Attorney marketing ranges from calling or emailing members of a fraternal association or a church to see if they need legal service to describing your areas of practice and expertise on your firm’s web site. It also encompasses the names you choose to list in your law firm’s name, including the surnames of deceased or departed partners, to associating with or establishing a referral relationship with another firm. As law practice technology becomes more pervasive and attorney ethics rules governing marketing struggle to adapt, all of these and other forms of attorney marketing activities become fraught with potential ethical pitfalls. This program will examine the range of attorney marketing activities, identify ethics issues and areas of common bar complaints, and discuss best practices for avoiding liability.

- Ethical issues in range of attorney marketing activities
- Ethics issues in descriptions of areas of practice and claims of expertise
- Permissible uses of past successes, honorary titles, depictions, and claims of quality of legal service
- Risks of associating with other law firms and referral relationships
- Solicitation of clients through phone calls, direct mail, or email
- Special web site advertising issues
- Law firm name issues, including use of names of departed or deceased partners

**Speaker:**

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.
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Other Applicable Laws

Hypothetical 1

Your state bar recently adopted new marketing rules. You are trying to convince your partner to take the changes seriously. One partner has argued that your law firm’s risks are fairly low, because inappropriate lawyer marketing at most brings a "slap on the wrist."

Can inappropriate lawyer marketing result in:

(a) Finding of an ethics violation?

YES

(b) Suspension of the lawyer conducting the marketing?

YES

(c) Claims against the lawyer under state consumer protection acts?

YES

(d) Discipline for violating state and federal laws governing spam faxes?

YES

(e) Suits against the lawyer for intentional interference with the relationship between another lawyer and her client?

YES

Analysis

(a)-(d) The vast majority of lawyer marketing issues arise in the fairly benign context of bars disapproving lawyer marketing in advance, or bars informally asking lawyers to alter their marketing.
However, lawyers can face far more severe punishment, as well as more exotic claims. A few examples suffice to show the range of risks lawyers undertake when they engage in inappropriate marketing.


- **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006) (holding that a law firm could be sued under the Colorado Consumer Protection Act for allegedly broadcasting false advertisements on television).

- James H. Laskey, Fernando M. Pinguelo & Andrew D. Linden, *Marketing the Law Firm Newsletter*, Apr. 14, 2009, available at http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202429877053 ("an advertisement that would raise no issues if disseminated by mail or in the print media can create major headaches for in-house counsel if the means of distribution is fax or e-mail. . . . Unlawful direct advertising through e-mail and fax promotions can be financially devastating, and cases that have made the headlines illustrate the potential devastation. . . . Federal laws governing e-mail and fax promotions regulate both the content of such advertisements and also to whom such advertisements may be sent. Violators may be subject to significant financial penalties. . . . The CAN-SPAM Act, which governs the sending of commercial e-mails, requires that commercial e-mails contain a return address or comparable mechanism that allows the recipient to send a request not to receive future advertisements. . . . Faxed advertisements and commercial e-mails are marketing tools that should help enhance a business' performance. Disseminating fax ads and e-mails that do not contain proper opt-out notices defeat their own purpose by potentially subjecting your business to quickly surmounting penalties. Ensuring that the opt-out notices of your business' fax and e-mail ads comply with the TCPA and CAN-SPAM Act, respectively, will significantly reduce your business' liability and may even increase goodwill. When marketing through e-mail and fax, it is critical that your business do so in accordance with these and other similar state laws. If the recipients of your faxed and e-mail[ed] advertisements cannot opt-out, you may reluctantly join the club of those having to pay-out." (emphasis added)).

New York courts have addressed anti-fax laws. A lower court found that a lawyer had violated federal laws. **Stern v. Bluestone**, 850 N.Y.S.2d 90, 92 (N.Y. App. Div. 2008) (holding that unsolicited faxes lawyers sent to potential clients constituted...
improper advertisements even if they contained the notation: "This is not an advertisement of the availability of services"; finding that the advertisements violate federal laws governing spam faxes).

A higher court disagreed. *Stern v. Bluestone*, 911 N.E.2d 844, 845, 846 (N.Y. 2009) ("During the roughly 16-month period from November 25, 2003 through March 29, 2005, plaintiff Peter Marc Stern, a solo practitioner, received 14 unasked-for facsimile messages (faxes) from defendant Andrew Lavoott Bluestone, a solo practitioner who specializes in bringing attorney malpractice actions. Each fax was entitled 'Attorney Malpractice Report,' and included Bluestone's contact information and web site addresses. The body of each fax consisted of a short essay about various topics related to attorney malpractice: fee disputes with clients, the elements of professional malpractice, liens, common causes of attorney malpractice litigation, and unexpected circumstances in which claims of attorney malpractice arise."); "We conclude that Bluestone's 'Attorney Malpractice Report' fits the FCC's framework for an 'informational message,' and thus the 14 faxes are not 'unsolicited advertisement[s]' within the meaning of the TCPA. In these reports, Bluestone furnished information about attorney malpractice lawsuits; the substantive content varied from issue to issue; and the reports did not promote commercial products. To the extent that Bluestone may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, '[a]n incidental advertisement' of his services, which 'does not convert the entire communication into an advertisement' *(id).*").
Some courts recognize that a lawyer’s successful marketing might trigger a claim against the lawyer for intentional interference with another lawyer’s relationship with a client.

One California court allowed such a claim to proceed. *Tishgart v. Feder*, 2006 Cal. App. Unpub. LEXIS 3692, at *13-14 (Cal. Ct. App. Apr. 28, 2006) (holding that a lawyer could be sued for interfering with the relationship between another lawyer and a former client who fired the other lawyer and hired the defendant lawyer; rejecting the defendant lawyer’s "reliance on cases holding that a client has an unfettered right to hire and fire counsel of his or her choosing"; "Trisirikul's [client] right to terminate her contract with Tishgart [fired lawyer] is legally irrelevant to Tishgart's rights against a third party for alleged interference with his attorney-client relationship."); reversing summary judgment for the defendant lawyer and remanding to determine if the defendant lawyer’s interference was the cause of the client's termination of the former lawyer).

A Florida decision issued the same year found that the defendant lawyer had not engaged in such tortious conduct -- but relied upon a helpful fact. *Kreizinger v. Schlesinger*, 925 So. 2d 431 (Fla. Dist. Ct. App. 2006) (holding that a lawyer retained by a client who had terminated her old lawyer could not be liable for intentional interference; noting that the client had initiated the contact with the new lawyer).

**Best Answer**

The best answer to (a) is YES; the best answer to (b) is YES; the best answer to (c) is YES; the best answer to (d) is YES; the best answer to (e) is YES.
Constitutional Standard

Hypothetical 2

You practice in a state which recently revised its ethics rules. Among other things, the new rules severely restrict lawyer marketing. You and your partners realize that your state's bar might challenge some of your firm's marketing under these new rules, and you want to know what standard will apply if the bar takes such action.

If the state bar challenges your law firm's marketing, will it have to prove that any clients or potential clients have been or might be harmed?

**NO (PROBABLY)**

**Analysis**

Lawyer marketing involves a complex mixture of ethics rules, common law and statutory regulation of advertising, and constitutional principles.

**Introduction**

While it might be legitimately argued that the First Amendment was intended only to protect political speech, the United States Supreme Court has extended at least limited First Amendment protection to commercial speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The current standard for judging a state's restriction of commercial speech comes from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 565 (1980). As the Supreme Court explained in that case, expression that proposes a lawful activity and is not misleading may be limited if the government can establish a substantial interest, and if the regulation directly advances that substantial governmental interest and is not more extensive to serve that interest.
The Supreme Court began to apply First Amendment considerations to lawyer advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The Supreme Court held that lawyer advertising could be regulated, but not completely prohibited. In rejecting the idea of a total ban on lawyer advertising (which many states had previously imposed), the Supreme Court recognized that professional advertising poses special risks of deception because consumers are unlikely to be as capable of judging the accuracy of a professional’s advertisement.

The United States Supreme Court has not addressed lawyer advertising very many times since Bates. In In re R.M.J., 455 U.S. 191 (1982), Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985), and Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), the Supreme Court overturned discipline of lawyers who engaged in direct mail marketing or print advertising. On the other hand, the Supreme Court upheld a thirty-day restriction on lawyers sending direct mail advertisements to families of accident victims. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

As explained below, one approach to lawyer advertising is to require more disclosure -- requiring various disclaimers to accompany advertisements. Some courts have upheld state rules requiring such disclaimers, while other courts have found that states have gone too far in requiring disclaimers.

As might be expected, the United States Supreme Court has given states more leeway in limiting in-person solicitation, which the Court reasons is much more susceptible to abuse than advertisements or direct mail. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
In what might be a trend, a number of courts in the last few years have invalidated as unconstitutional portions of states’ ethics rules.

- Pub. Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *11, *16, *17, *18, *27 & *36-37 (5th Cir. Jan. 31, 2011) (holding that some of Louisiana’s marketing rules pass constitutional muster, while some do not; describing as "necessarily false and deceptive" any lawyer advertisements that promise results, so finding it unnecessary to apply the Central Hudson standard to one Louisiana rule; "Rule 7.2(c)(1)(E) bars communications that 'promise[] results.' The district court found that '[t]he plain text of th[is] Rule prohibits only communications that are inherently misleading and untruthful.' Public Citizen, Inc. v. La. Att’y Discipline Bd., 642 F. Supp. 2d 539, 553-54 (E.D. La. 2009). This court arrives at the same conclusion. A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and Rule 7.2(c)(1)(E) is not an unconstitutional restriction on commercial speech."); in applying the Central Hudson standard to other rules, concluding that the Louisiana Bar had adequately identified two government interests; "[T]he court holds that LADB has asserted at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession."); in contrast, finding that "an interest in preserving attorneys’ dignity in their communications with the public is not substantial."; explaining the "narrowly drawn to materially advance the asserted substantial interests" prong of Central Hudson: "To show that a regulation materially advances a substantial interest, LADB must 'demonstrate[] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' . . . It may do so with empirical data, studies, and anecdotal evidence. . . . The evidence on which it relies need not 'exist pre-enactment.' . . . It may also 'pertain[] to different locales altogether.' . . . This requirement may also be satisfied with 'history, consensus, and simple common sense.'" (citation omitted); ultimately finding unconstitutional Louisiana’s rules (1) completely banning marketing "containing a reference or testimonial to past successes or results obtained", (2) banning marketing that includes "the portrayal of a judge or jury", and (3) requiring that any disclaimer use the same font size as the largest print size used in a written advertisement, be included in both written and oral form in any television advertisement, and be spoken at the same speed as the rest of the advertisement; in contrast, finding constitutional Louisiana’s ban on (1) marketing that "utilize[] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter" and (2) marketing that includes "a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer." (citations omitted)).
- **Harrell v. Fla. Bar**, 608 F.3d 1241, 1253, 1255, 1270, 1271 (11th Cir. 2010) (finding that a Florida lawyer could challenge a number of Florida marketing ethics rules on "void-for-vagueness" grounds; "Harrell has made an adequate threshold showing that five of the rules -- those prohibiting advertisements that are 'manipulative,' Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A), 'promise[] results,' Rule 4-7.2(c)(1)(G), 'characteriz[e] the quality of the lawyer's services,' Rule 4-7.2(c)(2), or provide anything other than 'useful, factual information,' Rule 4-7.1, cmt. -- seem to apply to his proposed advertisements, but fail to provide meaningful standards and thus chill his speech."); in contrast, upholding the constitutionality of Florida's pre-filing requirement; "Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it. . . . But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules."); "[W]e face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. . . . And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. . . . In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.").

- **Alexander v. Cahill**, 598 F.3d 79 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names).

- **McKinley v. Abbott**, Cause No. A-09-CA-643-LY, 2010 U.S. Dist. LEXIS 33499, at *14, *14-15, *15 (W.D. Tex. Mar. 25, 2010) (holding unconstitutional a Texas statute that prohibited written solicitation to potential criminal clients; "Villasana [plaintiff] challenges Section 38.12(d)(2)(C) as it relates to written solicitations made by attorneys to individuals recently arrested or served with a summons."); distinguishing the Texas limitation from other state statutes prohibiting solicitation of accident victims; "Persons recently arrested or served by a summons, however, do not possess the same need for privacy protection. 'While a criminal or traffic defendants [sic] may be shaken by his arrest, what he needs is representation, not time to grieve.'" (citation omitted); "This Court finds the Fourth Circuit's reasoning [in Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997)] persuasive and proper to apply to the 30-day ban on attorneys' written solicitations to individuals arrested or served with a summons under Section 38.12(d)(2)(C). Section 38.12(d)(2)(C) neither directly or materially advances a substantial state interest nor is it narrowly drawn under the Central Hudson [Cent. Hudson Gas & Elec. Corp. v. Pub.
Serv. Comm'n of N.Y., 447 U.S. 557 (1980)] test. Thus, the Court concludes that it contravenes the First Amendment to the United States Constitution and cannot stand.

Of course, some limits on marketing survive constitutional challenge.

- **Pub. Citizen**, 2011 U.S. App. LEXIS 1922, at *11, *27, *36-37 (holding that some of Louisiana's marketing rules pass constitutional muster, while some do not; describing as "necessarily false and deceptive" any lawyer advertisements that promise results, so finding unnecessary to apply the Central Hudson standard to one Louisiana rule; finding constitutional Louisiana's ban on (1) marketing that "utilize[] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter" and (2) marketing that includes "a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer." (citations omitted)).

- **Harrell**, 608 F.3d at 1253, 1280, 1271 (finding that a Florida lawyer could challenge a number of Florida marketing ethics rules on "void-for-vagueness" grounds (as well as ripeness grounds); upholding the constitutionality of Florida's pre-filing requirement; "Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it . . . But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules."; "[W]e face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. . . . And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. . . . In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.").

- **See, e.g., Bergman v. District of Columbia**, 986 A.2d 1208, 1211, 1212, 1217 (D.C. Cir. 2010) (upholding the constitutionality of a Washington, D.C., law; explaining that "[t]he Act makes it unlawful for 'practitioner[s]' to solicit business from 'a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.' D.C. Code § 22-3225.14 (a)(1)."; "The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the 'potential client, patient, or customer.' D.C. Code § 22-3225.14 (a)(2)."; analyzing the D.C.
law under commercial speech guidelines; concluding that "[w]e are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy, effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances."; noting that the United States Supreme Court upheld a thirty-day prohibition on direct mail solicitation of accident victims in Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995)).

Standard for Judging Lawyer Marketing

Courts have vigorously debated the standard for judging lawyer marketing.

This debate arises in large part because clients and would-be clients normally do not complain about lawyer marketing. Instead, the complaints almost always come from other lawyers or zealous regulators. Thus, courts frequently must determine whether those challenging a lawyer’s marketing must establish actual client or prospective client confusion or harm.

Marketing that is Inherently Misleading. Relying on United States Supreme Court precedent, courts initially determine if some statements protected by the commercial speech doctrine are “inherently misleading.” If so, the court can uphold a ban on such speech without applying the Central Hudson analysis.

- See, e.g., Pub. Citizen, 2011 U.S. App. LEXIS 1922, at *11 (upholding, without applying the Central Hudson standard, one Louisiana rule; "Rule 7.2(c)(1)(E) bars communications that 'promise[] results.' The district court found that '[t]he plain text of [t]his Rule prohibits only communications that are inherently misleading and untruthful.' Public Citizen, Inc. v. La. Att’y Discipline Bd., 642 F. Supp. 2d 539, 553-54 (E.D. La. 2009). This court arrives at the same conclusion. A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and Rule 7.2(c)(1)(E) is not an unconstitutional restriction on commercial speech.").
Not coincidentally, bars frequently seem to challenge lawyer marketing that easily fits into the "inherently misleading" category.¹

For instance, In re Shapiro, 780 N.Y.S.2d 680 (N.Y. App. Div. 2004), the bar targeted a lawyer for several marketing steps. One step involved an obviously inappropriate direct communication.

The letter sent by respondent states, in pertinent part, "We are holding a letter containing valuable information regarding your legal rights . . . When you are well enough to exercise such judgment, please call me." We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel. Despite language in the letter acknowledging the likelihood that the recipient was then unable to exercise reasonable judgment in retaining counsel, we are not persuaded by the explanation of respondent that he sent his letter to a stranger under these circumstances in order to educate her regarding her legal rights.

Id. at 682-83 (emphasis added). The bar also justifiably challenged one of the lawyer's television advertisements.

We also agree with the finding of the Referee that the television commercials aired by the respondent contained false and misleading statements. The commercials depicted respondent as an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients. The evidence presented at the hearing, however, supports the finding of the Referee that

¹ E.g., Unnamed Attorney v. Ky. Bar Ass'n, 143 S.W.3d 600, 601 (Ky. 2004) (privately reprimanding a Kentucky lawyer who advertised various office locations in Kentucky in telephone directories, which were "neither staffed by a lawyer or any legal support staff" and in fact were not actual offices; "Movant and the KBA [Kentucky Bar Association] agree that no client has ever expressed any confusion or misunderstanding concerning the location of Movant's Kentucky law offices. But by stating addresses in Movant's telephone directory advertisements for which no actual offices existed, Movant's communication is misleading, a misrepresentation, and a violation of SCR 3.130-7.15(1)."
respondent has not been actively engaged in the practice of
law in this state since 1995. Respondent has conceded that
he has continuously resided in the State of Florida since
1991. The daily operations of the Rochester firm of Shapiro
and Shapiro have been entrusted to one or two attorneys
and several paralegals. Respondent's role has been limited
to acting as spokesperson, providing funding and responding
to questions. In contrast to the image of respondent
depicted in the commercials, respondent has never tried a
case to its conclusion and has conducted approximately 10
depositions.

Id. at 684 (emphases added).

In Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001), the bar challenged a
widely-used television advertisement that two North Carolina lawyers had used. The
advertisement showed a "Strategy Session" in which well-dressed lawyers obviously
representing an insurance company discuss their defense of a personal injury case --
including the suggestion that "we could try to deny it or delay, see if they'll crack." Id. at
434. When one of the lawyers in the advertisement asks which law firm represents the
plaintiff, another lawyer names the plaintiff's firm.

