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## Oklahoma's New Rules on Lawyer Advertising and Solicitation

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# RECENT DEVELOPMENTS

## OKLAHOMA'S NEW RULES ON LAWYER ADVERTISING AND SOLICITATION

### I. INTRODUCTION

In response to the Supreme Court's indication in *In re R.M.J.*<sup>1</sup> that strict state regulation of lawyer advertising may be unconstitutional,<sup>2</sup> the Oklahoma Supreme Court has amended the Oklahoma Code of Professional Responsibility to include new disciplinary rules concerning lawyer advertising and solicitation.<sup>3</sup> The new rules allow lawyers much greater freedom in promoting their services than did the former rules,<sup>4</sup> and thus are likely to be viewed favorably by those lawyers who desire to advertise. Further, better informed consumer decisions about legal services should result from the increased flexibility of the new rules.<sup>5</sup> This Recent Development will compare the new rules to Oklahoma's former rules and the provisions of the Model Rules of Professional Conduct concerning lawyer advertising,<sup>6</sup> consider the consti-

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1. 455 U.S. 191 (1982). *R.M.J.* was judicially acknowledged in Oklahoma in *State ex rel. Okla. Bar Ass'n v. Schaffer*, 648 P.2d 355, 357 (Okla. 1982). For discussions of the impact of *R.M.J.* on the regulation of lawyer advertising, see Casenote, *In re R.M.J.: Easing Restrictions on Attorney Advertising*, 23 S. TEX. L.J. 455 (1982); Recent Development, *Lawyer Advertising in Oklahoma after In re R.M.J.*, 18 TULSA L.J. 136 (1982); Note, *Professional Responsibility—Lawyer Advertising—Restrictions Must Be Narrowly Drawn To Serve Substantial State Interest*, 5 U. ARK. LITTLE ROCK L.J. 457 (1982).

2. See *infra* notes 100-09 and accompanying text.

3. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101 to -106 (West Supp. 1983).

4. See *infra* notes 136-40 and accompanying text.

5. See *infra* notes 141-45 and accompanying text.

6. MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1-5 (1983), reprinted in 52 U.S.L.W. 1 (Aug. 16, 1983). The Model Rules were promulgated by the American Bar Association's Commission on Evaluation of Professional Standards. The Commission (known as the Kutak Commission after its chairman, Robert J. Kutak) was formed in 1977 to study the desirability of amending the Model Code of Professional Responsibility. Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A. J. 1628, 1628 (1981). Amendment was deemed necessary because of, among other things, changes in state and federal law, inconsistencies within the Code itself, and pressure from independent regulatory agencies stressing a lawyer's obligations to the "public interest" over his duties to clients. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116, 1116 (1981). Instead of recommending amendments, however, the Commission advocated abandonment of the Model Code of Professional Responsibility in favor of the new Model Rules of Professional Conduct, which are "intended to serve as a national model of the regulatory law—enforceable standards of conduct—

tutionality of the new rules under the standards set forth in *R.M.J.*, and evaluate the effect of the changes on lawyers and consumers.

## II. ANALYSIS OF THE NEW RULES

Under the "regulatory" approach to lawyer advertising, only specifically prescribed types of advertising are permitted.<sup>7</sup> Oklahoma's former rules, which employed the regulatory approach,<sup>8</sup> greatly restricted the information which could be included in a lawyer's public communications<sup>9</sup> and professional materials,<sup>10</sup> and limited the types of media available to an advertising lawyer.<sup>11</sup>

The committee charged with the task of conforming Oklahoma's advertising rules to constitutional requirements patterned its proposals after the Final Draft of the Model Rules of Professional Conduct.<sup>12</sup> In contrast to the regulatory approach, the Model Rules employ a "directive" approach which "do[es] not specify what a lawyer may advertise;

governing the practice of law." MODEL RULES OF PROFESSIONAL CONDUCT chairman's introductory note (Final Draft 1982), reprinted in 68 A.B.A. J. 3 (Pullout Supp. Nov. 1982). The Model Rules of Professional Conduct were adopted by the ABA on August 2, 1983. *Bar Association Approves Code of Ethics with Controversial Confidentiality Rule*, Wall St. J., Aug. 3, 1983, at 4, col. 2.

7. ABA Task Force on Lawyer Advertising, *Report to the Board of Governors*, reprinted in L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 91, 92 (1980).

8. Many of Oklahoma's former rules apparently were based on a preliminary draft of amendments to the Model Code of Professional Responsibility proposed by the ABA's Task Force on Lawyer Advertising in August 1977. Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509, 521 n.80 (1978).

9. Under the former rules, only the following information could be advertised: (1) name; (2) addresses; (3) telephone numbers; (4) foreign language ability; (5) credit arrangements; (6) hours of availability; (7) certain types of fee information; and (8) a limited indication of the lawyer's field of practice. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B)(1)-(8) (1981) (amended 1983). These restrictions and others also applied to listings in the classified sections of telephone directories. *Id.* DR 2-101(D). More extensive information could be included in a "reputable" legal directory, including organization memberships, references, names of clients regularly represented (but only if they consented in writing), and fields of practice. *Id.* DR 2-102(A)(5)(a)-(q).

