice of Law

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

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

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[36] Captions were edited and supplemented for clarity and to conform to defined terms used in preceding submission.

(2) for any other conduct:

(i) if the lawyer is licensed to practice only in this State, the rules to be applied shall be the rules of this State; and

(ii) if the lawyer is licensed to practice in this State and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

1200.6(a) – Substantive Requirement

(a) The content of advertising and solicitation shall be predominantly informational, and shall be designed to increase public awareness of situations in which the need for legal services might arise and shall be presented in a manner that provides information relevant to the selection of an appropriate lawyer or law firm to provide such services.

1200.6(b) – Ethical Requirement

(b) A lawyer or law firm shall not use or disseminate or participate in the ~~preparation~~ use or dissemination of any ~~public communication~~ advertisement or ~~communication to a prospective client containing statements or claims that~~ solicitation that:

(1) contains statements or claims that are false, deceptive or misleading~~.~~; or

~~(b) [Reserved]~~

(2) violates a disciplinary rule.

1200.6(d)(5) – Courthouses and Courtrooms

(d) ~~Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (c) of this section that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this rule.~~ An advertisement or solicitation shall not:

(5) depict the use of a courtroom or courthouse;

1200.6(h) – Warning Requirement

(h) Every written advertisement or solicitation, including computer-accessed communications, other than those appearing in a radio or television advertisement or in a telephone directory, newspaper, magazine or other periodical, or made in person pursuant to section 1200.8(a)(1) of this Part, shall be labeled "Attorney Advertising" on the first page. Any packaging utilized to transmit the advertisement or solicitation shall be labeled “Attorney Advertising” in red ink. If the communication is in the form of a self-mailing brochure or pamphlet, the words "Attorney Advertising" shall appear in red ink on the address panel of the brochure or pamphlet. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING".

1200.6(i) – Pop-Up Ban

(i) A lawyer or law firm shall not utilize:

1. a pop-up advertisement in connection with computer-accessed communications; or

[Additional Prohibitions Omitted.]

1200.6(l) – Clarity Requirement

(l) Any words or statements required by this rule to appear in an advertisement or solicitation must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.

1200.6(n) – Retention Requirement

~~(f)~~(n) If ~~the~~ an advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than ~~one~~ three years following such transmission. A copy of all written advertisements and solicitations and computer-accessed communications shall be retained for a period of not less than three years following their dissemination, except that in the case of an internet web site a printed copy of each page shall be retained for a period of not less than one year from its first publication or modification.

1200.6(o) – Filing Requirement

(o) All advertisements ~~of legal services that are mailed, or are distributed other than by radio, television,~~ or solicitations other than those appearing in a telephone directory~~, newspaper, magazine or other periodical,~~ which are utilized by a lawyer or law firm ~~that practices law~~ seeking to be retained by a client in this State~~,~~ shall also be subject to the following provisions:

(1) A copy of each advertisement or solicitation shall at the time of its initial ~~mailing or distribution~~ dissemination be filed with the ~~Departmental Disciplinary C~~ attorney disciplinary committee of the appropriate judicial department. A filing shall consist of:

(i) a copy of the advertisement or solicitation in the form in which it was disseminated, e.g., videotape, video disc, audiotape, computer-accessed communication (other than an internet web site or page) or photograph or accurate depiction of publicly displayed advertising;

(ii) for radio and television advertisements, a transcript of the audio portion of the tape and a listing of all media outlets in which the advertisement will appear, the frequency of its use, and the time period during which the advertisement will be used;

(iii) for mailed or computer-accessed communications, a copy of the document sent with any enclosures and sample envelope if utilized;

[Additional Requirements Omitted.]

1200.7(e)(1) – Identity Requirement

(e) A lawyer or law firm may employ a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site include the actual name of the lawyer or law firm in a type size as large as the largest type size used on the site;

[Additional Requirements Omitted.]