The pace of the remainder of the vignette speeds up. A
loud, metallic gong sounds immediately after the name of the
firm is stated. Upon hearing the name, while the gong is
sounding, the senior man's expression changes dramatically.
His eyebrows shoot up and his eyes widen and shift from
downward toward the junior man. The court finds that the
senior man's expression would be characterized by a
reasonable person as dismayed or alarmed. The camera
returns to the junior man's face, while the senior man
exclaims the name of the firm as a question, "Lewis and
Daggett?" The junior man nods, his mouth in a grim line.
The vignette ends with the camera back on the senior man's
face as he says, "Let's settle this one." His mouth is also set
into a grim line, and he looks away from the junior man and
downward.
Id. at 435 (emphases added; footnote omitted). The advertisement then features well-known actor Robert Vaughn recommending that listeners call the named law firm.\(^2\)

One of the lawyers using this advertisement had aired the ad in the Raleigh/Durham television market \(8,500\) times on six channels. Well into its opinion (in footnote 13), the court mentioned that

\[
\text{given Plaintiffs' own evidence that neither Farrin nor any attorney in his firm has ever tried a case, with the exception of sitting as second chair in one trial in which the opposing party prevailed.}
\]

Id. at 446 n.13 (emphasis added).

Not surprisingly, the court found the statement "inherently misleading," and thus capable of restriction without any additional evidence. The court explained its reasoning

\[
\text{Plaintiffs argue that the State Bar failed to sustain its burden of proof because it did not submit any evidence that actual consumers had either complained about the "Strategy Session" ad or been harmed by it. The case law, however, plainly states that such evidence is only required where the ad at issue contains a truthful statement that is nonetheless misleading and is not required where the ad is inherently misleading." . . .}
\]

\(^2\) This Robert Vaughn advertisement has faced bar criticism in several states, and for several reasons. For instance, another bar condemned this ad because it amounted to an improper celebrity endorsement. In re Keller, 792 N.E.2d 865, 870 (Ind. 2003) ("In the advertisements, Vaughn tells viewers, 'the insurance companies know the name Keller & Keller,' 'tell the insurance companies you mean business. Tell them you've called Keller & Keller,' and, finally, 'they go after your rights piece by piece by piece until you get every dollar you deserve.' The purpose of these statements is to reinforce the notion established in the 'Strategy Session' advertisement that the name Keller & Keller alone achieves results. In advising that the respondents 'go after your rights piece by piece by piece' until every possible dollar is recovered, Vaughn clearly is supporting the respondents and their ability to secure a positive result for the client, and even implies by these statements that, based on past successes, this is the respondents' usual outcome. Vaughn clearly implies that Keller & Keller can provide the services that the viewers need. He is not just encouraging the public to seek legal assistance, he is endorsing their contact with the firm of Keller & Keller because of their reputation. There is a distinction between simply suggesting that viewers call Keller & Keller, and suggesting that viewers who call Keller & Keller will obtain a favorable outcome. Because of Vaughn's endorsement of the respondent's services, we find the respondents violated Prof.Cond.R. 7.1(d)(3).")
The "Strategy Session" does not contain a truthful statement that is being challenged as misleading; rather, it consists of a fictional meeting of insurance adjusters whose dialogue leads to a decision to settle the case after learning the identity of the plaintiff's attorneys. The court finds that the State Bar was not required to conduct a public survey to determine that the "Strategy Session" is misleading because the ad contains a self-evident message. Plaintiffs argue that the ad's message varies depending on the eye of the beholder, which would essentially allow advertisers to depict any fictional scene so long as the script itself made no false explicit claim about the lawyer. However, the court is not required to employ a stricter evidentiary standard when dealing with a fictional vignette than required by the Supreme Court in dealing with a factually true statement. Thus, the court need not consider extrinsic evidence to determine whether the ad is misleading.

Id. at 437 (emphases added).

In In re Zang, 741 P.2d 267 (Ariz. 1987), the Arizona Supreme Court similarly dealt with print advertisements that included the following statements

"We're the [or 'a'] personal injury law firm:

<*> with the medical experience to understand complicated injuries

<*> with investigators to find witnesses and hidden evidence

<*> with computers for speed, accuracy and research

Detailed Preparation

is part of Zang & Whitmer, Chtd. because: the better your case is prepared for trial, the more likely your case will settle out of court without delay or hassles. (emphasis added)

Medicine and Law

are combined at Zang & Whitmer, Chtd. because: to prove serious injury and future suffering, your lawyer must have
the knowledge to *make complicated medical facts clear for the jury.*

. . .

**Licensed Investigators**

are part of Zang & Whitmer, Chtd. because: an investigator searches out witnesses, examines evidence at the accident scene, and discovers the facts *essential for victory in the courtroom.* . . .

. . . The television advertisements also were very dramatic. They featured an authoritative-sounding narrator and either frenetic or peaceful music as a backdrop for pictures of an automobile accident, a worried couple in a hospital waiting room, or a father kissing his daughter goodbye, apparently for the last time. Each of the television advertisements ended with a climactic scene showing Mr. Zang arguing before a jury in a courtroom, with the viewer visually located behind the jury box.

*Id.* at 273-74 (emphasis added). The court later noted that the

Committee and the Commission found that respondents' advertisements were false and misleading because they did not accurately portray respondents' practice. Zang & Whitmer was formed in 1979. From that time until the advertisements at issue appeared in 1982 and 1983, no attorney at Zang & Whitmer had tried a personal injury case to a conclusion. . . . Zang and Whitmer personally started only one trial, but a mistrial was declared after the first witness testified.

*Id.* at 275 (emphasis added). Not surprisingly, the court upheld the bar's three-day suspension of the lawyer.

Perhaps the bar "cherry picked" these types of cases to bring, but some lawyers are so egregious that any bar could satisfy the "inherently misleading" standard. *Id.*

**Marketing that is Not Inherently Misleading.** In contrast to inherently misleading statements that courts can judge without any further analysis (and without
any evidentiary support from a state bar), marketing statements that are only capable of a deceptive or other improper interpretation require a far more subtle analysis -- and evidentiary support by the state agency seeking to prohibit the marketing statements.

For instance, in Public Citizen, 2011 U.S. App. LEXIS 1922, the Fifth Circuit analyzed several Louisiana ethics rules limiting lawyer marketing -- finding unconstitutional some of the restrictions, but upholding other restrictions.

The Fifth Circuit noted that the Louisiana Bar had conducted a survey of 600 Louisiana residents, held various meetings around the state to discuss the proposed restrictions, undertook a web survey of Louisiana lawyers and sponsored various "focus group discussions." Id. at *5. The Fifth Circuit held that the Louisiana Bar had a "'heavy'" burden of proof in restricting commercial speech such as that covered by the Louisiana rules, and that the Bar could not carry its burden of proof "'by mere speculation or conjecture.'" Id. at *10 (citations omitted).

In analyzing the Central Hudson standard, the Fifth Circuit found that Louisiana pointed to two legitimate "substantial government interests."

[T]he court holds that LADB has asserted at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.

Id. at *16. The Fifth Circuit rejected another government interest relied upon by the Louisiana Bar.

[A]n interest in preserving attorneys' dignity in their communications with the public is not substantial.

Id.
In analyzing the "narrowly drawn to materially advance the asserted interests"

Central Hudson standard, the Fifth Circuit described the Louisiana Bar's burden.

To show that a regulation materially advances a substantial interest, LADB must "demonstrate[] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." . . . It may do so with empirical data, studies, and anecdotal evidence. . . . The evidence on which it relies need not "exist pre-enactment." . . . It may also "pertain[] to different locales altogether." . . . This requirement may also be satisfied with "history, consensus, and simple common sense."

Id. at *17 (citations omitted).

The Fifth Circuit ultimately found unconstitutional Louisiana's total ban on marketing statements "containing a reference or testimony to past successes or results obtained." The court found unconvincing the bar's argument in favor of the ban.

Even if, as LADB argues, the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a "fear that people would make bad decisions if given truthful information." . . . To the extent that Rule 7.2(c)(1)(D) prevents attorneys from presenting "truthful, non-deceptive information proposing a lawful commercial transaction," it violates the First Amendment.

Id. at *20-21 (citation omitted).

The Fifth Circuit pointed to but ultimately rejected the Louisiana Bar's reliance on surveys to support the Louisiana rule's ban on statements "of opinion or quality and . . . [those] of objective facts that may support an inference of quality." Id. at *19 (citation omitted).

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3 Public Citizen, 2011 U.S. App. LEXIS 1922, at *18. As the Fifth Circuit explained it, "[a] statement that a lawyer has tried 50 cases to a verdict, obtained a $1 million settlement, or procured a settlement for 90% of his clients, for example, are objective, verifiable facts regarding the attorney's past professional work." Id. at *19.
LADB bears the burden to show that the unverifiable statements prohibited by Rule 7.2(c)(1)(D) are so likely to be misleading that it may prohibit them. To do so, LADB relies on selected responses from the two Louisiana surveys: (1) 83% of the interviewed public did not agree "client testimonials in lawyer advertisements are completely truthful"; (2) 26% agreed that lawyers endorsed by a testimonial have more influence on Louisiana courts; (3) 40% believe that lawyers are, generally, "dishonest"; and (4) 61% believe that Louisiana lawyer advertisements are "less truthful" than advertisements for other items or services.

Id. at *21-22. The Fifth Circuit found the survey results insufficient to support the ban.

These responses are either too general to provide sufficient support for the rule's prohibition or too specific to do so. The general responses indicate that the public has a poor perception of lawyers and lawyer advertisements. However, they fail to point to any specific harms or to how they will be alleviated by a ban on testimonials or references to past results. . . . The more specific survey responses provide information regarding client testimonials, but do not shed light on the rule's prohibition of only those testimonials specifically discussing the attorney's past results or of all mere "references" to past results in unsolicited advertisements. They might be read to show that a majority of the Louisiana public may be unswayed by testimonials -- perhaps demonstrating that they are a poor advertising choice -- but not that banning only those testimonials that relate to past results will "ensur[e] the accuracy of commercial information in the marketplace" or is required to uphold ethical standards in the profession. . . . Only a minority of survey respondents agreed that attorneys employing testimonials in their advertisements have greater influence on the courts, and the ambiguity of the question posed to them leaves open the possibility that they were expressing a belief that these attorneys could obtain better results, not a belief that they would do so improperly.

Id. at *22-23.

The Fifth Circuit likewise found the Louisiana Bar survey results insufficient to support a very specific rule requiring certain font size for disclaimers in written
advertisements, and a requirement that televised advertisements include both a written disclaimer and a slowly-spoken oral disclaimer.

The record is devoid of evidence that Rule 7.2(c)(10)'s font size, speed of speech, and spoken/written provisions are "reasonably related" to LADB's substantial interests in preventing consumer deception and preserving the ethical standards of the legal profession. . . . The objected-to restrictions in Rule 7.2(c)(10) effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind. Accordingly, we hold that they are overly burdensome and violate the First Amendment.

Id. at *41-42.

In contrast, the court found that the Louisiana survey's results supported the constitutionality of a ban on statements that "'include[] a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer.'" Id. at *36-37 (citation omitted).

Interestingly, the Fifth Circuit acknowledged that the Second Circuit had very recently found unconstitutional a New York ethics rule prohibiting use of "'a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter'" (id. at *32, quoting Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010), cert. denied, 131 S. Ct. 820 (2010)) -- but found that the Second Circuit's finding of unconstitutionality was based on the New York Bar's failure to present enough supporting evidence.

The Fifth Circuit found that Louisiana had presented sufficient evidence to support the identical ban in Louisiana.

The court is satisfied that there is reliable and specific evidence on the record sufficient to support the restriction imposed by Rule 7.2(c)(1)(L). First, the survey and focus group responses consistently reveal that the advertisements containing these mottos misled the public, improperly promised results, and implied that the advertising lawyers
could manipulate Louisiana courts. Second, they present the perceptions of a significant number of people from each of the two pools of respondents. One-half of each survey was directed at the use of mottos and nicknames in attorney advertisements. Participants were either shown existing attorney advertisements making use of mottos or asked whether they recognized specific mottos. Finally, the questions asked about the shown or recognized advertisements were not abstract or hypothetical. They targeted the specific elements of commercial speech implicated by this rule and sought and received the reactions of the public and Bar Members to that type of speech. The result is evidence that directly pertains to and supports the restriction set forth in Rule 7.2(c)(1)(L). The court holds that LADB has met its burden to show that this rule will advance its substantial interest in preventing consumer confusion.

Id. at *29-30 (footnote omitted).

In 2010, the Second Circuit declared unconstitutional various portions of New York's marketing rules, including bans on testimonials; portrayals of judges; irrelevant techniques such as gimmicky depictions; nicknames; and trade names. 4

4 Alexander v. Cahill, 598 F.3d 79, 83-84, 90, 92, 93, 94, 94-95, 95, 102, 103 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; explaining that "[p]rior to the adoption of New York's new attorney advertising rules, the firm's commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name. Firm advertisements also featured dramatizations, comical scenes, and special effects -- for instance, depicting Alexander and his partner as giants towering above local buildings, running to a client's house so quickly they appear as blurs, and providing legal assistance to space aliens."; applying the Central Hudson [Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)] standard in assessing nearly all of the New York state marketing rules at issue -- other than the rule prohibiting misleading marketing of a law firm that does not exist; "At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this language as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., 'The Dream Team'). . . . We accept this interpretation. So read, this portion of § 1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of the firm), and such advertising is not entitled to First Amendment protection."; quoting a 1991 article by then-professor Calabresi analyzing the Central Hudson standard; emphasizing that "[d]efendants have not submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit. Nor have they specifically identified any studies from other jurisdictions on which the state relied in implementing the amendments."; finding unconstitutional New York State's ban on testimonials; "Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials
The Second Circuit repeatedly noted the absence of any evidence supporting the New York ethics rules. As the court explained,

    Defendants have not submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit. Nor have they specifically identified any studies from other jurisdictions on which the state relied in implementing the amendments.

**Alexander**, 598 F.3d at 92.

may, for example, mislead if they suggest that past results indicate future performance -- but not all testimonials will do so, especially if they include a disclaimer. The District Court properly concluded that Defendants failed to satisfy this prong of *Central Hudson* with respect to client testimonials.; also finding unconstitutional New York State's ban on portrayal of judges in marketing materials; "We believe the Task Force Report fails to support Defendants' prohibition on portrayals of judges and conclude that Defendants have not met their burden with respect to the wholesale prohibition of portrayals of judges. This prohibition consequently must fall." (footnote omitted); also finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics."; also finding unconstitutional New York State's ban on nicknames and trade names; "[T]he Task Force Report did not recommend outright prohibition of all such trade names or mottos -- it simply acknowledged that such names are often misleading. Defendants' rule, by contrast, goes further and prohibits such descriptors -- including, according to the Attorney General, Alexander & Catalano's own 'Heavy Hitters' motto -- even when they are not actually misleading. The Task Force Report therefore fails to support Defendants' considerably broader rule."; "There is a dearth of evidence in the present record supporting the need for § 1200.50(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under *Central Hudson*.; ultimately upholding the constitutionality of New York State's 30-day moratorium on certain direct marketing in wrongful death and personal injury cases; "[W]e conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to 'an untargeted letter mailed to society at large,' which 'involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession' as direct mail solicitations." (citation omitted); "Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion.".
Later in its opinion, the Second Circuit found that New York's ban on nicknames and trade names was unconstitutional.

There is a dearth of evidence in the present record supporting the need for § 1200.50(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under Central Hudson.

Id. at 95. In April 2011, New York changed its marketing rules to comply with this opinion.

The Eleventh Circuit also dealt with this issue, several years ago.

In Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000), the court analyzed a lawyer's advertisement of his "AV" Martindale-Hubbell rating.

Mason, a criminal defense attorney practicing in Orlando, Florida, submitted a proof of his yellow pages advertisement to the Bar for an ethics advisory opinion. In pertinent part, the advertisement states that Mason is "'AV' Rated, the Highest Rating [in the] Martindale-Hubbell National Law Directory.'" The Bar issued an opinion that the advertisement violated Rule 4-7.2(j) which provides: "Self-Laudatory Statements. A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication. . . ." The Bar notified Mason that his advertisement must include a "full explanation as to the meaning of the [Martindale-Hubbell] AV rating and how the publication chooses the participating attorneys." The Bar further indicated that the explanation must state "that the ratings and participation are based on 'exclusively on . . . opinions expressed by . . . confidential sources' and that these publications do not undertake to rate all Florida attorneys.' (internal quotations and ellipses in original).
Id. at 954 (footnotes omitted). The court pointed to the bar's fairly meager effort to show some harm or confusion.

In support of its position, the Bar offered the affidavit and testimony of the Bar's director of advertising and ethics, Ms. Tarbert, and portions of the 1998 Martindale-Hubbell Law Directory. Ms. Tarbert did not testify to any anecdotal accounts of actual harm to members of the general public misled by characterizations of Martindale-Hubbell's rating system, nor did the district court make a factual finding that any person had been mislead or deceived by Mason's ad or a similar ad. Ms. Tarbert merely offered the Bar's "simple common sense" to support its view that application of Rule 4-7.2(j) targeted an identifiable harm and furthered substantial state interests in a direct and material manner.

Moreover, the Bar presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public. While empirical data supporting the existence of an identifiable harm is not a sine qua non for a finding of constitutionality, the Supreme Court has not accepted "common sense" alone to prove the existence of a concrete, non-speculative harm.

Id. at 957 (emphasis added). The court ultimately rejected the bar's challenge to Mason's reliance on the Martindale-Hubbell rating.