10. Information which attorneys could convey on professional cards was limited to name, addresses, telephone numbers, firm name, and a limited indication of fields of practice. *Id.* DR 2-102(A)(1). Professional announcements were not to state "biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association." *Id.* DR 2-102(A)(2). Office signs were limited to "identifying the law office," *id.* DR 2-102(A)(3), and letterheads could include only names, addresses, telephone numbers, predecessor firms, and certain information concerning fields of practice, *id.* DR 2-102(A)(4).

11. Lawyers were permitted to advertise only in print media by the former rules. *Id.* DR 2-101(B).

12. Interview with Frederick K. Slicker, Member, Oklahoma Special Committee on Legal Advertising Rules, in Tulsa, Oklahoma (Sept. 12, 1983). Major changes were made to the Final Draft prior to its adoption. As a result, there are significant differences between some of the provisions of the Model Rules and the new Oklahoma rules, but the basic approach of the Model Rules remains consistent with the Oklahoma rules.

[it] only provide[s] the general guidelines for what a lawyer may not advertise."<sup>13</sup> As a result, Oklahoma's new rules eliminate most of the specific restrictions of the old rules. Instead, they prohibit, in general terms, the publication of "false or misleading communication[s] about the lawyer or the lawyer's services."<sup>14</sup> The new rules allow a lawyer to advertise in virtually any medium and to include any information he chooses, as long as the advertisement meets this standard.<sup>15</sup>

A. *DR 2-101: Communications Concerning a Lawyer's Services*

The former rules prohibited any advertising containing a "false, fraudulent, self-laudatory or unfair statement or claim"<sup>16</sup> and required that all information advertised be "accurate, reliable, truthful, and displayed in a professional and dignified manner."<sup>17</sup> The size of advertisements was limited,<sup>18</sup> and signs, symbols, and pictures could not be used in advertisements.<sup>19</sup> The new rules eliminate all these restrictions, and instead simply prohibit a lawyer from making any "false or misleading communication" about himself or his services.<sup>20</sup> In making this change the Oklahoma Supreme Court appears to have placed more emphasis on the communication's misleading effect on the client or potential client, rather than the content of the advertisement, as the basis for disciplinary action.<sup>21</sup>

The new rules specify four types of communications which will be considered false or misleading.<sup>22</sup> First, communications which contain a "material misrepresentation of fact or law" or which omit data necessary to make the communication nonmisleading are prohibited.<sup>23</sup> Second, communications "likely to create an unjustified expectation about the results the lawyer can achieve"<sup>24</sup> are also forbidden. The latter provision may prove more difficult to interpret than the former because its

13. Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967, 988 (1981).

14. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983).

15. See *infra* notes 16-44 and accompanying text.

16. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(A) (1981) (amended 1983).

17. *Id.* DR 2-101(B).

18. *Id.* DR 2-101(G) (maximum size of ten square inches).

19. *Id.* DR 2-101(I).

20. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983).

21. Robert J. Kutak noted that the Model Rules of Professional Conduct constitute "a more client-centered code." MODEL RULES OF PROFESSIONAL CONDUCT chairman's introductory note (Final Draft 1982).

22. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A)(1)-(4) (West Supp. 1983).

23. *Id.* DR 2-101(A)(1).

24. *Id.* DR 2-101(A)(2).

subjective language does not indicate the types of advertising which will be considered likely to create unjustified expectations. The comment to the Model Rule upon which this provision was based states that the rule is intended to preclude "advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."<sup>25</sup> This comment should provide guidance to Oklahoma authorities interpreting the rule.

A third type of prohibited communication is a statement or implication that the lawyer can achieve a result by violating the law.<sup>26</sup> Finally, a lawyer is not permitted to compare his services with those of another lawyer unless he can factually substantiate the comparison.<sup>27</sup> Other types of communications may also be found "false or misleading" as Oklahoma authorities apply the new rule.<sup>28</sup>

Although many restrictions on lawyer communications have been removed, the language of the new rules may be interpreted to encompass more types of communications than the former rules. Advertisements which are not inaccurate, unfair, or self-laudatory may still be considered "misleading." Also, while the former rule regulated all "public communications" made by lawyers,<sup>29</sup> the adjective "public" has been omitted from the new rule.<sup>30</sup> As the phrase "public communication" suggests an advertisement,<sup>31</sup> this change may indicate that any public or private lawyer communication, whether or not made to obtain professional employment, must now be made in compliance with the Code.

The former rules stated that a lawyer's communications on behalf of a partner, associate, or other lawyer affiliated with him were subject to the same restrictions applicable to communications by a lawyer concerning himself.<sup>32</sup> The new rules appear to apply only to a lawyer's

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25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 comment (1983).

26. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A)(3) (West Supp. 1983).

27. *Id.* DR 2-101(A)(4).

28. The language of the new rules does not indicate that the four specifically prohibited types of communications comprise an exclusive list of "false or misleading" communications. *See id.* DR 2-101(A).

29. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(A) (1981) (amended 1983).

30. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983).

31. Webster defines "advertise" as "to make *publicly* and generally known." WEBSTER'S NEW COLLEGIATE DICTIONARY 17 (1981) (emphasis added).

32. "A lawyer shall not, on behalf of himself, *his partner, associate or any other lawyer affiliated with him or his firm*, use, or participate in the use of any form of public communication containing a false, fraudulent, self-laudatory or unfair statement or claim." OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(A) (1981) (amended 1983) (emphasis added).

communications about himself, and not to his communications regarding other lawyers.<sup>33</sup> The new rules, however, may be interpreted to encompass communications about any lawyer despite the lack of language to that effect. Further, false or misleading statements made on behalf of other lawyers may still be prohibited by the Code provision forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>34</sup>

### B. DR 2-102: Advertising

Under the old rules, a lawyer could advertise only in certain print media, including newspapers of general circulation,<sup>35</sup> telephone and city directories,<sup>36</sup> and "other print media . . . published on a regular basis, the primary purpose of which is other than the publication of information about a lawyer or small group of lawyers."<sup>37</sup> The new rules remove almost all major restrictions on lawyers' choice of media. Radio and television advertisements are now permissible, as is any form of "written communication not involving personal contact."<sup>38</sup>

The former rules allowed a lawyer to advertise only in media "distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides."<sup>39</sup> This limitation has been termed a "blatant restraint on competition" between "big city" and "small town" attorneys.<sup>40</sup> The new rules impose no such geographic restrictions on lawyer advertising.<sup>41</sup>

Under the new rules, advertisements mailed to specific individuals, as well as general mailings, are permissible.<sup>42</sup> The front of the envel-

33. "A lawyer shall not make a false or misleading communication *about the lawyer* or the lawyer's services." OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983) (emphasis added).

34. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 1-102(A)(4) (1981) (amended 1983).

35. *Id.* DR 2-101(C)(1).

36. *Id.* DR 2-101(C)(2).

37. *Id.* DR 2-101(C)(3).

38. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(A) (West Supp. 1983). Any such communication must include "the name of at least one lawyer responsible for its content." *Id.* DR 2-102(D); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(d) (1983) (same). This provision is worded broadly enough to permit even outdoor advertising. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(a) (1983) (expressly sanctions outdoor advertising). *But see In re Utah State Bar*, 647 P.2d 991, 995 (Utah 1982) (upholding state "time, place, and manner" restriction on use of billboards).

39. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B) (1981) (amended 1983).

40. Hellman, *supra* note 8, at 560.

41. See OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(A) (West Supp. 1983).

42. *Id.*

ope or postcard of all mailed advertisements must conspicuously state "This is an advertisement" in type that is at least the same size as the address.<sup>43</sup> Personal delivery of written material, however, is prohibited.<sup>44</sup> The Model Rules as adopted permit general mailings, but forbid lawyers from sending advertisements to specific individuals.<sup>45</sup>

Though the new rules do not require official approval of an advertisement prior to placement,<sup>46</sup> a lawyer is required to maintain a written or recorded copy of the advertisement as well as records of where and when the advertisement was used.<sup>47</sup> If the advertisement is mailed, a record of each recipient's identity must also be maintained.<sup>48</sup> While the comparable Model Rule requires that such records be retained for only two years,<sup>49</sup> Oklahoma's new rule mandates a three-year retention period<sup>50</sup>—a result of the Oklahoma Bar Association's concern that potential violations of the advertising rules may not be brought to its attention within a shorter time frame.<sup>51</sup>

As with the old rules, a lawyer is bound by the fees he advertises.<sup>52</sup> Fee representations in printed advertisements are binding for a period ranging from 30 days to one year or more after the date of publication, depending on the frequency of publication of the print medium.<sup>53</sup> A

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43. *Id.* DR 2-102(E).

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment (Final Draft 1982) (noting that advertisements can be mailed by the postal service or a similar delivery service).

45. Mailings under the Model Rules are now limited to "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983). The Model Rules thus distinguish between mailed advertisements which are made to a "specific recipient," labeling these "direct mail" advertisements, and mailings to recipients not known to need legal services, naming these "general mailings." *Id.* Rule 7.3 comment. Direct mailings are prohibited under the Model Rules because they more closely approximate solicitation, *id.*, which the Model Rules prohibits in most instances. *See infra* note 63.

46. A requirement of official approval of lawyer advertisements was rejected by the drafters of the Model Rules on the basis that "[s]uch a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment (Final Draft 1982) (Record of Advertising).

47. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(B) (West Supp. 1983).

48. *Id.* DR 2-102(C).

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(b) (1983).

50. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(B), (C) (West Supp. 1983).

51. Interview with Frederick K. Slicker, Member, Oklahoma Special Committee on Legal Advertising, in Tulsa, Oklahoma (June 29, 1983).

52. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(F) (West Supp. 1983) (lawyers are bound by advertised fees plus expenses incurred).