The Bar has the burden in this case of producing concrete evidence that Mason's use of the words "'AV' Rated, the Highest Rating" threatened to mislead the public. The Bar's inferences from the Introduction to Martindale-Hubbell are mere speculation, and Ms. Tarbert's testimony reveals that the Bar's concerns consist of unsupported conjecture. This court is unwilling to sustain restrictions on constitutionally protected speech based on a record so bare as the one relied upon by the Bar here.

Id. at 958 (emphasis added).

In some situations, courts acknowledge that state bars have presented evidence supporting restrictions -- but reject the studies' methodologies.
See, e.g., In re Anonymous Member of the S.C. Bar, 684 S.E.2d 560, 561, 565 (S.C. 2009) (analyzing the following television advertisement: "'It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim. You're afraid your boss won't believe you're really hurt - or worse, that you'll be fired. We'll protect you against these threats - these accusations - and work to protect your job. I'm not an actor, I'm a lawyer. I'm - [Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.'"; rejecting a study undertaken by the bar that supposedly showed the ad to be misleading; "At the outset, there is no evidence that any member of the public was misled when Respondent aired his television advertisement. Moreover, we find the results of the Market Search study are suspect and do not definitively establish that the advertisement was misleading." (emphasis added); "The sample group was smaller than normally used for such a study and, in turn, may not have been statistically reliable. The study had a 20% margin of error. The participants were shown a total of five attorney advertisements, of which two were produced by Respondent. This undoubtedly focused the participants’ attention more keenly on the Respondent’s advertisements. Respondent's advertisement was the only one of the five that referenced anything regarding a client's job. The questionnaires were also worded in a way that elicited the desired response from participants." (emphasis added); ultimately holding that the bar had failed to establish by "clear and convincing evidence" that the advertisement violated the ethics rules).

In analyzing whether marketing statements are "inherently misleading," some bars have turned to experts.

For instance, in North Carolina State Bar v. Culbertson, 627 S.E.2d 644 (N.C. Ct. App. 2006), the court analyzed the following lawyer marketing:

The complaint alleged defendant's law office letterhead contained an asterisk beside his name. Below defendant's name is printed another asterisk and the phrase. "Published in Federal Reports, 3d Series" surrounded by parentheses. The complaint also alleged defendant is described on the firm's website as "also one of the elite percentage of attorneys to be published in Federal Law Reports - the large law books that contain the controlling caselaw [sic] of the United States."

Id. at 646 (emphases added).

The court explained that
Where the possibility of public deception is self-evident, the DHC [North Carolina State Bar Disciplinary Hearing Commission] is not required to survey the public to determine whether the communication has a tendency to mislead.

Id. at 648 (emphases added). In an effort to argue that the challenged statements fell within this category, the bar presented both survey results and expert testimony.

At the DHC hearing, defendant introduced evidence of a detailed survey conducted by a Wake Forest University political science professor that asked members of the general public whether the phrase, "Published in Federal Reports, 3d" on an attorney's letterhead was misleading. Defendant also introduced a study performed by a Duke University English and anthropology professor which analyzed how the general public would interpret the word, "publish." Defendant argues the DHC failed to consider this evidence of whether the public would actually be misled by the language and erred in relying on its judgment to determine whether this language was false or misleading.

Id. (emphasis added). The court found that the bar had carried its burden of showing that the statements were "inherently misleading," and thus could restrict them.

Because defendant’s statements are inherently misleading, the DHC was not required to consider extrinsic evidence of whether the public was actually misled. . . . Substantial evidence in the record supports DHC's conclusion that defendant’s statements published on his letterhead and website asserting he is "Published in the Federal Law Reports" are false or misleading.

Id. at 650 (emphasis added).

**Effect of Required Disclaimers**

In every area of commercial speech restrictions, courts have debated the effect of governmental rules that require additional disclosure (such as a disclaimer) rather than prohibit the challenged speech.
Not surprisingly, this debate also appears in the case law dealing with lawyer marketing.

For instance, one court explained that

The fact that the regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment.

Walker v. Board of Professional Responsibility, 38 S.W.3d 540, 545 (Tenn. 2001).

Later, the court reiterated that "the Board's burden is lower than it would be had it prohibited Walker from advertising truthful information." Id. at 546. The Court ultimately affirmed the Tennessee Bar's conclusion that a divorce lawyer's advertisement must include a disclaimer explaining that the lawyer was not certified as a specialist in divorce law.

On the other hand, the Eleventh Circuit found unconstitutional the Florida Bar's restriction on a lawyer's truthful advertisement about his Martindale-Hubbell rating. The court rejected the Florida Bar's argument that a disclaimer requirement lessened its burden of proof.

The Bar argues that its restriction on Mason's speech should be upheld because it has not insisted upon an outright ban on speech, but merely requires the use of a disclaimer. But given the glaring omissions in the record of identifiable harm, we see little merit in this argument. . . . Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm. Accordingly, we hold that the Bar is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban on Mason's speech.

Mason v. Florida Bar, 208 F.3d 952, 958 (11th Cir. 2000) (emphasis added).
Not surprisingly, lawyers cannot avoid bar restrictions on their intentionally misleading marketing by adding their own fleeting disclosures in the marketing. 

For instance, the North Carolina federal court which upheld the bar’s restriction on a lawyer’s deceptive television advertisement (which implied that insurance defense lawyers would be likely to settle a case once they knew that the lawyer was representing a plaintiff) was not affected by what the lawyer pointed to as a disclaimer in the television advertisement that "no specific results implied." Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001).

[T]he existence of a disclaimer stating that no specific result was implied by the vignette does nothing to prevent the conclusion that the ad is inherently misleading. It would defeat the purpose of Rule 7.1 and other advertising regulations if the advertiser could employ deceptive and misleading methods so long as the ad included a disclaimer of what was portrayed.

Id. at 445.

Best Answer

The best answer to this hypothetical is PROBABLY NO.
Reach of State Ethics Rules

Hypothetical 3

Your firm's chairman just asked you to supervise your firm's marketing efforts in a southern state. Although you do not have an office in that state, several of your Charlotte office partners hold licenses in the state. Your first question is the application of the state's ethics rules to your marketing efforts.

(a) Will the state's ethics rules apply to a print advertisement placed in that state's main business magazine?

YES

(b) Will the state's ethics rules apply to a print advertisement placed in American Lawyer magazine, which is sold in the state?

MAYBE

Analysis

(a) Not surprisingly, states clearly can regulate lawyer marketing specifically targeting the state's citizens.

Perhaps the clearest example involves a lawyer who is physically present in the state, but not admitted to practice there. See, e.g., Gould v. Florida Bar, 259 F. App'x 208, 210, 211 (11th Cir. 2007) (assessing advertisements by a New York lawyer who moved to Florida and advertised that he could provide legal services for "NEW YORK LEGAL MATTERS ONLY" or his practice was "LIMITED TO FEDERAL ADMINISTRATIVE LAW"); holding that Florida could ban the advertisement because the lawyer "who is not admitted to the Florida Bar, does not have the authority to practice New York law in Florida," meaning that the advertisement was for unlawful activity and could be stopped by the Bar; rejecting the lawyer's argument that Florida could not
prevent him from practicing "federal administrative law" or advertising that he practices such law; acknowledging that federal law preempts any efforts by Florida to prevent lawyers from representing persons "before an agency," but finding that provision inapplicable; "The Florida Bar responds that it is unlawful for Gould, who is not licensed to practice law in Florida, to engage in a general ‘federal administrative practice’ in Florida and that, under Central Hudson, the Florida Bar is entitled to regulate an advertisement for those services because the advertisement concerns unlawful activity. The words ‘federal administrative law’ apply to a broad range of legal issues, and are not limited to the representation of persons before federal agencies. Issues of federal administrative law arise in state and federal courts, as well as before federal agencies.”; granting summary judgment to the Florida Bar prohibiting the advertisements), cert. denied, 128 S. Ct. 2433 (2008).

The same basic rule applies to lawyers who personally solicit in the state, or send direct mail to the state’s residents.

- Florida Rule 4-7.1(c) ("Subchapter 4-7 shall apply to lawyers admitted to practice law in jurisdictions other than Florida: (1) who have established a regular and/or permanent presence in Florida for the practice of law as authorized by other law; and (2) who solicit or advertise for legal employment in Florida or who target solicitations or advertisements for legal employment at Florida residents.").

- New York Rule 7.3(i) ("The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.").

For instance, in In re Murgatroyd, 741 N.E.2d 719 (Ind. 2001), the Indiana Supreme Court held that Indiana could insist on compliance with Indiana’s ethics rules by California lawyers who sent direct mail solicitations into Indiana after a 1992 airplane crash in Indiana.
By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts to address loss or injury associated with the plane crash. As such, they held themselves out to the public as lawyers in this state when neither was admitted to practice here. Those acts constituted professional legal activity in this state subject to our regulatory authority.

Id. at 721 (footnote omitted; emphases added).

Other state courts and bars have taken the same approach.

- North Carolina LEO 2005-10 (1/20/06) ("Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. See South Carolina Appellate Court Rule 418, 'Advertising and Solicitation by Unlicensed Lawyers' (May 12, 1999) (requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers)").


- Accord California LEO 2001-155 (2001) ("The concerns and requirements described above apply to the activities of Attorney A in California, and apply equally to foreign attorneys in California in their 'communications' in California about their availability to provide legal services in California for pecuniary gain."; "We do not address in this opinion the issue of what state's advertising rules will apply to a lawyer who is licensed in more than one state. ABA Model Rule 8.5(b)(2)(ii) suggests a choice-of-laws rule for disciplinary purposes when lawyers are licensed in more than one state. Despite the possible arguments that arise from choice-of-law concepts, the most prudent course for any attorney licensed in more than one jurisdiction is to comply with the advertising rules of each jurisdiction.").

- Illinois LEO 94-2 (7/1994) ("Solicitation of personal injury cases within Illinois by a lawyer not admitted to practice in Illinois is a form of unauthorized practice of law. All solicitations must comply with all restrictions imposed by the Illinois Supreme Court on lawyer advertising, and must contain all information necessary to prevent the recipient from being misled.").

South Carolina's ethics rules are fairly typical of states' approach to this issue.
Any advertising or solicitation by an unlicensed lawyer shall comply with Rules 7.1 through 7.5 of the Rules of Professional Conduct contained in Rule 407, SCACR, when the advertising or solicitation is: (1) an in-person contact with a potential client which occurs in South Carolina; (2) a telephone communication (to include a facsimile of other electronic transmission) to a potential client at a telephone number in South Carolina; (3) a letter or other document sent to a potential client through the U.S. mail or a private carrier to an address in South Carolina; (4) an advertisement on a radio or television station located in South Carolina; (5) an advertisement in a South Carolina newspaper or any other publication which is primarily distributed in South Carolina; or (6) any other form of advertising or solicitation which is specifically targeted at potential clients in South Carolina.

South Carolina Rule 418(b) (emphases added).

Some states take a more aggressive approach. For instance, an Arizona legal ethics opinion indicates (at least on its face) that a law firm must comply with Arizona's ethics rules if it has even one lawyer admitted in Arizona -- regardless of where the advertisement will appear.

If a law firm has offices in many states, must the firm comply with Arizona ethics rules if the firm either has an office in Arizona or attorneys admitted to practice in Arizona? Yes. Pursuant to ER 8.5, if you are a member of the State Bar of Arizona, you must follow the Arizona Model Rules of Professional Conduct, even if your advertisement will appear, electronically, both inside and outside of the state.


Thus, every state feels entitled to police marketing that targets that state's citizens. The more aggressive states articulate a greater power (including the authority to police the law firm's marketing if any of the firm's lawyers hold a license in that state), but appear not to exercise that self-proclaimed authority.
(b) State bars’ approach to national magazines provides an interesting example of articulated but unexercised power.

The general rules discussed above would theoretically allow states to punish their lawyers for unethical advertisements appearing in national magazines sold in the state. For instance, Arizona’s aggressive approach (discussed above) would certainly apply to a national magazine.

Other states are somewhat more modest. For instance, South Carolina Rule 418(b)(5) applies South Carolina’s ethics rules to a newspaper or other publication "which is primarily distributed in South Carolina" (emphasis added).

Even then, it would be incongruous for a South Carolina lawyer to face punishment for an unethical print advertisement published in a South Carolina magazine, but be immune from sanctions for publishing the identical advertisement in a national magazine sold throughout South Carolina.

Perhaps because state bars have too much to do anyway, no single state seems to care much about advertisements appearing in national magazines.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **MAYBE**.
Law Firm Websites

Hypothetical 4

As your law firm’s partner chiefly responsible for ethics issues, you field questions and complaints from state bars. You just received calls from two state bars. Each of the bars complained about several statements on your firm's website. Your firm has a two-lawyer office in the capital of one of the states whose bar has complained about your website, and one of your 500 lawyers is licensed in the other state whose bar has complained.

(a) Must your firm website comply with the marketing rules of the state in which you have a two-lawyer office?

YES (PROBABLY)

(b) Must your firm website comply with the marketing rules of the state whose bar members include one of your lawyers?

MAYBE

Analysis

State bars have always been able to punish foreign lawyers who commit some ethics breach (including marketing violations) in that state. Of course, the punishment necessarily consists of barring the foreign lawyer from practicing in that state -- along with perhaps reporting the lawyer to his or her home state.

Law firm websites present far more interesting issues.

The first issue is whether law firm websites must comply with marketing rules at all. Most bars now hold that websites amount to a form of advertising, and therefore must comply with advertising rules.

(a) Although the answer is not without doubt, it would seem that the bar of a state in which a law firm has an office may exercise jurisdiction over that firm's website.
Pennsylvania LEO 96-17, 1996 WL 928126, at *3 (5/3/96) ("I do not believe there is any question that a web site created and maintained by a Pennsylvania law firm is subject to the applicable provisions of Pennsylvania Rules of Professional Conduct. Whether other jurisdictions may impose their rules governing lawyer advertising is an open question.").

In fairly typical fashion, Iowa has taken an aggressive approach. In Iowa LEO 96-14 (12/12/96), an out-of-state firm with an Iowa office asked whether its website home page could explain that its "non-Iowa home page is separate from any Iowa home page" and "disclaims offering services in Iowa." In fact, the firm’s proposed home page would contain the following more detailed disclaimer.

This _________ home page and website do not contain information about, and are not intended to promote or sell services relating to, legal services which are available in Iowa or which relate to Iowa law; nor does this home page and website contain information about the Des Moines office of ________.

Id. The law firm obviously was hoping to avoid application of Iowa’s goofy marketing rules to anything but its Iowa office home page on the firm’s website.

Not surprisingly, the Iowa Bar rejected the poor law firm’s efforts.

It is the opinion of the board that if an out-of-state based law firm advertises that it has a branch office in Iowa or that certain firm members are licensed to practice in Iowa, it is a solicitation for Iowa legal representation and all copy, however communicated, must conform with all the requirements of the Iowa Code of Professional Responsibility for Lawyers.

Id. (emphases added).

Inexplicably, the Iowa Bar held that the law firm’s disclaimer made matters worse, not better.
Further, it is the opinion of the board that communicating any information about Iowa or Iowa legal representation such as, but not limited to, the disclaimer you propose only operates to emphasize an Iowa advertisement and would be improper. Further, it is the opinion of the board that the proposed, "If the Des Moines office has a web site at all, the Iowa home page would have a separate web site which would not refer to the web site for other ________ offices, but would list the cities where these offices are located. These separate web sites will not have hyper-text links," would not be improper, provided all required disclosures are published, and the restrictions in DR 2-101 and DR 2-105 are complied with.

Id. (emphasis added). Thus, the law firm could not avoid Iowa's marketing ethics rules unless it had an entirely separate website for its Iowa office, with no links to the firm's website describing non-Iowa offices.

(b) Only a few states have addressed a bar's attempt to police websites of firms which do not have an office in that state.

As explained above, the Iowa Bar has indicated that an out-of-state law firm must comply with the Iowa ethics requirements if the law firm advertises that it has a branch office in Iowa or that it has Iowa lawyers in the firm. Iowa LEO 96-14 (12/12/96).

The Arizona Bar has also indicated that it may exercise jurisdiction over a firm's website simply because one of the firm's lawyers is licensed in that state.

IIf you are a member of the State Bar of Arizona, you must follow the Arizona Model Rules of Professional Conduct, even if your advertisement will appear, electronically, both inside and outside of the state.

Arizona LEO 97-04 (4/1997). This approach apparently has not been tested in court, so it is unclear whether state bars may freely exercise jurisdiction to that extent.

If state bars may exercise jurisdiction over a firm's website with the only nexus being one lawyer's bar membership in that state, one would expect that there would
soon be a "least common denominator" effect, and that most large law firms would have to comply with the most restrictive state's advertising regulations. See, e.g., California LEO 2001-155 (2001) (warning California lawyers that other states might regulate their websites); West Virginia LEO 98-03 (10/16/98) ("If a web site promotes a West Virginia law firm, for example, it does not matter where [the] web site is maintained. If the firm is a multistate firm, it must adhere to the most restrictive standards among those jurisdictions.").

**Best Answer**

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **MAYBE**.

b 2/11
Prohibition on False Statements

Hypothetical 5

In checking out some of your competitors' websites, you notice two interesting websites. First, one local lawyer boasts that he is "published in Federal Reports," and describes himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling case law of the United States." You wonder whether the website statement violates your state's prohibition on false advertising. Second, another local firm's website includes pictures of what the website implies to be law firm lawyers and staff -- but they all are much more attractive than the lawyers and staff who work at the firm, and thus obviously are paid models.

(a) Does the lawyer's website reference to being published in the Federal Reports violate your state's prohibition on false advertisements?

YES

(b) Does the law firm's use of models to depict law firm lawyers and staff violate your state's prohibition on false advertisements?

NO (PROBABLY)

Analysis

(a) Not surprisingly, every state's ethics rules prohibit false statements.

The main issue is whether the bar's disciplinary regulators must establish that any client or would-be client was misled by a statement, or whether the regulators can simply argue that a statement is "inherently misleading" and thus sanctionable.

In many situations, state bar regulators have a fairly easy time punishing lawyers for false statements.

- Neely v. Comm'n for Lawyer Discipline, 196 S.W.3d 174, 185 (Tex. App. 2006) (suspending for nine months a lawyer making false claims about a class action, which implied "that a class had already been certified and that members of that class would be eligible for damage recovery").
• Unnamed Attorney v. Ky. Bar Ass'n, 143 S.W.3d 600, 601 (Ky. 2004) (privately reprimanding a Kentucky lawyer who advertised various office locations in Kentucky in telephone directories, which were "neither staffed by a lawyer or any legal support staff" and in fact were not actual offices; "Movant and the KBA [Kentucky Bar Association] agree that no client has ever expressed any confusion or misunderstanding concerning the location of Movant's Kentucky law offices. But by stating addresses in Movant's telephone directory advertisements for which no actual offices existed, Movant's communication is misleading, a misrepresentation, and a violation of SCR 3.130-7.15(1).").

• State ex rel. Okla. Bar Ass'n v. Mothershed, 66 P.3d 420, 422 (Okla. 2003) (disbarring a lawyer who had the following background: "Respondent is a member of the Oklahoma Bar Association. He was licensed to practice law by the Supreme Court of the State of Oklahoma in 1968. At all times pertinent hereto, Respondent was a resident of the state of Arizona. Respondent sat for the Arizona Bar Exam three times, unsuccessfully, in February 1996, July 1996 and February 1997. He has never been licensed to practice law in the state of Arizona."; finding that the lawyer had improperly identified himself as admitted to the Arizona Bar; "In February 1998, the Respondent filed pleadings in the Superior Court of Arizona, Maricopa County in Bonney v. Bedore, et al., CV-98-01771. Again Respondent identified himself as 'Attorney for the Plaintiff,' but failed to indicate he was not licensed to practice law in Arizona. The pleadings indicated Respondent's State Bar Number was 006472, but did not state that this was his Oklahoma Bar Number. Respondent's stationary displayed an Arizona address and 'Attorney at Law' but did not specify he was licensed to practice law in Oklahoma.").

• Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Bjorklund, 617 N.W.2d 4, 8, 8-9 (Iowa 2000) (issuing a public reprimand of a lawyer who advertised that he had published a book; "Praetorian published the book in the latter part of 1998, but did not sell any copies"; "In the same letter to the Board, Bjorklund indicated the telephone number listed in the advertisement was a direct line to the publisher. The area code and prefix of the telephone number listed in the advertisement, however, covered the Coralville area. Except for the last two digits, it was the same number as the fax number for Bjorklund's office."; "Although the ad may be a veiled attempt to market the sale of a book, it contains a claim attributable to a lawyer which violates our disciplinary rules on advertising. The ad prominently displays Bjorklund's name and occupation as an attorney at law following the question 'Have you been caught drinking and driving?' and the exclamation 'I can help!' It does not offer the book for sale or necessarily promote the book as the source of help, but mainly refers to the book as a means to validate the ability of Bjorklund to help.").
This hypothetical comes from a North Carolina case, in which a North Carolina court affirmed an admonition against the lawyer for publishing what the court considered an inherently misleading advertisement. North Carolina State Bar v. Culbertson, 627 S.E.2d 644, 647 (N.C. App. Ct.) (affirming an admonition issued against a lawyer who advertised on his letterhead and website that he is "published in Federal Reports" and describing himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling caselaw [sic] of the United States" (emphasis omitted); finding the advertisements inherently misleading), review denied, 633 S.E.2d 819 (N.C. 2006).

A number of courts have ruled against state restrictions or efforts to stop particular lawyer advertisements.

- Alexander v. Cahill, 598 F.3d 79, 93, 94 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; among other things, finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."); "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics." (emphases added)).

- In re Anonymous Member of the S.C. Bar, 684 S.E.2d 560, 561, 565 (S.C. 2009) (analyzing the following television advertisement: "It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim."

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You're afraid your boss won't believe you're really hurt - or worse, that you'll be fired. We'll protect you against these threats - these accusations - and work to protect your job. I'm not an actor, I'm a lawyer. I'm -[Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.";

rejecting a study undertaken by the bar that supposedly showed the ad to be misleading; "At the outset, there is no evidence that any member of the public was misled when Respondent aired his television advertisement. Moreover, we find the results of the Market Search study are suspect and do not definitively establish that the advertisement was misleading."; "The sample group was smaller than normally used for such a study and, in turn, may not have been statistically reliable. The study had a 20% margin of error. The participants were shown a total of five attorney advertisements, of which two were produced by Respondent. This undoubtedly focused the participants' attention more keenly on the Respondent's advertisements. Respondent's advertisement was the only one of the five that referenced anything regarding a client's job. The questionnaires were also worded in a way that elicited the desired response from participants."; ultimately holding that the bar had failed to establish by "clear and convincing evidence" that the advertisement violated the ethics rules).

Not surprisingly, the increasing use of electronic communications in the practice of law can affect a bar's analysis of statements' falsity.

- See, e.g., Pennsylvania LEO 2010-200 (2010) (analyzing the marketing implications of a lawyer practicing out a "virtual law office"); "[T]his Committee believes that an attorney is not required to disclose the specific location of his or her office, but must disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law."; "The Committee notes that, consistent with Rule 7.1, the address provided by an attorney may not be misleading. Thus, letterhead or other documents that list a private mailbox or similar service as a physical address, but which is merely a mail drop, may be misleading and violate the Rules."; "[A] solo practitioner with a VLO, principally practicing law in Philadelphia, decides to expand the practice by hiring two additional attorneys, one of whom principally practices in Pittsburgh and one of whom principally practices in Harrisburg. The solo practitioner and his associates each work from home and share client files and communicate electronically. If the attorney in Philadelphia is sending the electronic files of his local clients to the two attorneys in Pittsburgh and Harrisburg, then the two attorneys in Pittsburgh and Harrisburg are principally practicing law in Philadelphia, even if they never set foot within that city. Such a situation is analogous to outsourcing, and will not require the firm to list additional addresses in Pittsburgh and Harrisburg.";)

(b) An early 2009 Daily Business Review article discussed this issue.
The article started with a reference to Holland & Knight's use of models in their website.

The images of several well-groomed, professional-looking people permeate the pages on the Web site of the Holland & Knight law firm. But would-be clients should not seek to speak with any of those people about their legal needs when contemplating whether to hire the Tampa, Fla.-based firm.

All of those good-looking folks shown on virtually all of the Web site's main pages -- blacks and whites, males and females, younger people and gray-haired ones -- are paid models. Not one is a lawyer with the firm.

Bud Newman, Do Model Web Faces Misrepresent Law Firms? Daily Business Review, Jan. 5, 2009. The article quoted a Florida Bar regulator as indicating that the bar has never received a complaint about Holland & Knight's use of models, and that the bar has never dealt with it. The article also quoted a Holland & Knight spokesman.

Holland & Knight chief marketing officer Bruce Alltop also was unavailable for an interview on why the firm uses so many paid models on its Web site. However, in response to a question from the Daily Business Review, he issued a statement saying the practice is about to end.

"Holland & Knight is in the process of redesigning the firm's marketing materials," Alltop said in the statement. "The look and feel of our Web site will be compatible with the new marketing materials, which will not incorporate the use of models as a design element. When our existing Web site was redesigned in 2007, firm management decided to use models rather than our own lawyers so as not to divert our lawyers' time from serving our clients."

Holland & Knight spokeswoman Susan Bass added that the firm's new Web site -- sans models -- is expected to debut in the first quarter of this year.

Id.

At least one state's rules seem to prohibit such advertisements.
Pennsylvania Rule 7.2(f) ("A non-lawyer shall not portray a lawyer or imply that he or she is a lawyer in any advertisement or public communication; nor shall an advertisement or public communication portray a fictitious entity as a law firm, use a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated together in a law firm if that is not the case.").

However, if the hyperactive Florida Bar discipline authorities have not moved against Holland & Knight for using phony lawyers in their ads, no state bar is likely to do so.

**Best Answer**

The best answer to (a) is **YES**; the answer to (b) is **PROBABLY NO**.
Self-Laudatory and Unverifiable Claims

Hypothetical 6

Your firm’s executive committee members have become increasingly frustrated by what they perceive to be your law firm’s main competitors’ aggressive marketing techniques. The committee asked you to assess the ethical propriety of some statements in your competitors’ print advertisements.

Do generally applicable ethics standards allow your competitors to include the following statements (or images) in their print advertisements:

(a) The firm’s real estate department is "one of the best" in the area?

   \textbf{NO}

(b) The firm has an anti-trust department that is "second to none" in providing anti-trust advice?

   \textbf{NO}

(c) The law firm is "a premier personal injury law firm" in its city?

   \textbf{MAYBE}

(d) The law firm is a "full service firm"?

   \textbf{MAYBE}

(e) The law firm’s lawyers are "committed" to obtain a successful result for their clients?

   \textbf{NO (PROBABLY)}

(f) The law firm provides "quality legal services"?

   \textbf{NO (PROBABLY)}
(g) The law firm has "30 years of experience" (which represents the combined legal experience of the firm's lawyers)?

NO

(h) The law firm will be a "passionate and aggressive advocate"?

NO

(i) The motto: "Don't settle for less than you deserve"?

MAYBE

(j) The phrase: "Let us take care of you"?

MAYBE

(k) The slogan: "People make mistakes. I help fix them"?

MAYBE

(l) A close-up image of a tiger's eyes?

MAYBE

(m) A photograph of a man looking out a window, representing victims of drunken driving collisions?

MAYBE

(n) An image of a wizard?

MAYBE

(o) The lawyer's membership in the Florida Bar (if the lawyer is a member of the Florida Bar)?

MAYBE
Analysis

(a)-(o) As state bars have struggled with applying constitutional standards to lawyer marketing, courts have tended to take one of two general directions. Some states have followed the ABA Model Rules in moving away from micromanagement of lawyer marketing’s substance, and evolved toward a much more general prohibition on false and misleading statements. Other states have taken exactly the opposite approach -- adopting detailed and often ludicrous restrictions.

ABA Model Rules

The ABA Model Rules now take a fairly simple and generic approach to lawyer marketing.

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

ABA Model Rule. 7.1. A comment acknowledges that a lawyer's truthful marketing statement might nevertheless be misleading.

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

ABA Model Rule 7.1 cmt. [2].

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

ABA Model Rule 7.1 cmt. [3].

This approach recognizes that consumers of legal services are not stupid. One well-known and insightful commentator articulated this concept.

Historically, through a slew of ethics opinions and court challenges, nobody has ever been able to show any data that suggest people have been harmed by lawyer advertising -- accurate, misleading or otherwise. The concept that a loud and splashy TV ad for a personal injury firm, a law firm-sponsored "divorce seminar" at the Holiday Inn, or simply a brand-identity print ad in an industry publication involves varying degrees of trickery is simply unsubstantiated. And the underlying anti-advertising critics at many state levels are simply attorneys who just do not like it -- and get on a small committee that can do something about it. Such is the way that law firms and the bars that regulate them operate.

Listen -- (some) lawyers are smart people. We specialize (a word you better not use in your lawyer advertising . . . lots of words are violations) in the art of finding loopholes in laws, statutes and cases. The result is that the controls do not work anyway. Those harmed are often the average Joe or Joan Attorney just trying to promote his or her practice. A review of rules and opinions shows that those on the regulating committees are often out of touch and far removed from the realities of business development. Even in traditional advertising circles, trying to make sense of
Facebook, Twitter, blogs and search engines can be a challenge. For old-tyme practitioners, it is just ridiculous. The opinions often show a lack of understanding. They are still stuck on Yellow Pages advertising (now that is archaic). The results are often laughable. Marketing methods continue to evolve -- these folks are way behind the curve.

What exactly am I advocating here? Let ambulance-chasing lawyers run amok? Isn't that the real image and concern behind these arcane rules? Open the floodgates with distasteful and unprofessional billboards, Web sites and commercials? No — just let law firms market the way nearly every other business does. There are state and federal regulations that address consumer fraud and misleading claims. Let them deal with it. Many lawyers and law firms are trying to survive and prosper. The very people who should be helping them should start thinking about not being obstacles to their ability to earn a living. (Some) people are smart. They know the difference between a commercial and the news. I think they can figure it out.


Some states are moving in this direction. For instance, on January 1, 2010, Illinois adopted new ethics rules that take this bottom-line approach. See, e.g., Illinois Rule 7.1.

**States’ Micromanagement Approach**

In stark contrast to the ABA Model Rules approach (which some states have followed), other states continue to engage in a remarkable campaign of micromanaging lawyer marketing.

Some of the state restrictions specifically prohibit particular phrases that the bars claim cannot be objectively verified, or which seem excessively self-laudatory.
• South Carolina Rule 7.1 cmt. [4] ("Paragraph (e) precludes the use of nicknames, such as the 'Heavy Hitter' or 'The Strong Arm,' that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers. See also Rule 8.4(f) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.").

• Tennessee LEO 2004-F-149 (9/17/04) (providing general guidance about what type of claims in lawyer advertising would violate the Tennessee ethics rules; "[L]awyers’ advertisements shall not contain subjective, particularly self-imposed, characterizations or descriptions of the lawyer, the quality of legal services offered by the lawyer, the level of fees charged, or any comparison of one lawyer's or law firm's quality with the quality of other lawyers' services which cannot be factually substantiated. Thus, in the absence of factual substantiation, a lawyer shall not advertise that he or she (or his or her law fir) is 'No. 1', 'the best', 'one of the best', 'better', 'top', 'excellent', 'qualified', 'highly qualified', 'experienced', 'most experienced', 'reputable', 'efficient', 'preferred', or that the lawyer's or law firm's fees are the lowest. Such terms may be likely to create unjustified expectations about results to be obtained by the lawyer. These characterizations (and many others too numerous to list) are necessarily relative and ambiguous terms comparing lawyer services and inherently misleading in the absence of factual substantiation."); pointing to a Pennsylvania federal district court case forbidding use of terms "such as 'experienced', 'expert', 'highly qualified', or 'competent'") (emphases added)).

• In re Wamsley, 725 N.E.2d 75, 76, 77 (Ind. 2000) ("Respondent Vaughn A. Wamsley's advertisement for his legal practice, prominent on the back cover of the 1997 Indianapolis telephone directory, proclaimed, 'Best Possible Settlement . . . Least Amount of Time.' That statement and others included in the advertisement represented misleading, deceptive, self-laudatory, and unfair claims and thus violated the Rules of Professional Conduct for Attorneys at Law. For that, we find today that the respondent should be publicly admonished."); noting the following advertisement statements: "'Best Possible Settlement . . . Least Amount of Time.'" "'My reputation, experience, and integrity result in most of our cases being settled without filing a complaint or lengthy trial.'" and "'I have helped thousands who have been seriously hurt or lost a loved one.'"; "By claiming that he could obtain the best possible settlement in the least amount of time, the respondent likely created an unjustified expectation of such a result in any case the respondent agreed to handle. See Prof.Cond.R. 7.1(c)(3). As such, the statement is misleading, deceptive, self-laudatory, and unfair and thus violated Prof.Cond.R. 7.1(b). That statement, along with the respondent's assertion that his reputation, experience, and integrity result in most cases
being settled without the filing of a complaint or a lengthy trial, also constitutes an opinion of and contains implications as to the quality of the respondent's legal services and is thus prohibited by Prof.Cond.R. 7.1(d)(4). Finally, by stating that he has helped thousands who have been seriously hurt or who have lost a loved one, the respondent offered statistical data or other information based on past performance and an implicit prediction of future success, statements that when appearing in lawyer advertising are prohibited by Prof.Cond.R. 7.1(d)(2)."

Various states taking this approach have at one time or another condemned the following phrases:

- "[Q]uality legal services."\(^1\)
- "[O]ne of the best."\(^2\)
- "[O]ne of the most experienced."\(^3\)
- "[C]ompetent" and "intelligent."\(^4\)
- "[P]roven and highly successful record."\(^5\)
- "[P]remier" firm in a city.\(^6\)

\(^1\) District of Columbia LEO 117 (12/14/82).
\(^2\) Florida Rule 4-7.2 cmt.; Virginia Adver. Op. A-0113 (2/29/00) (prohibiting use of the following phrases in an advertisement, even if made as part of a client testimonial: the lawyer is "the best"; the lawyer will obtain "quick results").
\(^3\) Florida Rule 4-7.2 cmt.
\(^4\) Pennsylvania LEO 93-183B (11/30/93) (prohibiting use of the terms: "intelligent"; "aggressive"; "competent"; "committed"; "skilled"; "sympathetic"; "caring").
\(^5\) Nassau County LEO 86-39 (9/11/86) (prohibiting use in advertisements of the following phrases because they are incapable of objective verification: "often result in quick, practical and favorable resolutions"; "proven and highly successful record").
\(^6\) In re Anonymous, 689 N.E.2d 442, 443, 444 (Ind. 1997) (issuing a private reprimand for a yellow page advertisement; "We now find that the respondents placed the following advertisement in the Yellow Pages of 26 regional telephone directories for 1993-94: 'The respondents' firm] has quickly become recognized as [a] premier personal injury law firm. With 30 years trial experience and a support network to rival that of a larger city firm, [the firm] offers the track record and resources you need to win a settlement. Don't take chances with your case, put the team of [the firm] to work for you.'; 'The advertisements were clearly self laudatory. Furthermore, by stating in their advertisement that the respondents 'offer[ed] the track record and resources you need to win a settlement,' the respondents' message was likely to create the unjustified expectation that similar results could be obtained in every claim or case they were hired to handle, without reference to the specific factual and legal circumstances of the particular claims or cases. A person unfamiliar with personal injury litigation might understand the advertisement to promise that any claim or case handled by the respondents would result in a favorable
• Lawyers can help "when others cannot."  
• "[P]ut our 30 years of experience to work with you" (which represents the combined experience of the law firm's lawyers).  
• "[P]assionate and aggressive advocate."  

A number of law firms use the phrase "full service law firm." Some bars prohibit use of this term, while one state court decision allowed the term's use.