53. *Id.* DR 2-102(H) (lawyers are bound for 30 days after publication of advertisement in media published more frequently than once a month, bound until the next publication date after advertising in media published once a month or less frequently, and bound for a reasonable time of not less than one year after advertising in a medium with no fixed date for publication of the

lawyer advertising on radio, television, or other electronic media must abide by fee representations from the date of the first broadcast of the advertisement until 30 days after its last broadcast.<sup>54</sup> In contrast to the old rules,<sup>55</sup> there are now no restrictions on the types of fee information a lawyer may advertise.

Under both the new and old Oklahoma rules lawyers are generally precluded from paying others to recommend their services.<sup>56</sup> They may, however, pay the reasonable costs of advertising and the reasonable fees of a nonprofit lawyer referral service or other legal service organization.<sup>57</sup> As under the old rules,<sup>58</sup> lawyers are prohibited from rendering payment of any type for professional publicity in a news item.<sup>59</sup>

### C. DR 2-103: Personal Contact with Prospective Clients

The former rules concerning recommendation of a lawyer's services<sup>60</sup> and solicitation of employment<sup>61</sup> have been combined and clarified in one rule in the amended Code.<sup>62</sup> Client solicitation, either in person or by telephone, is permissible in a limited number of situations. For instance, a lawyer may solicit employment from a close friend or relative, or from a former client or a person he reasonably believes to be a former client, if that contact pertains to former employment.<sup>63</sup> A

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next issue). This provision is essentially identical to that contained in the former rule. *See* OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(F) (1981) (amended 1983).

54. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(G) (West Supp. 1983).

55. In the former rule, fee information which could be advertised was limited to:

- (a) fees charged for an initial consultation;
- (b) the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific service;
- (c) hourly rate, provided that the statement discloses that the total fee charged will depend on the number of hours which must be devoted to the particular matter . . . ;
- (d) fixed fees for specific legal services, the description of which service is not subject to misunderstanding or is not deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described . . . .

OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B)(7)(a)-(d) (1981) (amended 1983).

56. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(I) (West Supp. 1983); OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-103(B) (1981) (amended 1983).

57. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(I) (West Supp. 1983). The comparable Model Rule is substantially similar, but does not include Oklahoma's express prohibition on both direct and indirect payments. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1983).

58. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(K) (1981) (amended 1983).

59. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-102(J) (West Supp. 1983).

60. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-103 (1981) (amended 1983).

61. *Id.* DR 2-104.

62. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-103 (West Supp. 1983).

63. *Id.* DR 2-103(A)(1). Such contact was also allowed under the former Oklahoma rule.



lawyer operating under the "auspices of a public or charitable legal services organization"<sup>64</sup> or a "bona fide political, social, civil, fraternal, employee or trade organization"<sup>65</sup> may personally contact members or beneficiaries of such organizations<sup>66</sup> if he is free to exercise "independent professional judgment on behalf of his client."<sup>67</sup>

Under the old rules, a lawyer was permitted to request referrals only from a lawyer referral service operated, sponsored, or approved by his local bar association.<sup>68</sup> He could not "knowingly assist" a person or organization that recommended legal services in promoting the use of his services.<sup>69</sup> He was, however, allowed to "cooperate in a dignified manner" with specified group legal services organizations, including legal aid offices, military assistance offices, bar associations and any other constitutionally protected "nonprofit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries."<sup>70</sup> The new rules allow a lawyer to be recommended by, as well as to cooperate with, an almost identical list of organizations.<sup>71</sup>

The interaction of the rules concerning solicitation of clients and recommendation of lawyers is unclear. The rule governing solicitation states that such personal contact is "subject to" the rule concerning recommendation by legal services groups.<sup>72</sup> Likewise, the recommendation rule sets forth the types of organizations that may recommend a lawyer "under the provisions of" the solicitation rule.<sup>73</sup> The rules do not clearly indicate whether lawyers may only initiate personal contact

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OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-104(A)(1) (1981) (amended 1983). The Model Rules, by comparison, permit solicitation of persons with whom the lawyer has a "family or prior professional relationship," but not of close friends and other persons, at least if "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

64. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-103(A)(2) (West Supp. 1983).

65. *Id.* The purpose of such organizations must include, but cannot be limited to, the rendition of legal services. *Id.*

66. *Id.* DR 2-103(A)(2)(a).

67. *Id.* DR 2-103(A)(2)(b).

68. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-103(C) (1981) (amended 1983).

69. *Id.* DR 2-103(D).

70. *Id.*; see *In re Primus*, 436 U.S. 412, 426 (1978) (the Supreme Court's decision in *NAACP v. Button*, 371 U.S. 415 (1963), established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.") (quoting *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)).

71. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-103(B) (West Supp. 1983).

72. *Id.* DR 2-103(A).

73. *Id.* DR 2-103(B). This section makes reference to "DR 2-102(A)(2)," a non-existent rule. This reference is apparently a typographical error. If so, the rule should probably refer to DR 2-103(A)(2), the provision concerning solicitation of the members and beneficiaries of group legal services organizations.

under the auspices of organizations which meet the standards of both rules.