States taking this approach frequently include restrictions on the format or even the sound effects that lawyers may use -- apparently believing that they have some substantive effect.

settlement. We conclude that the advertisement was misleading, deceptive, and self laudatory and thus violative of Prof. Cond. R. 7.1(b); "By describing themselves the 'premier' personal injury law firm in their area, the respondents offered an opinion as to the quality of the services they render, implying that their legal services are better that [sic] those provided by other area practitioners.

7 District of Columbia LEO 249 (7/19/94) (holding that an advertisement claiming that a lawyer can help a client "when others cannot" violates the ethics rules because it is incapable of substantiation).

8 North Carolina LEO 2004-7 (7/16/04) (addressing the following question: "An advertisement for Jones, Smith & Johnson, PA, contains the statement, 'Put our 30 years of experience to work for you.' The law firm employs a number of lawyers."; "Although the combined legal experience of these lawyers is 30 years, no single lawyer with the firm has practiced law for more than ten years. Is this statement in an advertisement allowed under the Rules of Professional conduct?"; answering as follows: "No. Rule 7.1 prohibits false and misleading communications about a lawyer or a lawyer's services. A communication is false or misleading if omits [sic] a fact necessary to make the statement considered as a whole not materially misleading. Rule 7.1(a). To comply with the rule, the Jones, Smith & Johnson advertisement must state the 'combined legal experience' of the lawyers with the firm is 30 years.").

9 In re PRB Docket No. 2002 093, 868 A.2d 709-10, 710, 712 (Vt. 2005) (privately admonishing a lawyer who used the term "INJURY EXPERTS" and "WE ARE THE EXPERTS IN [certain areas of law]" in yellow page advertisements; finding that use of the term "experts" violated the Vermont ethics rules "by placing an advertisement that implicitly compared his firm's services with those provided by other lawyers in a way that can not be 'factually substantiated.' The panel noted that the phrase 'the experts' was 'an implicit statement of superiority' as compared with other firms, and had a 'serious potential to mislead the consumer, since there is no objective way to verify the claim.'"; pointing to an Ohio case prohibiting lawyers from using the phrase "passionate and aggressive advocate").

10 Nassau County LEO 93-10 (3/31/93) (prohibiting use of the term "full service law firm" because the term is too ambiguous to refer to a fact or facts that can be measured and verified); Accord Philadelphia LEO 98-11 (6/98) (prohibiting use of the term "The Everything Lawyers"); Alabama LEO 88-56 (9/11/88) (prohibiting use of the term "complete legal services" because the term might mislead or create unjustified expectations).

11 In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 545 (Ky. 2001) (allowing a law firm to use the phrase "a full service business law firm").
• See, e.g., Iowa requires that any television or radio advertisement articulate information "only by a single nondramatic voice, not that of the lawyer, and with no other background sound." 12

States taking this approach thus try to manage everything from substance to sound effects.

Although perhaps it is not a trend, three circuits have overturned (or allowed challenges to) several states' micromanagement approach.

• Public Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *18, *25 (5th Cir. Jan. 31, 2011) (finding that some of Louisiana's ethics rules pass constitutional muster, while some do not; ultimately finding unconstitutional Louisiana's total rules (1) completely banning marketing "containing a reference or testimonial to past successes or results obtained" and (2) banning marketing that includes "the portrayal of a judge or a jury"); also finding unconstitutional (3) Louisiana's requirement that any disclaimer use the same font size as the largest print size used in a written advertisement, and include in both written and oral form in any television advertisement, and be spoken at the same speed as the rest of the advertisement).

• Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, finding unconstitutional certain provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names.).

The Eleventh Circuit has also allowed challenges to Florida's incredibly detailed marketing rules -- discussed immediately below.

**Florida**

Florida stands alone in the breadth and depth of its micromanagement approach.

Florida rules (vigorously interpreted and policed by the Florida Bar) include numerous limits on the substance of a lawyer's marketing statements.

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12 Iowa Rule 32:7.2(e).
- Florida Rule 4-7.2(c)(1)(I) ("A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it . . . compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.").

- Florida Rule 4-7.2(c)(2) ("A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and unsolicited written communications.").

- Florida Rule 4-7.2 cmt. ("The prohibition in subdivision (c)(1)(I) of comparisons that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is 'the best,' 'one of the best,' or 'one of the most experienced' in a field of law.").

One Florida rule seems ridiculously overbroad.

- Florida Rule 4-7.2 cmt. ("Although this rule permits lawyers to list the jurisdictions and court to which they are admitted, it also would be misleading for a lawyer who does not list other jurisdictions or courts to state that the lawyer is a member of The Florida Bar. Standing by itself, that otherwise truthful statement implies falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida." (emphasis added)).

Other Florida rules try to micromanage such peripheral issues as sound effects.

- See, e.g., Florida Rule 4-7.5(b)(1)(C) (prohibiting "[A]ny background sound other than instrumental music.").

Not surprisingly, Florida's intrusive approach to lawyer marketing has resulted in numerous (and unintentionally humorous) analyses of various lawyer marketing.

For instance, a Florida court issued a public reprimand of two Florida lawyers who used the image of a pit bull in their advertisement -- citing various studies about the violent nature of pit bulls, and predicting that allowing Florida lawyers to use a pit bull image would result in other lawyers using "images of sharks, wolves, crocodiles and piranhas."¹³

¹³ Florida Bar v. Pape, 918 So. 2d 240, 243, 244, 245, 247 (Fla. 2005) (issuing a public reprimand against two Florida lawyers who used a television commercial with an image of a pit bull, and using the term "pit bull" as part of their firm's phone number: 1-800-PIT-BULL; acknowledging that a bar referee
In 2010, the Eleventh Circuit allowed challenges to many of Florida's detailed rules -- in an opinion that highlighted both the inconsistency and the arguable foolishness of the Florida Bar's approach to lawyer marketing. Harrell v. Fla. Bar, 608 F.3d 1241 (11th Cir. 2010).
Whatever group wishing to challenge the constitutionality of Florida's rule certainly picked the right plaintiff. When plaintiff Harrell approached the Florida Bar in 2002, the Bar indicated that he could not use his proposed advertising slogan: “Don’t settle for anything less.” The Bar itself suggested that he use the following slogan:

"Don't settle for less than you deserve." However,
five years after it had authorized the slogan . . . , the Bar informed Harrell that "Don't settle for less than you deserve" and improperly characterized the quality of his firm's services and therefore is prohibited under Rule 4-7.2(c)(2) . . . Harrell appealed to the Standing Committee, reminding it that the Bar had itself suggested the slogan seven years earlier, but, by letter dated November 28, 2007, the Standing Committee affirmed the decision of the Ethics and Advertising Department, noting that the Committee had previously rejected "Do not settle for anything less" and similar slogans.

Id. at 1249 (emphasis added). Thus, poor Harrell had undoubtedly invested considerable sums in marketing a slogan that the Florida Bar itself had suggested, but which five years later it found to be unethical.

The Eleventh Circuit ultimately found that Harrell could challenge a number of the specific Florida rules. In its detailed analysis, the Eleventh Circuit noted the Florida Bar's often-inexplicable interpretation and enforcement of the rules.

For instance, the Eleventh Circuit noted that the Florida Bar took the following positions when enforcing the rule prohibiting "characterizing the quality of the lawyer's services":

- "[T]he Standing Committee held that the phrases 'When who you choose matters most' and 'MAKE THE RIGHT CHOICE!' violated the rule . . . but that the phrase 'Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely' did not."

Id. at 1256.

The Eleventh Circuit also noted the Florida Bar's various positions when enforcing the rule prohibiting "promis[ing] results."

- "[I]n applying the rule against statements that 'promise[] results,' Rule 4-7.2(c)(1)(G), the Standing Committee held that a claim to 'fight . . . insurance companies' impermissibly offered such a promise, . . . but the Board of Governors decided that a claim to 'stand up' to insurance companies did not . . . ."
"The Standing Committee also found that the phrase 'let us take care of you' impermissibly promised results . . . but wrote in its advertising handbook that the phrase 'An Attorney Who Cares For Your Rights!' did not . . . ."

"The Committee held that the slogan 'People make mistakes. I help fix them' promised results, but that 'People make mistakes. I help them,' did not."

"The Standing Committee further found that the phrase 'We'll help you get a positive perspective on your case and get your defense off on the right foot quickly' promised results, . . . whereas the Board independently determined that there was no such promise in the phrase 'If an accident has put your dreams on hold we are here to help you get back on track,' . . . ."

[T]he Standing Committee ruled that the phrase 'your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom' violated the rule, . . . but the Board found that the phrase 'the lawyer you choose can help make the difference between a substantial award and a meager settlement' did not. (internal citation omitted).

Id. at 1256.

The Eleventh Circuit noted the same sort of inconsistency in the Florida Bar's enforcement of the ban on pictures that were allegedly manipulative:

"[T]he Standing Committee held that a close-up image of a tiger's eyes . . . and a claim to have the "strength of a lion in court," . . . were manipulative, whereas the Board held that an image of two panthers was not manipulative."

"[T]he Standing Committee noted that a photograph of a man looking out of a window, representing victims of drunken driving collisions, was not manipulative, . . . while the Board held that an image of an elderly person looking out of a nursing home window, suggesting nursing home neglect, was manipulative . . . ."

"The Ethics and Advertising Department, for its part, said that an image of a fortune teller was 'deceptive, misleading, or manipulative,' . . . and the Standing Committee similarly held that an image of a wizard violated the applicable rule, . . . but the Board ultimately concluded that the image of the wizard was not 'deceptive, misleading, or manipulative . . . ."
The Eleventh Circuit also made the Florida Bar look silly when describing its enforcement of the ban on any background noise other than instrumental music in television advertisements.

- "[W]hile the Bar has predictably invoked this rule to prohibit the sound of honking horns, traffic, the sound of squealing breaks, and other potentially inflammatory auditory references to accident scenes, it has also applied the rule to seemingly innocuous sounds such as the 'sounds of kids playing with [a] bouncing ball; [the] sound of a computer turning off; [the] sound of a light switch turning off; . . . . [the] [s]ound of a seagull in the background; . . . [and] [the] [s]ound of a telephone ringing that interrupts an attorney speaking in a television advertisement." (internal citation omitted).\(^{15}\)

Id. at 1251.

It will be interesting to see how the Florida Bar reacts to the undoubtedly embarrassing analysis of its approach to lawyer marketing.

**Best Answer**

The best answer to (a) is NO; the best answer to (b) is NO; the best answer to (c) is MAYBE; the best answer to (d) is MAYBE; the best answer to (e) is PROBABLY NO; the best answer to (f) is PROBABLY NO; the best answer to (g) is NO; the best answer to (h) is NO; the best answer to (i) is MAYBE; the best answer to (j) is MAYBE; the best answer to (k) is MAYBE; the best answer to (l) is MAYBE; the best answer to (m) is MAYBE; the best answer to (n) is MAYBE; the best answer to (o) is MAYBE.

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\(^{15}\) Harrell v. Fla. Bar, 608 F.3d 1241, 1251 (11th Cir. 2010).
Depictions, Testimonials, and Endorsements

Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

(a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

MAYBE

(b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

MAYBE

(c) A client testimonial (from a real client) saying that your law firm is "one of the best" that your client ever employed?

NO

(d) A client testimonial (from a real client) saying that your firm's lawyers always returned the client's phone call quickly?

MAYBE

(e) A reference to your being a client's "preferred" law firm?

MAYBE

(f) An endorsement by a well-known local sports figure?

MAYBE
(g) Quotations from a newspaper article praising your law firm?

**MAYBE**

**Analysis**

This hypothetical deals with the substance of lawyer advertising -- the rules governing fictional depictions and client testimonials.

(a)-(b) Not surprisingly, states' approach to this type of marketing mirror their general approach to marketing. Some states (such as Illinois) follow the generic ABA Model Rules approach, which simply prohibits false and misleading statements. Other states explicitly permit certain specified depictions -- some with almost humorous detail.

- Florida Rule 4-7.2(b)(1)(J)-(L) (permitting "(J) common salutary language such as 'best wishes,' 'good luck,' 'happy holidays,' or 'pleased to announce'; (K) punctuation marks and common typographical marks; [and] (L) an illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, columns(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.").

- Florida Rule 4-7.2 cmt. ("Subdivision (c)(3) prohibits visual or verbal descriptions, depictions, portrayals, or illustrations in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. Illustrations permitted under Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), are informational and not misleading, and are therefore permissible. As an example, a drawing of a fist, to suggest the lawyer's ability to achieve results, would be barred. Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.").
Other state ethics rules permit depictions as long as they are accompanied by an appropriate disclaimer.

- New York Rule 7.1(c)(2) ("An advertisement shall not . . . include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case"); New York Rule 7.1(c)(3) ("An advertisement shall not . . . use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes without disclosure of same").

- North Carolina Rule 7.1(b) ("A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.").

- Pennsylvania Rule 7.2(g) ("An advertisement or public communication shall not contain a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.").

- Virginia Rule 7.2(a)(2) (prohibiting any advertisement that "contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization").

- Accord Virginia Adver. Op. A-0101 (4/28/93) (allowing the use of actors in television advertisements, but requiring disclosure that the actor is not a law firm member or employee).

In January 2011, the Fifth Circuit upheld Louisiana's rule prohibiting marketing communications that "include[] a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer." Public Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *37 (5th Cir. Jan. 31, 2011).

The Utah Bar generally approved what sounds like an interesting advertisement.

An acceptable fictional vignette should be labeled as "fictional" or should be clearly identifiable as fictional, as with...
lawyers portrayed as giants towering over the town, counseling a space alien about an insurance matter, and "running as fast as blurs to reach a client in distress." . . . A fictional vignette can convey such a message about a lawyer or law firm so long as the message itself is not misleading or likely to create unjustified expectations. A clearly identified fictional sketch in which a fictional party or opposing counsel shows frustration to learn that the opposing party has retained Firm X would be acceptable. The only limits are that these vignettes should be identified as fictional and ultimately must not lead a reasonable person to form an unjustified expectation. Obviously which fictional portrayals will be appropriate and which deemed misleading may depend, to some extent, on the facts about the lawyer and the contents of the vignette."; "Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation regarding the lawyer or the services to be rendered. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

Utah LEO 08-03 (2/23/09) (emphasis added).

The Utah lawyer might have been using some generic nationally-circulated advertisements, because in March 2010, the Second Circuit overturned New York's efforts to stop an ad that seems strikingly similar.

- **Alexander v. Cahill**, 598 F.3d 79, 93, 94 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judge, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; among other things, finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano’s wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs;
and they do not actually provide legal assistance to space aliens. But given
the prevalence of these and other kinds of special effects in advertising and
entertainment, we cannot seriously believe -- purely as a matter of 'common
sense' -- that ordinary individuals are likely to be misled into thinking that
these advertisements depict true characteristics." (emphasis added)).

(c)-(d) Most bars permit lawyers to mention the names of their clients in
advertisements, as long as the clients consent.

- Ohio LEO 2000-6 (12/1/00) ("It is proper for a law firm to list a client's name
  with a client's consent in public communication, such as a law firm Web
  Site. . . . As a matter of courtesy and confidentiality, a lawyer should not
  publicly list a client's name without client consent.").

New York requires that lawyers obtain their clients' written consent to use of the
clients' name.¹

State ethics rules governing client testimonials tend to take one of four positions.²

First, some states permit truthful testimonials.³ Of course, even states permitting
client testimonials would prohibit testimonials from clients that include statements
prohibited if made by the lawyers or the law firm. For example, because an
advertisement's use of the word "best" might amount to a prohibited unverifiable and
misleading comparison of the lawyer's services with other lawyers' services (ABA Model
Rule 7.1 Comment [3]), an advertisement probably cannot put those words in a client's
testimonial.

¹ New York Rule 7.1(b)(2) ("[A]n advertisement may include information as to . . . names of clients
regularly represented, provided that the client has given prior written consent.").

² Joan C. Rogers, Some Jurisdictions' Professional Conduct Rules for Lawyers Forbid or Limit Use
(noting that Arkansas, Florida, Indiana, Nevada, New Mexico, South Carolina and Wyoming totally forbid
testimonials; California, Missouri, Oregon, Pennsylvania, South Dakota and Wisconsin permit testimonials
as long as they also contain disclaimers).

suspending enforcement of an Ohio rule that banned client testimonials; see Joan C. Rogers, Facing
Federal Suit, Ohio Supreme Court Freezes Rule Against Client Testimonials, 21 ABA/BNA Law. Manual
on Prof. Conduct [Current Reports] 64 (Feb. 9, 2005)).
New York formerly allowed testimonials from former clients.

- New York Rule 7.1(c)(1) ("An advertisement shall not: (1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending.").

The Second Circuit recently overturned this restriction.

- **Alexander**, 598 F.3d at 92 (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; finding unconstitutional New York State's ban on testimonials; "Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials may, for example, mislead if they suggest that past results indicate future performance -- but not all testimonials will do so, especially if they include a disclaimer. The District Court properly concluded that Defendants failed to satisfy this prong of Central Hudson with respect to client testimonials.").

Second, some states permit testimonials, but require accompanying disclaimers.

For instance, the Utah rules generally permit testimonials, as long as they are accompanied by qualifying language.

Utah LEO 09-01 (2/23/09) ("It is legitimate to require such additional language when it is necessary to prevent the advertisement as a whole from being materially misleading or likely to create unjustified expectations. In our view when using testimonials to advertise prior accomplishments it is wise (and may be necessary depending upon the context) to include such qualifying language. Similarly, a 'testimonial' should be given by the real person involved (e.g. a former client), unless the portrayal expressly states otherwise (e.g. an actor dramatizing a former client’s letter of thanks) in order to avoid its being misleading.").

Third, some state bars take an odd middle position -- prohibiting client testimonials about specific successes or the quality of the lawyer's work, but **allowing**
what are called "soft endorsements" about the lawyer's general attitude, prompt return of telephone calls, etc.

- Connecticut LEO 01-07 (5/21/01) (prohibiting an advertisement that contains a quotation from a client that the lawyer "seemed more knowledgeable about our matters" because it had applied a comparison with other lawyers; but allowing the following client quotations in advertisements: "Appointment was helpfully scheduled at my home, since I have difficulty accessing your facility (wheelchair)."; "Very knowledgeable, informative as well."; "Service was excellent."; "I did not feel rushed. Mr. ______ was very patient."; "We were very impressed and pleased with the commitment to service."; "Very thoughtful. Always accommodating."; "My experience was one of courtesy and most importantly no rushing of explanations or directions, and I found myself at ease at all times."; "__________ made me feel comfortable and like we knew one another for years.").

- Philadelphia LEO 91-17 (3/1992) (prohibiting television or radio advertisements from including a client testimonial that the lawyer reached a "good" result, but allowing such "soft endorsements" as testimonials that the lawyer: "returned my telephone calls"; "appeared concerned"; "given me a sympathetic ear"; "proceeded on a prompt basis").

Fourth, some states prohibit testimonials.

- Florida Rule 4-7.2(c)(1)(J) ("A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it: . . . (J) contains a testimonial.").

- Florida Rule 4-7.2 cmt. ("The prohibition in subdivision (c)(1)(J) precludes endorsements or testimonials, whether from clients or anyone else, because they are inherently misleading to a person untrained in the law. Potential clients are likely to infer from the testimonial that the lawyer will reach similar results in future cases. Because the lawyer cannot directly make this assertion, the lawyer is not permitted to indirectly make that assertion through the use of testimonials.").

(e) States disagree about whether law firms can boast that they are client's "preferred" firm. The Ohio Bar has prohibited such a reference on a client website.

- Ohio LEO 2004-7 (8/6/04) ("A law firm may be identified on a business client's Web site, but may not be referred to as the company's preferred attorneys. Communication to the public of a law firm's name and logo on a business client's Web site is acceptable because it is not a false, fraudulent,
misleading, deceptive, self-laudatory, or unfair statement. Communication to the public through the company Web site that a law firm is the company’s "preferred attorneys" is misleading. Whether it is proper for a business client to list a law firm in the company’s brochure and in press releases will depend upon the context and the content. A lawyer must be vigilant that any such communication does not imply that the company and law firm are in business together. A lawyer or law firm may not request a client to promote the law firm on its Web site and may not compensate the client for the publicity. If a lawyer is aware that a law firm client Web site is using the law firm name or its lawyers' names inappropriately or making improper statements or references to the lawyers or law firm, the lawyers should counsel the client and withdraw [from representation] if the Web site remains objectionable.

The Philadelphia Bar has permitted such a designation.

- Philadelphia LEO 2007-13 (12/2007) (generally permitting lawyers to be included on a "preferred" lawyer list prepared by a non-profit educational institution; also generally permitting the lawyer to purchase "booth space" at "housing fairs" sponsored by the institution).

(f) States also disagree about the ethics propriety of celebrity endorsement.

First, some states flatly prohibit such endorsements.

- Pennsylvania Rule 7.2(d) ("No advertisement or public communication shall contain an endorsement by a celebrity or public figure.").

- Philadelphia LEO 2008-1 (2/2008) (holding that a lawyer may not include pictures on his website of himself "and celebrity friends from the sports, entertainment and political fields"; explaining that such pictures would violate the prohibition on endorsements by a celebrity or public figure, although there is no caption under the pictures; "The usage of the photographs in the manner described would violate this provision in that the clear intent of their use is to imply either that the prominent persons depicted have endorsed the usage of the lawyers’ services, and/or that the inquirer’s association with prominent figures enables him to achieve better results than lawyers not associated with such persons."); also noting that the use of such pictures might violate Rule 1.6 if the person had not consented to their use).

Second, some states allow such endorsements -- if they include a disclaimer.

- Virginia Rule 7.2(a)(1) ("[A]n advertisement violates this Rule if it . . . contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement").
As a result of the Second Circuit opinion in Alexander v. Cahill, 598 F.3d 79, 93, 94 (2d Cir. 2010), New York changed its ethics rules so that they now allow "a testimonial or endorsement from a client with respect to a matter still pending" as long as "the client gives informed consent confirmed in writing." New York Rule 7.1(e)(4).

For matters that are not "still pending," presumably client testimonials or endorsements must meet the general standards of all content-based rules but no longer need the client's written consent.

Interestingly, New York formerly took an interesting position -- allowing celebrity endorsements as long as they are not paid.

- New York LEO 792 (2/14/06) (A "[l]awyer may advertise on TV or radio using a testimonial by a celebrity client so long as the testimonial is not false, deceptive or misleading and otherwise satisfies the record-keeping requirements for any radio and TV advertising. However, the lawyer may not compensate or give anything of value to the celebrity client for the testimonial, including compensation for the celebrity's time and services in making it.").

(g) Surprisingly, lawyers’ reliance on complimentary newspaper articles seem not to have generated many ethics opinions.

One state held that a lawyer could not avoid the restriction on mentioning case results in advertisements by quoting a newspaper article about a case result.

Connecticut LEO 88-3 (2/25/88) (prohibiting advertisement that contains a news article about a specific jury award in a personal injury case).

The Florida Bar found that a lawyer using 17-year-old newspaper articles would have to comply with the Florida marketing rules -- because the lawyer "adopted the articles as contents and made them into advertising copy." Florida Bar v. Gold, 937 So. 2d 652, 653-54, 657 (Fla. 2006) (assessing a lawyer's brochure that "consists of a few paragraphs of introductory text and a copy of three newspaper articles discussing Gold
and his firm and his practice in defense of traffic and DUI cases. Two of the articles appear to have been published in The Miami Herald and the third appears to have been published in the Fort Lauderdale Sun-Sentinel."; noting that the newspaper articles appear to be at least 17 years old; "[W]e have never held that republication or circulation of news articles in direct mail solicitations completely insulates a lawyer from prosecution for ethical misconduct under the Bar's advertising rules. In this instance, for example, it is apparent that by taking the articles and including them in a direct mail solicitation for legal representation, Gold adopted the articles' contents and made them into advertising copy. In this way, the articles' contents became subject to the strictures of the Bar's advertising rules." (footnote omitted); overturning a finding in favor of the lawyer, and remanding).

Best Answer

The best answer to (a) is MAYBE; the best answer to (b) is MAYBE; the best answer to (c) is NO; the best answer to (d) is MAYBE; the best answer to (e) is MAYBE; the best answer to (f) is MAYBE; the best answer to (g) is MAYBE.
Law Firm Websites

Hypothetical 8

As one of your firm's newest partners, you have been pushing your firm to hire a consultant who can help with expanding your firm's website. Your firm's managing partner just put you in charge of the job, and now you have a few questions about the pertinent ethics rules.

(a) Will your law firm's website be considered an "advertisement" for ethics purposes?

YES

(b) If so, will your law firm's website have to comply with all ethics requirements governing advertisements?

MAYBE

Analysis

Not surprisingly, state bars have struggled with applying their often-specific lawyer marketing rules to law firm websites and other forms of electronic marketing (such as those using social media).

For instance, most states require that lawyers using advertisements retain copies of the advertisements for one,\(^1\) two,\(^2\) or three\(^3\) years. Some bars also require that the lawyers keep records of when and where the advertisements were used.\(^4\)

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1. New York Rule 7.1(k); Virginia Rule 7.2(b).
2. Georgia Rule 4-102.7.2(b); Pennsylvania Rule 7.2(b).
3. Florida Rule 4-7.7(d) ("[T]he lawyer shall retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical written communications are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical written communications and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the written communication was sent."); Maryland Rule 7.2(b).
4. Florida Rule 4-7.7(d); Maryland Rule 7.2(b); Pennsylvania Rule 7.2(b).
The ABA Model Rules formerly required that all advertisements be kept for two years, but this requirement was deleted several years ago. The Reporter's explanation indicates that "the requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes." Time will tell if states follow the ABA's lead.

Some bars apply a different (more lenient) standard to brief announcements that a lawyer or law firm is contributing to a specific charity, has sponsored a public service announcement, or supported a specific charitable, community or public interest program, activity or event.\(^5\)

Most state bars require that the name of a lawyer\(^6\) (or at least the law firm)\(^7\) appear on all advertisements. This allows the pertinent state bar authorities to punish someone for any unethical advertisements. Some states require inclusion of the lawyer's address.\(^8\)

Some states require certain disclaimers on all lawyer marketing, and even regulate the speed at which a marketing spokesman recites the disclaimer at the end of

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\(^5\) See, e.g., Florida Rule 4-7.8(b).

\(^6\) See, e.g., Florida Rule 4-7.2(a)(1) ("All advertisements and written communications pursuant to these rules shall include the name of at least 1 lawyer or the lawyer referral service responsible for their content."); Illinois Rule 7.2(c) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."); New York Rule 7.1(h) ("All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered."); Virginia Rule 7.2(e) (requiring a "full name and office address").

\(^7\) See, e.g., ABA Model Rule 7.2(c) (requiring the "name and office address of at least one lawyer or law firm"); North Carolina Rule 7.2(c).

\(^8\) Florida Rule 4-7.2(a)(2) ("All advertisements and written communications provided for under these rules shall disclose, by city or town, 1 or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis.").
a marketing video or audio. This type of restriction does not always survive constitutional scrutiny.

- See, e.g. Public Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *7, *41, *42 (5th Cir. Jan. 31, 2011) (finding unconstitutional, among other things, a Louisiana rule regulating the font size of written disclaimers, and requiring that any television advertisement include both a written and oral disclaimer -- 'spoken at the same or slower rate of speed as the other spoken content of the advertisement'; concluding that "[t]he record is devoid of evidence that Rule 7.2(c)(10)'s font size, speed of speech, and spoken/written provisions are 'reasonably related' to LADB's substantial interests in preventing consumer deception and preserving the ethical standards of the legal profession."; "The objected-to restrictions in Rule 7.2(c)(10) effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind. Accordingly, we hold that they are overly burdensome and violate the First Amendment.").

(a) All bars now seem to hold that websites amount to a form of advertising, and therefore must comply with at least some advertising rules. States have all tried in one way or another to apply the ethics rules to websites.

- West Virginia LEO 98-03 (10/16/98) (law firm websites must satisfy the advertising rules).

- Vermont LEO 97-05 (1997) ("As long as the Web Page is equivalent to a 'yellow page' advertisement or a magazine article, the general rules of truth in advertising and limitations on indirect solution [sic] should apply to a lawyer's use of Web Pages.").

- Missouri Bar Office of Chief Disciplinary Counsel, Informal Op. 970161 (1997) ("In the course of internet communications regarding Attorney's services, Attorney is required to comply with the Supreme Court Rule 4, including Rules 7.1 through 7.5, relating to advertising.").

- Illinois LEO 96-10 (5/16/97) ("For example, the Committee views an Internet home page as the electronic equivalent of a telephone directory 'yellow pages' entry and other material included in the web site to be the functional equivalent of the firm brochures and similar materials that lawyers commonly prepare for clients and prospective clients. An Internet user who has gained access to a lawyer's home page, like a yellow pages user, has chosen to view the lawyer's message from all the messages available in that medium. Under these circumstances, such materials are not a 'communication directed to a specific recipient' that would implicate Rule 7.3 and its provisions governing..."
direct contact with prospective clients. Thus, with respect to a web site, Rule 7.1, prohibiting false or misleading statements concerning a lawyer’s services, and Rule 7.2, regulating advertising in the public media, are sufficient to guide lawyers and to protect the public.”).

- Arizona LEO 97-04 (4/1997) (“A lawyer's web site is a 'communication' about the lawyer or the lawyer's services that is subject to the ethics rules.”).

- Maryland LEO 97-26 (7/17/97) (“The Committee's opinion is that a web page constitutes advertising under Rule 7.2(a) as it is plainly a communication 'not involving in person contact.' Therefore, the Rules allow such advertising. . . . Such advertising creates another potential problem under the Rules. Rule 5.5(a) prohibits you from practicing law in a jurisdiction where you are not licensed to practice. Rule 7.1 prohibits the making of misleading communications about one's services. Because your web page may be accessed by persons outside Maryland, you need to be very careful to make sure that your web page makes clear the states in which you are licensed to practice.”).

- North Carolina LEO RPC 241, 1996 WL 875832, at *1 (1/24/97) ("[A] lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful").

- North Carolina LEO RPC 239, 1996 WL 875828, at *1 (10/18/96) ("[A] lawyer may display truthful information about the lawyer's legal services on a World Wide Web site on the Internet").

- Iowa LEO 96-01 (8/29/96) ("The Board is of the opinion that such law firms’ (and lawyers’) home page or web sites are generally designed to promote the firm and to sell legal services of the firm and constitute advertising. Therefore it is the opinion of the Board that they must conform to the Iowa Code of Professional Responsibility for Lawyers provisions governing advertising.").

- Michigan LEO RI-276, 1996 WL 909975, at *1 (7/11/96) ("A lawyer may post information about available legal services on the Internet which may be accessed by users of the technology as long as ethics rules governing the content of the posted information are observed.").

- Pennsylvania LEO 96-17, 1996 WL 928126, at *1 (5/3/96) ("Thus, if the web site contains communications about the lawyer or the lawyer's services, it is my opinion that it is lawyer advertising subject to the Rules of Professional Conduct.").

**(b)** State bars have struggled with determining how traditional ethics requirements covering advertisements should apply to websites.
First, will state rules requiring preapproval or prefiling of advertisements apply to each new version of a law firm’s website?

Some states have applied such rules to websites.

- **Anderson v. Ky. Bar Ass’n**, 262 S.W.3d 636 (Ky. 2008) (publicly reprimanding a lawyer and conditionally suspending his license for 30 days for improperly establishing a website to recruit plaintiffs involved in an airplane crash without seeking pre-approval of the website advertisement as required by the Kentucky ethics rules; also noting that the lawyer’s paralegal had sent e-mails to a potential client without the appropriate disclaimer indicating that the e-mail was an advertisement (emphasis added)).

- **Tennessee LEO 95-A-570 (5/17/95)** (not for publication) ("The posting on the World Wide Web must comply with all ethical rules regarding publicity. For instance, if there is an area of practice listed the appropriate certification disclaimer should be utilized. DR 2-101(C). The statement: 'This Is An Advertisement' must also be utilized on the posting. DR 2-101(N). The Board must be furnished a copy of the communication three days before it is placed on the World Wide Web. DR 2-101(F). The information contained in the posting must be truthful and not a misrepresentation. DR 2-101(A)." (emphasis added)).

One state has not required such preapproval.

- **Arizona LEO 97-04 (4/1997)** ("Do lawyers need to submit a copy of their web sites to the State Bar and the Supreme Court pursuant to ER 7.3? Probably not. Web sites probably will not fall within the requirements of ER 7.3, which requires lawyers to submit a copy of all direct mail solicitation letters to the State Bar and the Supreme Court. Lawyers only need to send copies of direct mail correspondence to the Bar and the Court when the solicitation is sent to a prospective client who has a known need for legal services for a particular matter. Presumably web sites are designed to provide general information about a law firm and are not sent directly to certain prospective clients and thus do not need to follow ER 7.3." (emphasis omitted)).

Second, will state rules requiring lawyers to preserve their advertisements for a certain period of time apply to each version of its website?

Several states have applied such retention requirements to websites.

- **California LEO 2001-155 (2001)** ("Rule 1-400(F) adds the requirements that the attorney retain for two years copies or recordings of any communications by written or electronic media and that these copies or recordings be made..."
available to the State Bar if requested. These requirements apply to each page of every version and revision of the web site." (emphasis added)).

- New York City LEO 1998-2 (1998) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).

- Virginia Adver. Op. A-0110 (4/14/98) ("The Committee observes that a lawyer's communications over the Internet are 'disseminated to the public by use of electronic media' for which the lawyer has given value and therefore are subject to the requirements of DR 2-101(B) [which now appears in Rule 7.1(b)]. This means that a lawyer or law firm that advertises on the Internet must make and preserve for at least one year a hard copy of any advertisement posted on the Internet. This includes advertisements in the form of home pages, postings to bulletin boards, news groups, usenets, telnets, etc. The Committee observes that not all of the disciplinary rules which apply to lawyer advertising via other media will apply to lawyer advertising over the Internet, and therefore it may be necessary for the Committee to issue further opinions on this subject as new questions arise." (emphasis added)).

Some states require that lawyers had to retain for a certain period of time "material" changes on their website.

- Arizona LEO 97-04 (4/1997) (Do lawyers need to keep a copy of their websites and any changes that they make to their websites pursuant to ER 7.1(o)? Yes. Lawyers need to keep a copy of their websites in some retrievable format for three years after dissemination along with a record of when and where the website was used. Additionally, if there is a material substantive change to the website, the lawyer should retain a copy of all material changes as well." (emphasis omitted)). Some states seem to be softening the application of their bar rules' literal language. For instance, Florida only requires approval and retention of a home page rather than an entire website.).

- New York Rule 7.1(k) ("Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently that once every 90 days.").
Third, given the inherent nature of the "worldwide web," lawyers' websites can easily be linked to other websites. This can occur because the lawyer has created the link from his or her website to another website -- or because someone else has linked to the lawyer's website (with or without the lawyer's permission).

Not surprisingly, state bars have restricted lawyers' ability to adopt some other website's statements that would violate the marketing rules had the lawyers themselves included them in marketing materials.

- See, e.g., South Carolina LEO 09-10 (2009) (holding that a lawyer directing potential clients to a website had to assure that statements on the website complied with the advertising rules; "[A] lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing."; "A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content."; "Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf."; "[A] lawyer who adopts or endorses information on any similar website becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct."; "[S]everal states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as 'the best' or statements about results obtained.").

If states begin to insist that websites comply with all of the ethics rules governing advertising, they have quite a chore ahead of them.

On February 27, 2009, the Florida Supreme Court addressed the Florida Bar's proposed ethics rules governing electronic marketing. The Florida Supreme Court described the context of its analysis.