Finally, the new rules specify three situations in which an attorney may not make personal contact with a prospective client: (1) when the lawyer knows or reasonably should know that the client could not exercise reasonable judgment in choosing a lawyer;<sup>74</sup> (2) when the client has informed the lawyer he does not desire to be contacted;<sup>75</sup> and (3) when the communication involves coercion, duress or harassment.<sup>76</sup> The old rules contained no comparable provisions.

#### D. DR 2-104: *Communication of Fields of Practice*

Prior to the adoption of the new rules, an Oklahoma lawyer could not state that he limited his practice to or concentrated in a particular field,<sup>77</sup> that he was engaged in the "general practice of law,"<sup>78</sup> or that he did not practice in certain fields.<sup>79</sup> All these statements are allowed by the new rules.<sup>80</sup>

As before,<sup>81</sup> a lawyer is permitted to advertise the fact that he specializes in patent, trademark or admiralty law.<sup>82</sup> Lawyers in other fields, however, cannot indicate that they are specialists or experts unless they are certified as specialists by the Oklahoma Supreme Court.<sup>83</sup> At present there is no such certification procedure in Oklahoma.<sup>84</sup>

74. *Id.* DR 2-103(C)(1); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (1983) ("A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest.").

75. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-103(C)(2) (West Supp. 1983).

76. *Id.* DR 2-103(C)(3).

77. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B)(8)(a) (1981) (amended 1983). Such language is also prohibited under the Model Rules, as the drafters believed it has "acquired a secondary meaning implying formal recognition as a specialist." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 comment (1983).

78. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B)(8)(b) (amended 1983).

79. *Id.* DR 2-101(B)(8)(c).

80. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-104(A) (West Supp. 1983).

81. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-105(A)(1) (1981) (amended 1983).

82. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-104(A)(1)-(2) (West Supp. 1983) (allowing lawyers to use the terms "Patent Attorney," "Proctor in Admiralty," or "substantially similar" designations). Lawyers in these fields have historically been permitted to advertise their specialties. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 comment (1983).

83. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-104(A)(3) (West Supp. 1983).

84. In 1982, the Oklahoma Bar Association established a committee to study the advisability of certification. Bond, *Formal Legal Specialization in Oklahoma: Report of the OBA Committee on Legal Specialization*, 54 OKLA. B.J. 827, 827 (1983). This committee submitted a "Plan for Recognition and Regulation of Specialization in the Law" to the Oklahoma Bar Association's Board of Governors. *Final Recommendations of the OBA Committee on Legal Specialization*, 54 OKLA. B.J. 1391, 1391 (1983). On November 4, 1983, the Oklahoma Bar Association House of Delegates

E. DR 2-105: Firm Names and Letterheads

The former rules prohibited a lawyer in private practice from using a trade name.<sup>85</sup> The new rules permit the use of such names as long as they are not false or misleading and do not suggest an affiliation with a government agency or public or charitable legal services organization.<sup>86</sup>

The former restrictions on signs, letterheads, and other professional designations<sup>87</sup> have also been eliminated, leaving such material subject only to the "false and misleading" standard applicable to all lawyer communications.<sup>88</sup> Signs, letterheads, and other professional designations are no longer required to be in "dignified form" as they were under the old rules.<sup>89</sup>

As with the former rules,<sup>90</sup> a law firm with offices in more than one jurisdiction may use the same name in each jurisdiction,<sup>91</sup> although "identification of the lawyers in an office of the firm [must] indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located."<sup>92</sup> A firm name may not include the name of a lawyer holding public office who is not regularly practicing with the firm,<sup>93</sup> nor may it falsely indicate that the firm's lawyers are practicing in a partnership or other organizational form.<sup>94</sup> Both provisions were included in the former rules.<sup>95</sup> The new rules do not, however, contain previous restrictions forbidding a lawyer to indicate on his letterhead, office sign, or professional card that he is engaged in another profession or to indicate on his other professional publications that he is a lawyer.<sup>96</sup>

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voted against the proposal by a 43-42 margin. *Specialization of Legal Profession Fails at Oklahoma Bar Association Meeting*, 54 OKLA. B.J. 2888, 2888 (1983). In view of this narrow defeat, it appears likely that the proposal will be reconsidered in the future.

85. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-102(B) (1981) (amended 1983).

86. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-105(A) (West Supp. 1983).

87. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-102(A) (1981) (amended 1983); *see supra* note 10 and accompanying text.

88. OKLA. STAT ANN. tit. 5, ch. 1, app. 3, DR 2-105(A) (West Supp. 1983).

89. *See* OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-102(A) (1981) (amended 1983).

90. *See id.* DR 2-102(D).

91. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-105(B) (West Supp. 1983).

92. *Id.*

93. *Id.* DR 2-105(C).

94. *Id.* DR 2-105(D).

95. *See* OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-102(B)-(C) (1981) (amended 1983).

96. *See id.* DR 2-102(E).

### F. DR 2-106: Prohibition on Employment

The new rules prohibit a lawyer from accepting employment "when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited" under the Disciplinary Rules concerning advertising and solicitation.<sup>97</sup> Similar provisions in the former rules applied only to communications involving recommendations<sup>98</sup> and solicitations<sup>99</sup> of professional employment. The Model Rules contain no similar provision.

### III. CONSTITUTIONALITY OF THE NEW RULES

The Supreme Court recognized in *In re R.M.J.*<sup>100</sup> that the states have power to regulate even nonmisleading lawyer advertising, as well as advertising which is potentially misleading, inherently misleading, or shown to be subject to abuse.<sup>101</sup> That power, however, is not absolute. To constitutionally regulate nonmisleading advertising, a state must assert "a substantial interest and the interference with speech must be in proportion to the interest served."<sup>102</sup> Such regulations are subject to the closest judicial scrutiny and must be narrowly drawn.<sup>103</sup> Moreover, in *Bates v. State Bar of Arizona*,<sup>104</sup> the Supreme Court implied that the state's interest in preventing potential adverse effects on professionalism and quality legal services did not warrant regulation of nonmisleading advertising.<sup>105</sup>

Potentially misleading advertising may be regulated by means of restrictions "no broader than reasonably necessary to prevent the de-

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97. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-106 (West Supp. 1983).

98. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-103(E) (1981) (amended 1983).

99. *Id.* DR 2-104(A).

100. 455 U.S. 191 (1982).

101. *Id.* at 203.

102. *Id.* Further, the state has the burden of showing that an advertisement is misleading, or that a substantial state interest is being promoted by state-imposed restrictions. Thus, in *R.M.J.* the Court found Missouri's sanctions against an attorney who violated the state's advertising regulations unconstitutional because Missouri failed to suggest or identify a substantial state interest to justify its restrictions. *Id.* at 205-07.

103. *Id.* at 203.

104. 433 U.S. 350 (1977).

105. *Id.* at 368 ("[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained."). *But see In re Utah State Bar*, 647 P.2d 991 (Utah 1982) (Utah Supreme Court interpreted *Bates* as standing only for principle that the state's interest in maintaining standards of dignity and professionalism did not justify a complete suppression of lawyer advertising, but may still be considered a substantial state interest which will justify curtailing certain types of advertising); Frank, *Lawyer Advertising After the R.M.J. Case*, 28 PRAC. LAW. 53, 55 (1982) (suggesting that a carefully drawn "regulatory" scheme may still be constitutional if supported by substantial state interests).

ception."<sup>106</sup> In such cases the constitutionally preferable method of preventing clients from being misled is the requirement of a disclaimer or explanation of the information, rather than a total prohibition of the advertising.<sup>107</sup> Communications which are inherently misleading may, however, be prohibited entirely.<sup>108</sup>

Several of Oklahoma's former rules which were aimed at non-misleading or only potentially misleading lawyer communications were of questionable constitutionality.<sup>109</sup> The permissive approach of the new rules appears to be more consistent with current constitutional standards. The Court in *Bates* acknowledged, "Advertising that is false, deceptive, or misleading . . . is subject to restraint."<sup>110</sup> Oklahoma's new rules forbid only "false or misleading" communications.<sup>111</sup> The subsection which defines such communications as those that contain "a material misrepresentation of fact or law"<sup>112</sup> or that are "materially misleading" due to the omission of information<sup>113</sup> regulates, by its terms, communications that are inherently misleading and thus within the state's power to prohibit. The restriction on communications premised on achieving results through illegal or unethical means<sup>114</sup> can also be viewed as aimed at inherently misleading information.

Though comparative advertising may not be misleading per se, comparisons which cannot be proven are also arguably inherently misleading.<sup>115</sup> Inasmuch as Oklahoma's new rules prohibit only comparisons which cannot be factually substantiated,<sup>116</sup> this provision also seems to be within the standards of *R.M.J.*

The new Oklahoma rules also prohibit results oriented advertis-

106. *R.M.J.*, 455 U.S. at 203.

107. *Id.*; see also *Durham v. Brock*, 498 F. Supp. 213, 225 (M.D. Tenn. 1980) ("There are many ways in which any deception in a facially truthful advertisement may be cured short of total prohibition. *Bates* appears to approve of either supplementation or warnings or disclaimers as a method of curing an advertisement which might otherwise have the potential to mislead.").

108. *R.M.J.*, 455 U.S. at 203.

109. See Hellman, *supra* note 8, at 552-63 (noting that the former rules' advertising content regulations, media and size restrictions, and "professional and dignified" standard were of debatable constitutionality in the wake of *Bates*); Recent Development, *supra* note 1, at 145 (suggesting that Oklahoma pattern its rules after those promulgated by the Kutak Commission).

110. 433 U.S. at 383, cited with approval in *R.M.J.*, 455 U.S. at 200.

111. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983).

112. *Id.* DR 2-101(A)(1).

113. *Id.*

114. *Id.* DR 2-101(A)(3).

115. This would be particularly true of comparisons of the quality of lawyers' services. See *Bates*, 433 U.S. at 383-84 ("[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.").

116. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A)(4) (West Supp. 1983).

ing.<sup>117</sup> Since “[s]uch information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances,”<sup>118</sup> it is at least potentially misleading. Moreover, since Oklahoma’s rule forbids only results oriented advertising “likely” to create such unjustified expectations in potential clients,<sup>119</sup> it is doubtful that the rule could be used expansively against communications which are not purposely aimed at assuring a particular outcome. If the rule’s scope is limited in this manner, it should be held constitutional.<sup>120</sup>

The new rules’ provisions concerning in-person solicitation<sup>121</sup> appear to present few problems of constitutionality. Although the Supreme Court has held that in-person solicitation may be prohibited entirely due to the likelihood of “fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct,’”<sup>122</sup> the new Oklahoma rules merely limit the number of situations in which in-person solicitation is permissible.<sup>123</sup> Similarly, although the Supreme Court has found prohibitions on the use of trade names in professional practice constitutional,<sup>124</sup> Oklahoma permits attorneys to use trade names as long as they do not mislead potential clients into believing the law firm is governmental or charitable in nature.<sup>125</sup>

Oklahoma’s provision forbidding most lawyers from advertising their fields of practice as areas of “specialization”<sup>126</sup> is intended to protect potential clients from being misled as to the lawyer’s competence.

117. *Id.* DR 2-101(A)(2).

118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 comment; *see also* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 n.25 (“[L]awyers . . . do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.”).

119. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A)(2) (West Supp. 1983).

120. *See R.M.J.*, 455 U.S. at 202 (“[T]he Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently *likely* to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.”) (emphasis added).

121. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-103 (West Supp. 1983).

122. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 (1978) (quoting Appellant’s Brief at 25), *cited with approval in R.M.J.*, 455 U.S. at 202; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (Final Draft 1982) (solicitation involves potential for “harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims”).

123. *See supra* notes 60-67, 74-76 and accompanying text.

124. *See Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (upholding Texas’ prohibition on the use of trade names by optometrists).

125. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-105(A) (West Supp. 1983).

126. *Id.* DR 2-104(A).

It is believed that indications of "specialization" imply expertise in an area or official recognition of an attorney's abilities.<sup>127</sup> Thus, such designations are potentially misleading. Oklahoma does not prohibit mention of fields of practice, and even allows a lawyer to state that his practice is "limited to" or that he "concentrates in" an area of the law.<sup>128</sup> The restriction on indications of specialization can therefore be viewed as the least restrictive means of preventing client confusion.

Some of Oklahoma's new rules stem directly from recent Supreme Court decisions. For instance, the requirement that mailed advertisements display the legend "This is an advertisement"<sup>129</sup>—in order to alleviate the recipients' potential apprehensions about receiving mail from lawyers<sup>130</sup>—was suggested by the Court in *R.M.J.*<sup>131</sup> The elimination of the requirement that advertisements be made in a "professional and dignified manner"<sup>132</sup> may also have been influenced by the *R.M.J.* decision.<sup>133</sup>

#### IV. FULFILLMENT OF COMMERCIAL ADVERTISING OBJECTIVES

Lawyer advertising, like other forms of commercial advertising, serves two purposes. First, it provides an opportunity for the lawyer to increase his public exposure and his clientele.<sup>134</sup> Second, it provides the consumer with information about available legal services.<sup>135</sup> An analysis of Oklahoma's new lawyer advertising rules should not be limited to whether they adequately comply with constitutional guidelines, but also should examine whether the new rules facilitate the two objectives of commercial advertising.

Under the new rules the lawyer is allowed a greater opportunity to increase his public exposure, since he is now less restricted in what he can say and how he can say it. A lawyer may now advertise on televi-

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 comment (1983).

128. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-104(A) (West Supp. 1983).

129. *Id.* DR 2-102(E).

130. Interview with Frederick K. Slicker, Member, Oklahoma Special Committee on Legal Advertising Rules, in Tulsa, Oklahoma (June 29, 1983).

131. 455 U.S. at 206 n.20 (Supreme Court suggests stamping "This is an advertisement" on the envelopes of lawyers' general mailings if it is likely that the public would be alarmed by receiving mail from law offices).

132. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101(B) (1981) (amended 1983).

133. *See R.M.J.*, 455 U.S. at 205 (although *R.M.J.*'s advertisement was in "bad taste," that alone did not justify its prohibition).

134. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

135. *Id.*; *see also Bates*, 433 U.S. at 377 (the Supreme Court found that it is the bar's "obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available'" (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1976)).

sion, "one of the most powerful media for getting information to the public, particularly persons of low and moderate incomes."<sup>136</sup> The abolition of restrictions on advertising fee information<sup>137</sup> and limitations of fields of practice<sup>138</sup> will allow lawyers to communicate to potential clients more information about the services they offer. Lawyers may now also focus on the information conveyed in their communications, rather than speculative or subjective concerns such as the "dignity" and "professionalism"<sup>139</sup> of their advertisements. Although such concerns should not be abandoned entirely, excessive preoccupation with such matters will unnecessarily stifle the free flow of information to consumers.<sup>140</sup>

Consumers of legal services will also be benefitted by the new rules. A potential client will no longer have to guess whether the lawyer he is calling will handle his type of case.<sup>141</sup> The abandonment of the regulatory approach<sup>142</sup> means the consumer will be able to make a more informed decision when selecting a lawyer, rather than relying on the limited information allowed under the previous rules.<sup>143</sup> The rules' prohibition of false and misleading advertising<sup>144</sup> will help assure that lawyer advertising is accurate and tailored to the consumer's understanding.<sup>145</sup>

136. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment (1983).