Before submitting previous proposed amendments to the Court for consideration, see In re Amendments to the Rules Regulating the Florida Bar - Advertising, 971 So. 2d 763
(Fla. 2007), the Task Force originally concluded that websites are distinguished from general advertising because the typical viewer would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information regarding a specific legal topic. In contrast, the Board of Governors' Citizens Forum disagreed with the Task Force and concluded that attorney websites should be subject to the same general regulations as other forms of lawyer advertising. The Citizen's Forum reasoned that for website advertising, the public should be provided with the same protections (from false and misleading attorney advertising) that are required for more traditional methods of advertising. Thereafter, the Board voted to continue regulating websites pursuant to the general advertising regulations, except for a few specified exceptions.

Afterwards, through its study, the Special Committee determined that each substantive attorney advertising regulation should apply to attorney websites, and that websites should be subject to the same regulation as other forms of media, except websites should be exempt from the requirement that advertisements must be filed with the Bar for review. However, in December 2006, the Board voted against adopting the Special Committee's recommendation that all substantive lawyer advertising rules apply to lawyer websites.

In re Amendments to Rules Regulating the Fla. Bar -- Rule 4-7.6, Computer Accessed Commc'ns, No. SC08-1181, 2009 Fla. LEXIS 271, at *3 n.1 (Fla. Feb. 27, 2009). The Florida Supreme Court quoted the bar's petition as framing the basic issue.

"A website cannot be easily categorized as either information at the request of the prospective client, which is subject to no regulation under this subchapter but is subject to the general prohibition against dishonesty, or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television, radio, or print media. Although some steps must be initiated by the viewer to access a website, the viewer might not necessarily be attempting to access that law firm's website, or a law firm website at all. It is therefore inappropriate to treat a website as information upon request, because it is not the same as direct contact with a known law firm requesting information. On the other
hand, the viewer is unlikely to access a lawyer or law firm website completely by accident."

Id. at *3 (emphases added; internal citation omitted).

The Florida Bar petitioned the Florida Supreme Court to approve rules that would have required a lawyer's home page to comply "with all the substantive lawyer advertising regulations" -- but which would have declined to apply all marketing rules to a lawyer's website "after the homepage." Id. at *4.

The Florida Supreme Court rejected the Florida Bar's approach.

In contrast to the Bar's arguments, we find that the proposed amendments are not sufficient to make material behind the homepage fall under the concept of information "upon request" (which is exempted from regulation by subchapter 4-7, pursuant to rule 4-7(f)). We recognize, however, that sufficient changes could be made to the rules regulating websites to make pages behind the homepage constitute materials "upon request." For example, a website could require users to complete two steps on webpages before they could access result or testimonial information. First, a user could be required to complete a "Request" page with their name, address, and phone number (all required fields). Second a disclaimer page could appear with the bottom of the page requiring a click on a button to indicate that the user had read the disclaimer (and an option for the user to discontinue the request for information). Only after the user navigated through these two pages would the user be able to obtain the additional information. This process would make obtaining information from a website similar to obtaining information "upon request" from a lawyer, when a potential client picks up a phone and calls a lawyer to ask for information, and then is mailed a DVD or brochure by the lawyer with the requested information.

Id. at *6-7 (emphases added).
Several months after issuing this opinion, the Florida Supreme Court withdrew the opinion -- because the Florida Bar had essentially complied with the Supreme Court's implicit direction to take a different approach about such website pages.\(^9\)

In March 2010, the Florida Supreme Court postponed application of the Florida ethics rules to Florida law firms' websites. The Florida Supreme Court then extended the deadline again in July 2010.

The Florida Supreme Court's difficulty in applying marketing rules to lawyers' websites reflects the unique nature of that type of marketing. States will undoubtedly continue to debate this issue.

**Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **MAYBE**.
Law Firm Names

Hypothetical 9

As part of a total revamping of your firm's marketing focus, you have decided to choose a new name for your law firm. You are considering a number of possibilities, but you want to assure that you comply with the ethics rules.

(a) May a law firm's name include the name of a retired partner who is still alive, but in a nursing home?

YES

(b) May a law firm's name include the name of a retired partner who lives in Florida and occasionally drafts or revises wills for her friends?

NO

(c) May a law firm's name include the name of a former partner who is now a state senator?

NO

(d) May a law firm's name include the name of a former partner who was practicing at the firm when he was suspended from the practice of law?

NO (PROBABLY)

(e) May a law firm's name include the phrase "and Associates" if the lawyer practices by herself?

NO

(f) May a law firm comprised of two lawyers named Keaton start a law firm with the name "Keaton & Keaton" -- when two other lawyers with the same name have been using that name for nearly 40 years in a city 100 miles away?

YES
(g) May the two sons of the founders of the "Suisman Shapiro" law firm leave their fathers' firm and start their own firm -- using the name "Suisman Shapiro"?

**NO (PROBABLY)**

(h) May two law firms include the name of the same practicing lawyer in their names?

**MAYBE**

(i) May lawyers practice under the name of Smith, Jones & Doe, P.C. -- if Jones and Doe are not shareholders, and do not share in the firm's profits and expenses?

**MAYBE**

(j) May a law firm's name include the name of a lawyer who is only "of counsel" to the firm?

**MAYBE**

**Analysis**

Determining which lawyers' names can be included in a firm name seems easy at first blush, but there are a number of considerations.

While partnership and contractual requirements might provide some limits, the bottom-line ethics principle is to avoid giving the public a false impression when using a firm name, which would violate the prohibition on false statements.¹

(a) The ABA² and state bars³ permit the inclusion in a law firm's name of a lawyer who is retired from the practice of law. It may be necessary that the retired partner have practiced law at the law firm until retirement.

¹ ABA Model Rule 7.5(a) ("A lawyer shall not use a firm name, letterhead or other professional designation that violates [Model] Rule 7.1."). See, e.g., In re Foos, 770 N.E.2d 335 (Ind. 2002) (holding that lawyers employed full time by an insurance firm may not use the name "Conover & Foos, Litigation Section of the Warrior Insurance Group, Inc.,” because it misleadingly implies that the lawyers work for an independent law firm; explaining that even a detailed disclaimer to the contrary would not cure the violation).
Similarly, it is permissible to use a deceased partner's name in the firm name.\(^4\)

Of course, this actually makes the law firm name a trade name.

The North Carolina Bar has stated this general rule, and also indicated that the law firm must make additional disclosures if the firm includes a deceased or retired partner on its letterhead.

- North Carolina LEO 2006-20 (7/13/07) (explaining that a law firm could not continue to use the name of a member in its name if the member left the firm and practiced elsewhere; "Rule 7.5 permits a law firm to continue to use a lawyer's surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on the law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe's surname because it would be misleading pursuant to Rule 7.1. . . . Any agreement between Attorney Doe and the PC must reflect this restriction and may not violate Rule 5.6(a) of the Rules of Professional Conduct." (emphases added); also explaining that the same rule applied to the law firm's use of the former member's likeness; "The agreement may grant to the PC the right to use Attorney Doe's likeness while he practices with the PC but not if he ceases to practice with the PC. As long as Attorney Doe practices with the PC, there is probably no danger that the

\(^2\) ABA LEO 85-1511 (3/26/85) (a law firm may include the name of a retired partner in its name).

\(^3\) North Carolina Rule 7.5 cmt. [1] ("The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law."); Illinois LEO 03-02 (1/04) (finding that a law firm may continue to use the name of a retired lawyer who has stopped practicing law); Virginia LEO 1706 (11/21/97) (a law firm may continue to use a deceased or retired partner's name in its title; although declining to indicate whether a lawyer who has only been an independent contractor of a firm may continue to use the firm's name after all of the firm's partners retire (calling the question a "legal issue"), the Bar refers to a Maryland LEO indicating that such use would be improper; as long as the lawyer was a "successor in interest" to the firm, the lawyer could continue to use a deceased partner's name in the firm name).

\(^4\) Florida Rule 4-7.9 cmt. ("It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm."); Illinois Rule 7.5 cmt. [1] ("It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer."); Virginia LEO 1704 (9/12/97) (a law firm's name may include the names of deceased partners).
use of his likeness will mislead, deceive, or confuse the public. However, if Attorney Doe ceases to practice with PC (whether by retirement, departure, or death), the PC’s use of his likeness will be inherently misleading and confusing to the public, in violation of Rule 7.1, because of the specific fact that Attorney Doe, while the sole shareholder in the firm, invested substantial resources to make his likeness synonymous with the PC. Therefore, after Attorney Doe’s departure from the PC, a disclaimer on the PC’s advertisements and marketing communications would be insufficient to overcome the public perception that Attorney Doe’s services are still available through the PC. This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in marketing or advertising, as long as the likeness includes a clear statement of the attorney’s status so as not to imply ongoing involvement with the firm.” (footnotes omitted)).

(b) Bars generally hold that it would mislead the public for a law firm name to include the name of a lawyer who practicing law elsewhere or engaging in some other business.\(^5\)

\(^5\) North Carolina LEO 2006-20 (7/13/07) ("Rule 7.5 permits a law firm to continue to use a lawyer’s surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe’s surname because it would be misleading pursuant to Rule 7.1. See Rule 7.5(a), cmt. [1]. Any agreement between Attorney Doe and the PC must reflect this restriction and may not violate Rule 5.6(a) of the Rules of Professional Conduct."); "[I]f Attorney Doe ceases to practice with PC (whether by retirement, departure, or death), the PC’s use of his likeness will be inherently misleading and confusing to the public, in violation of Rule 7.1, because of the specific fact that Attorney Doe, while the sole shareholder in the firm, invested substantial resources to make his likeness synonymous with the PC. Therefore, after Attorney Doe’s departure from the PC, a disclaimer on the PC’s advertisements and marketing communications would be insufficient to overcome the public perception that Attorney Doe’s services are still available through the PC. . . . This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in marketing or advertising, as long as the likeness includes a clear statement of the attorney’s status . . . so as not to imply ongoing involvement with the firm." (footnote omitted)); Florida LEO 00-1 (4/30/00) (a law firm may continue to use the name of a retired partner who is "of counsel" to the firm; but affirming an earlier LEO that prohibited a law firm from continued use of a retired partner's name in the law firm name if the retired partner was "of counsel" to the firm but continuing to practice law in an adjacent independent office, because the retired partner was not making his services available exclusively to the law firm's clients); District of Columbia LEO 273 (9/17/97) (analyzing the ethics rules governing lawyers' withdraw from one firm and joining another firm; "Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer’s name in written materials used for external communications."); D.C. LEO 273 (9/17/97) ("Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").
ABA Model Rule 7.5(c) indicates that "the name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." State rules take the same approach.

- Florida Rule 4-7.9(e) ("The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").

- Georgia Rule 7.5(c) ("The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").

- New York Rule 7.5(b) ("A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer’s name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.").

Thus, it is impermissible for a law firm's name to include the name of a Congressman who is precluded from the practice of law, or a lawyer/legislator who is not actively practicing in the firm.

(d) Not surprisingly one state has indicated that a law firm's name cannot include the name of a suspended lawyer, because it is inherently misleading.

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6 Virginia LEO 277 (12/15/75) (a law firm may not use the name of a lawyer who has stopped practicing law and is now engaged in a business).
7 Virginia LEO 1034 (2/9/88) (it is improper to list a Congressman, who is precluded from the practice of law, as "of counsel" to a law firm).
8 Virginia LEO 206 (5/28/70) (a law firm's name may not include the name of a lawyer/legislator who is not actively practicing in the firm).
9 Rhode Island LEO 2001-07 (10/18/01).
Numerous bars have prohibited lawyers from using the phrase "and Associates" unless the lawyer in fact has other lawyers involved in her firm.

- North Carolina Rule 7.5 cmt. [1] ("It is also misleading to use a designation such as 'Smith and Associates' for a solo practice.").

- Utah LEO 09-01 (2/23/09) ("[A] Utah lawyer cannot have a firm name 'and Associates' unless there are at least two lawyer associates.").

- Disciplinary Counsel v. McCord, 2009 Ohio 1517, at ¶ 26, 30 (Ohio 2009) (indebtedly suspending a lawyer for various acts of wrongdoing, including deceptive use of various names for his law firm; "Under this count, relator claims that respondent improperly held himself out as a member of entities named 'McCord, Pryor & Associates,' 'McCord, Pryor & Associates Co., L.P.A.,' and 'McCord & Associates.' Respondent's actions related to these purported entities raise three questions: (1) Was respondent ever a law partner with David E. Pryor? (2) Did respondent act inappropriately in forming an entity named 'McCord, Pryor & Associates Co., L.P.A.?' and (3) Did respondent have any associates that would justify using the term 'and associates' in firm names?"; finding that McCord had never been a partner of Pryor, and had never employed true "associates").

- Minnesota LEO 20 (6/18/09) ("[T]he use of the word 'Associates' in a law firm name, letterhead or other professional designation -- such as 'Doe Associate' -- is false and misleading if there are not at least two licensed attorneys practicing law with the firm. Similarly, the use of the phrase '& Associates' in a firm name, letterhead or other professional designation -- such as 'Doe & Associates' -- is false and misleading if there are not at least three licensed attorneys practicing law with the firm."; "Whether or not a law firm name using the word 'Associates' or the phrase '& Associates' is false and misleading will depend on the particular facts and circumstances of each case. For example, there may be circumstances where three attorneys with a law firm name such as 'Doe & Associates' may lose one of the firm's attorneys. In that event, if another attorney joins the firm within a reasonable period of time thereafter, or if the firm reasonably and objectively anticipates another attorney joining the firm within a reasonable period of time, it is not false or misleading for the firm to continue using '& Associates' in its name during the interim period. If neither circumstance exists, the continued use of '& Associates' would be considered false and misleading. In addition, there may be circumstances where one or more of the attorneys practicing with a firm may be working part-time. As long as the requisite minimum number of attorneys, part-time or otherwise, regularly and actively practice with the firm, the use of 'Associates' or '& Associates' would not be considered false or misleading.").
Ohio LEO 2006-2 (2/10/06) ("It is proper for a solo practitioner to name his or her law firm 'The X Law Group' when 'X' is the solo practitioner's surname and 'X' employs one or more attorney [sic] as associates. 'Group' and 'Law Group' are not considered misleading or a trade name when used in naming a law firm comprised of more than one attorney. 'Group' or 'Law Group' should not be used in a law firm name to refer to paralegals, other non-attorney personnel, office sharing attorneys, or 'of counsel' attorneys.").

District of Columbia LEO 332 (10/18/05) ("A lawyer who opens a solo practice may conduct his or her business under any trade name that does not constitute a false or misleading communication about the lawyer or the lawyer's services. The use of the word 'firm' in the firm name does not inherently constitute a misleading representation about a solo practitioner. A solo practitioner must take care, however, to insure that clients and potential clients are not misled as to the nature of his or her practice."); "It is useful to reiterate that, as we said in Opinion No. 189 (decided under the former Code of Professional Responsibility), a solo practitioner may not practice under the name 'John Doe & Associate' for the use of the word 'associates' would naturally be read to necessarily imply the existence of other legal staff in the practice. See D.C. Ethics Op. 189 (1988). This prohibition remains in effect today under Rule 7.5(d) of the Rules of Professional Conduct. Cf. Disciplinary Counsel v. Furth, 754 N.E.2d 219 (Ohio 2001) (solo practitioner may not practice under his name followed by 'Associates, Attorneys and Counselors at Law'); cf., Medina County Bar Ass'n v. Grieselhuber, 678 N.E.2d 535 (Ohio 1977) (solo practitioner may not style his firm 'and Affiliates' or hold himself out as 'Body Injury Legal Centers'). Similarly a solo lawyer using the title 'Senior Attorney and Director of Services' misleads because the lawyer implies the existence of other staff. Oklahoma Bar Ass'n v. Leigh, 914 P.2s 611 (Okla. 1996).").

In re Schneider, 710 N.E.2d 178, 179, 180 (Ind. 1999) ("The letterhead denoted his law practice as 'Professional Services Group' and listed five additional members, two designated as attorneys and three as CPAs. None were actually employees of the respondent's law practice."); "In this case, the respondent held himself out as part of a group including other attorneys, although his law practice had no employees other than himself. Referring to his practice as part of a group created a false impression that the other attorneys were associated with respondent in the practice of law. The respondent argues that the letterhead and trade name accurately reflect the dual nature of his practice and therefore is not misleading. Even though the respondent provided both legal and accounting services, he did not practice law as part of a legal entity comprised of the persons listed on his letterhead. He testified that he practices law as a sole proprietor, with no employees. There was no 'group,' only the respondent.").
One interesting article noted that Justice Sotomayor might have improperly used that term when in private practice.

On Page 143 of her Senate Judiciary Committee questionnaire, she said she "practiced alone" in a side legal business from 1983 to 1986 "as a consultant to family and friends." During that time, she also was serving as a prosecutor and then as a member of a larger law firm. Judge Sotomayor listed the name of the solo practice as Sotomayor and Associates.

Advertising a solo practice as if it has more than one lawyer is actually banned by bar associations in all 50 states. Judge Sotomayor appears to have violated this minor but clear rule of legal ethics for four years.

Who were the 'associates' in her legal consulting business? The Washington Times, June 24, 2009, at A20.

(f) This question comes from a 2006 Indiana case.

The Indiana Supreme Court recognized both law firms' names as legitimate, and refused to enjoin one law firm's efforts to block the other law firm from using the same name.10

(g) Disputes about the use of a deceased lawyer's name can involve both ethics issues and contract issues.