137. See *supra* notes 52-55 and accompanying text.

138. See *supra* notes 77-80 and accompanying text. The lifting of this restriction also reflects the trend toward lawyer specialization. A 1982 survey conducted by the Oklahoma Bar Association indicated that 76% of Oklahoma's lawyers have a specialty and 56% favor the adoption of a specialty certification program. Bethel, *Report of the 1982 Informational and Service Survey of the Oklahoma Bar Association*, 54 OKLA. B.J. 223, 246-50 (1983).

139. See *supra* notes 16-20 and accompanying text.

140. The importance of providing commercial information to the public was acknowledged in *Virginia Pharmacy*, 425 U.S. at 765 ("It is a matter of public interest that [consumer decisions] be intelligent and well informed. To this end, the free flow of commercial information is indispensable."). Further, the Court in *Bates* noted, "Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less." 433 U.S. at 375.

141. Shortly after adoption of the old rules, 76.6% of Oklahomans surveyed indicated, "Presently there is not enough information about lawyers to choose one intelligently." Kasulis & Humphreys, *Legal Services and the Oklahoma Public: A Survey*, 50 OKLA. B.J. 2491, 2493 (1979).

142. See *supra* notes 7-11 and accompanying text.

143. See *Virginia Pharmacy*, 425 U.S. at 770 (rejecting paternalistic attitude of the state pharmacy board, stating that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"), quoted in *Bates*, 433 U.S. at 365; MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment (1983) ("Limiting the information that may be advertised . . . assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.").

144. OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101(A) (West Supp. 1983).

145. Further protection for consumers may be found in the Oklahoma Consumer Protection Act, OKLA. STAT. tit. 15, §§ 751-771 (1981). Other states have recently held that a lawyer may be



The new rules nonetheless present potential problems. Under the former rules, a lawyer who advertised faced the difficult task of complying with numerous restrictions on the content and format of his advertisements.<sup>146</sup> The new rules simplify this task, but present an equally challenging problem. The advertising lawyer must now interpret provisions couched in vague and subjective language.<sup>147</sup> The provisions of the new rules may also prove difficult to administer in a fair and even-handed manner. If a lawyer errs in judgment by placing an advertisement which is found to be misleading, he may be subject to disbarment, suspension, public censure, or private reprimand.<sup>148</sup> Suspension and disbarment, though perhaps appropriate punishments for wilful refusal to read and comply with a code embodying the regulatory approach, appear to be excessive when levied on a lawyer who misjudges the effect of an advertisement on potential clients. Furthermore, a lawyer may be disciplined under the Code although no client or consumer has been damaged by his advertisement.<sup>149</sup> These factors may encourage overcautious drafting of lawyer communications, which in turn may impede the flow of adequate information to consumers, thus thwarting one of the objectives of commercial advertising.<sup>150</sup>

## V. CONCLUSION

The Oklahoma Supreme Court in *State ex rel. Oklahoma Bar Association v. Schaffer*<sup>151</sup> recognized, "Advertising can play a meaningful role in aiding consumers' recognition of a legal problem and in gaining better insight into the economics of the law practice."<sup>152</sup> Oklahoma's new, more liberal, rules concerning lawyer advertising and solicitation further this objective by increasing the flow of information to consum-

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liable for his false and misleading advertisements under state consumer protection acts, as well as under their ethical codes. See, e.g., *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 461 A.2d 938 (Conn. 1983); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. Ct. App. 1979); *DeBakey v. Staggs*, 605 S.W.2d 631 (Tex. Civ. App. 1980); see also *Brady, From Client to Customer: The Hidden Impact of Bates v. Arizona*, 48 OKLA. B.J. 2601, 2601-03 (1977) (noting "potential pitfalls" of application of the Oklahoma Act to lawyers).

146. See *supra* notes 7-11 and accompanying text.

147. See *supra* notes 24-25 and accompanying text.

148. OKLA. STAT. tit. 5, ch. 1, app. 1-A, Rules 1.5, 1.7 (1981). R.M.J., whose advertising was violative of Missouri's "regulatory" code, was subjected to a disbarment proceeding and issued a private reprimand by the Supreme Court of Missouri. *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1981), *rev'd*, 455 U.S. 191 (1982).

149. See OKLA. STAT. ANN. tit. 5, ch. 1, app. 3, DR 2-101 to -106 (1983).

150. See *Central Hudson*, 447 U.S. at 563.

151. 648 P.2d 355 (Okla. 1982).

152. *Id.* at 359.

ers of legal services. If lawyers utilize the new rules to increase consumer awareness of their legal rights and responsibilities, both attorneys and their clients will benefit.

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