10 Keaton & Keaton v. Keaton, 842 N.E.2d 816, 821 (Ind. 2006) (analyzing a situation in which two lawyers named Keaton established a firm in 1971 in Rushville, Indiana, while two other lawyers also named Keaton formed a firm in 2002 in Fort Wayne, Indiana; noting the one law firm called itself "Keaton and Keaton" while the other law firm used the name "Keaton & Keaton"; acknowledging that consumers occasionally confused the two firms, even though Rushville is 100 miles from Fort Wayne; "Law firms with the same or similar names are abundant, and there is no evidence that the Rushville P.C. has any name recognition in Fort Wayne over 100 miles from Rushville. To the extent the Rushville P.C. has demonstrated a secondary meaning in its locale, we agree with the trial court that the three instances of alleged name confusion designated by the Rushville P.C. in its motion for summary judgment are insufficient as a matter of law to establish actionable infringement."; denying one firm's efforts to stop the other law firm from using its name).
Not surprisingly, bars sometimes deal with law firm lawyers (or even independent contractors) who wish to continue using the name of a law firm that has dissolved.

- Virginia LEO 1706 (11/21/97) (an independent contractor who was never a partner in a law firm may use the law firm's name if the independent contractor is a "bona fide successor" of the law firm, which is a legal issue rather than a ethics issue; determining whether the independent contractor must obtain the consent from anyone to use the law firm's name is a legal issue; as long as the firm's letterhead explains that one of the named partners is deceased, it would not be misleading for a sole practitioner to practice under a law firm name containing two names.).

- Virginia LEO 1704 (9/12/97) (A lawyer from a dissolving law firm may (1) continue to use the name of that law firm during the winding-up of the law firm's affairs; and (2) simultaneously practice under another law firm name -- which includes the original law firm's partners' name and his or her name (suggesting but not requiring the letterhead mention that two of the partners in the law firm's name are deceased.).

In one October 2009 case, the South Carolina Supreme Court refused to enjoin a law firm from using a deceased partner's name -- noting that the lawyer had approved such a use, and rejecting the lawyer's widow's claim that her deceased husband "visited her in a dream" and advised her that he would "not mind" if the law firm stopped using his name.

- Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E. 2d 756, 757 n.1, 762 n.6 (S.C. 2009) (holding that the widow of a law firm's founder cannot sue the law firm for improper use her late husband's name in the law firm; noting that the founder had expressed a desire that his name continue to be included in the firm's name, but that "Ms. Gignilliat testified that her deceased husband visited her in a dream and said that he did not mind if GSB discontinued the use of his name. Nonetheless, this ghostly visit is not a revocation of consent." (emphasis added); "This Court takes judicial notice of the custom and practice in this state of law firms continuing to use the names of deceased members in their firm names. Heretofore, the basis has been the taking for granted that the deceased partner would consent. Hereafter, it is presumed, unless proven otherwise, that the deceased partner consented to the continued use of his or her name in the partnership's name.").

This question comes from a 2006 Connecticut case.
The District of Connecticut found that the "Suisman Shapiro" name had acquired a "secondary meaning" under the Lanham Act, and enjoined the founders' sons from using the same name in their new law firm.\(^{11}\)

(h) The District of Columbia Bar has issued a number of opinions dealing with the possibility of the same lawyer's name appearing in two different law firm names.

In District of Columbia LEO 277 (11/19/97), the District of Columbia Bar explained that "[e]thics opinions, in the District of Columbia and elsewhere, have long recognized that it is permissible for law firms to use trade names that include the names of deceased or retired partners."

The bar further explained that "[t]o fall under the 'trade name' exception, however, the use of the deceased or retired partner's name must be permitted under the law applicable to one's property value in the commercial use of his or her name. Such use could, depending on the circumstances, be governed by common law or partnership or corporate law." Id.

The bar also held that a law firm's name could not include the name of a lawyer practicing elsewhere. "It is, however, misleading (and therefore a violation of Rule 7.5(a)) to include in a firm name the name of a lawyer practicing elsewhere. Under

\(^{11}\) Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C. v. Suisman, Civ. A. No. 3:04-CV-745 (JCH), 2006 U.S. Dist. LEXIS 8075, at *15-17, *44 (D. Conn. Feb. 15, 2006) (analyzing a situation in which sons of the founding named partners of a law firm left that firm and started their own firm using the accurate name "Suisman Shapiro"; concluding that the title "Suisman Shapiro" has acquired a "secondary meaning" under the Lanham Act, even though the law firm founded by the two lawyers' fathers and continuing to practice obviously included other names beside those two names; taking "judicial notice of the custom, at least in Connecticut, of identifying law firms by the first two names in a firm's title when the firm's name includes several individual names"; acknowledging that the firm which the two lawyers left had provided the testimony that two callers had been confused by the new firm's name; permanently enjoining the two lawyers from using the name "Suisman Shapiro" or "any combination of Suisman followed by Shapiro joined by any connective such as ampersand, colon, slash mark, comma or symbol, or a spelling such as 'and'"; also awarding attorneys fees to the law firm that sued the two lawyers who had left it).
such circumstances, according to the Rule, the possible identifying value of the firm name as a trade name yields to the greater possibility that the public will be misled by retention of the departed lawyer’s name in the firm name.” Id.

Several years later, however, the District of Columbia Bar indicated that the same lawyer’s name could appear in two different law firm’s names.

A lawyer may have an "of counsel" relationship with one firm and be a partner in a different firm, so long as the lawyer’s "of counsel" association with the first firm is regular and continuing and the lawyer is generally available personally to render legal services to that firm’s clients; and the two firms are treated as one for conflicts of interest purposes. When a former partner continues to render legal services to the firm’s clients, that firm may retain the former partner’s name in the firm name, even though the former partner also practices in a new firm with a name that also includes his name.

District of Columbia LEO 338 (10/2006) (emphasis added). After repeating the general rule that lawyers may practice in more than one law firm, the District of Columbia Bar concluded that as a corollary of this general rule the law firms can all use the same lawyer’s name in their name.

[T]he question is whether including a former partner’s name in the old firm name, as well as in the new firm’s name will mislead the public. We conclude that if the lawyer has a regular and continuing association with both firms and will be generally available personally to render legal services to each firm that bears his name, using his name in the names of both firms is consistent with D.C. Rule 7.5(a). If, instead, he were to practice with only one of the firms, including his name in both could mislead the public. Under these circumstances, however, while using X’s name in both firm names may be unusual, it would not be misleading, so long as he maintains a regular and continuing association with both firms and is generally available personally to render services at each firm. We caution, however, that X must take special care to ensure that each client to whom he renders legal services understands which firm will be
delivering legal services and responsible for the client's legal matter.

Id. (emphasis added).

(i) The Illinois Bar dealt with this issue in 2004. In Illinois LEO 03-02 (1/2004), the Illinois Bar addressed the following scenario.

Lawyer Smith has practiced law for many years with lawyers Jones and Doe under the name of Smith, Jones & Doe, P.C. Smith is the only shareholder. Neither Jones nor Doe is a shareholder in the firm: they do not share in profits or expenses of the firm. Smith assumed that incorporation took his firm out of the ethical requirement relating to holding oneself out as a partnership.

Id. Surprisingly, the Illinois Bar prohibited use of that name.

[U]se of the law firm name Smith, Jones & Doe, P.C. when Jones and Doe are not shareholders, principals or other equity holders therein is misleading to the public. A client who hires Smith, Jones & Doe, P.C. could be under the misunderstanding that Jones and Doe may be held jointly and severally liable for professional malpractice committed by the firm, or that the firm is in compliance with Supreme Court Rule 722, when that is not in fact the case. Accordingly, in order to comply with Rules 7.1 and 7.5(d), either the names Jones and Doe must be removed from the law firm name or they must be made shareholders or given an equity interest in the professional corporation.

Id.

(j) An "of counsel" relationship requires that the "of counsel" lawyer have a continuing close relationship with the law firm, which does not constitute only a referral arrangement or similar marketing scheme. However, such lawyers obviously are not full-time partners in the firm.

The difficulty of analyzing all the effects of "of counsel" relationships (including the implications for purposes of law firm names) has become more difficult recently.
The "of counsel" designation formerly was limited to semi-retired partners. However, law firms now use that designation for part-time associates, folks who are valuable enough to stay at the firm, but not eligible for full-time partnership positions, etc.

Another complicating factor is the ability of a lawyer with an "of counsel" relationship with one firm to have a similar relationship with another firm -- which also complicates law firm name issues.

Over twenty years ago, the ABA issued an ethics opinion indicating that a law firm may keep the name of an "of counsel" lawyer in the law firm name if the lawyer had been active at the firm before taking that designation -- but could not add the name if the "of counsel" lawyer had just joined the firm.

- ABA LEO 90-357 (5/10/90) (explaining that a law firm cannot use a lawyer's name in the law firm name if he has a new "of counsel" relationship with a law firm, but may do so if a retired partner of the firm has such a relationship with the firm; "The Committee believes that in the case of a new or recent firm affiliation there is no escaping an implication that a name in the new firm name implies that the lawyer is a partner in the firm, with fully shared responsibility for its work. On the other hand, the Committee also believes that there is not a similar misleading implication in the use of a retired partner's name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized.").

Since the ABA issued that opinion, states have taken differing approaches to this issue. For instance, in 2007 the District of Columbia Bar indicated that a lawyer having an "of counsel" relationship with more than one firm may have his or her name included in both law firms' names.

- District of Columbia LEO 338 (2/07) ("A lawyer may have an 'of counsel' relationship with one firm and be a partner in a different firm, so long as the lawyer's 'of counsel' association with the first firm is regular and continuing and the lawyer is generally available personally to render legal services to that firm's clients; and the two firms are treated as one for conflicts of interest purposes. When a former partner continues to render legal services to the firm's clients, that firm may retain the former partner's name in the firm name,
even though the former partner also practices in a new firm with a name that also includes his name.; three members of the committee dissented).

In 2008, the Ohio Bar essentially took the ABA approach, but with an even more explicit requirement -- that an "of counsel" lawyer whose name appears in the law firm name must have been a named partner or shareholder before assuming the "of counsel" status.

- Ohio LEO 2008-1 (2/8/08) ("A lawyer in a law firm may be 'of counsel' to another law firm if the requisite continuing relationship exists between the lawyer and the law firm. The requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship. The 'of counsel' relationship is continuing, close, regular, and personal. A lawyer who enters an 'of counsel' relationship must be aware of the accompanying ethical implications. A lawyer who serves as 'of counsel' must have an active license to practice law. A law firm may continue to include in the firm name the name of a lawyer who was already a name partner or name shareholder but who becomes 'of counsel' to the law firm. A law firm may not include in the firm name the name of an 'of counsel' lawyer who was not already a name partner or name shareholder of the law firm. The listing of an out-of-state lawyer as 'of counsel' to an Ohio law firm must include the jurisdictional limitation of the 'of counsel' lawyer on the letterhead. An 'of counsel' lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated as 'of counsel.' A lawyer may serve as 'of counsel' to more than one law firm. Conflicts of interest are attributed in an 'of counsel' relationship. 'Of counsel' relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.").

In 2010, the Nebraska Bar took essentially the same approach, but added the prohibition on a law firm using an "of counsel" lawyer's name in the firm name if the lawyer had withdrawn from the firm to practice elsewhere.

- Nebraska LEO No. 10-04 (2010) (analyzing the following situation: "An attorney retired from the practice of law approximately three years ago. At that time, he was one or two partners in a limited liability partnership law firm. The remaining partner in the firm purchased the majority of his interest in the partnership; however[,] the retiring partner retains a 0.01% interest in the
partnership. The last name of the retired partner continues to be part of the firm name and the retired partner is listed on the firm's letterhead and in advertisements as 'of counsel.' Since his retirement, the attorney has conducted no legal business and his status with the Nebraska State Bar Association is characterized as 'regular inactive.'; explaining the "of counsel" relationship; "The ABA Ethics Committee, which formerly had limited 'of counsel' designations to no more than two firms, has more recently taken the position that there is no formal numerical limit that need be placed on 'of counsel' relationships. The committee warned, however, that as a practical matter, 'of counsel' designations will be circumscribed both by the requirement that each relationship be close and continuing and by the effect of imputed disqualification that extends among all lawyers and firms connected by the 'of counsel' relationship. ABA Formal Ethics Op. 90-357 (1990)."; "The more traditional view is that a lawyer may be 'of counsel' to only one firm at a time. See Iowa Ethics Ops. 82-19 (1982) and 87-9 (1987). Texas limits 'of counsel' affiliations to two firms. Texas Ethics Op. 402 (1982). However, most states now follow the ABA's view rather than the traditional view."; noting that "[v]arious types of practitioners have been deemed acceptable for 'of counsel' affiliation, including the following: sole practitioner -- Connecticut Informal Ethics Op. 99-31 (1999)[;] retired lawyer -- Florida Ethics Op. 00-1 (2000)[;] retired judge -- New York County Ethics Op. 727 (1999)[;] withdrawing partner or associate -- Pennsylvania Informal Ethics Op. 7-81 (1997)[;] part-time practitioner -- South Carolina Ethics Op. 98-31 (1998)[;] lawyer in another firm -- Missouri Informal Ethics Op. 980143[;] non-practicing government official or law professor - Iowa Ethics Op. 87-12 (1987)[;] spouse -- Maine Ethics Op. 142 (1994)."; ultimately concluding that a law firm's "name" may include the name of a retired partner, but may not do so if the retired partner is practicing law elsewhere -- even if the retired partner is still "of counsel" to the firm; "If a named partner of a firm merely withdraws from the firm to practice elsewhere, there is general agreement that continued use of that attorney's name in the firm name is misleading and therefore impermissible under Model Rule 7.1 . . . . However, if the named partner who withdraws to practice elsewhere maintains an affiliation with the former firm in an 'of counsel' capacity, there is a split of opinion on whether the firm name can retain the attorney's name."; "Some ethics committees have concluded that a firm name cannot retain the name of a former partner who withdraws to practice elsewhere even if the attorney remains affiliated with the former firm as 'of counsel.' See Rhode Island Ethics Op. 94-65 (1994); Florida Ethics Ops. 71-49 (1971) and 00-1 (2000). Both the Rhode Island and Florida committees concluded that a named partner who withdraws from a law firm to practice elsewhere but remains 'of counsel' to the firm may not continue to include his name in the firm name because such inclusion connotes a partnership and is misleading to the public."; "Other committees have allowed a firm name to retain the name of a partner who withdrew to actively practice elsewhere but became 'of counsel' to the former firm. See South Carolina Ethics Op. 98-31 (1998); New York City Ethics Op.
ultimately concluding that "[a]n attorney may be listed as 'of counsel' on a law firm's letterhead and in advertising, as long as the attorney has on-going regular contact with the members of the firm for purposes of providing consultation and advice. In Nebraska, there is no numerical limit on the number of 'of counsel' designations for attorneys as long as each relationship with a law firm exists pursuant to active involvement such that it meets the required definition. An 'of counsel' designation may only be utilized when the attorney's responsibilities in that role are factually correct."; "A firm name may retain the name of a retired partner or principal of the firm. If the retired partner assumes 'of counsel' status to the firm, the firm name may continue to retain the attorney's name. If the retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney's name in the former firm's name is misleading to the public and therefore prohibited. This is true even if the attorney becomes 'of counsel' to the former firm after resuming practice. Use of an 'of counsel' attorney's name in a firm name must be limited to the circumstance in which a named partner or principal has retired from active practice and assumed 'of counsel' status to the firm that bears the attorney's name.").

Best Answer

The best answer to (a) is YES; the best answer to (b) is NO; the best answer to (c) is NO; the best answer to (d) is PROBABLY NO; the best answer to (e) is NO; the best answer to (f) is YES; the best answer to (g) is PROBABLY NO; the best answer to (h) is MAYBE; the best answer to (i) is MAYBE; the best answer to (j) is MAYBE.
Law Firm Trade and Domain Names

Hypothetical 10

In an effort to improve your firm's recognition in your community, you want to start using a trade name, and also select a domain name that is likely to draw the attention of the increasing number of clients that are selecting lawyers over the Internet.

May you use the following names for your law firm:

(a) "The West End Law Firm"?

MAYBE

(b) "The Best West End Corporate Law Firm"?

NO (PROBABLY)

(c) "westendlawfirm.com" (as a domain name)?

YES

Analysis

(a) The ABA Model Rules allow a lawyer to use a trade name in private practice "if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1,"

which prohibits false or misleading communications. ABA Model Rule 7.5(a).

States take one of two basic approaches to law firms' use of trade names. First, some states flatly prohibit trade names.

- Ohio LEO 2010-1 (2/5/10) ("It is improper for a lawyer to name a law firm the lawyer's surname followed by the words Intellectual Property or the initials IP. The use of an area of practice or specialization in a law firm name constitutes a trade name. Prof. Cond. Rule 7.5(a), Gov. Bar. R. III(2), and Prof. Cond. Rule 7.4 do not authorize the inclusion of an area of practice or specialization
in a law firm name and Prof. Cond. Rule 7.5 specifically does not allow a trade name.

- Rodgers v. Commission for Lawyer Discipline, 151 S.W.3d 602, 611, 610, 611 (Tex. Ct. App. 2004) (suspending for two years a lawyer using the trade name "Accidental Injury Hotline" in the yellow pages; noting that a Texas ethics rule "prohibits a lawyer's use of three types of names: (1) a trade name; (2) a name that is misleading as to the lawyer's identity; or (3) a firm name with names other than those of the lawyers in the firm"; also noting that the yellow page advertisement did not include necessary disclosures and disclaimers; "Rule 7.01(e) provides that '[a] lawyer shall not advertise in the public media or seek professional employment by written communication under a trade or fictitious name.'") 7.01(e). Rodgers contends that the trade name rule prohibits only the use of deceptive trade names and that rule 7.01(a) defines trade name as 'a name that is misleading as to . . . identity.'

- Arizona LEO 01-05 (3/2001) (citing Arizona ER 7.5(a) for the proposition that "[a] trade name may not be used by a lawyer in private practice").

Interestingly, one court held that a state's total ban on trade names violated the constitution. In Michel v. Bare, 230 F. Supp. 2d 1147, 1148 (D. Nev. 2002), the court analyzed the following Nevada ethics rule:

Rule 199. Firm names and letterhead.

1. A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 195. The firm name shall contain the names of one or more living, retired, or deceased members of the law firm. No trade names shall be used other than those utilized by non-profit legal services organizations; however, phrases such as "the law offices of" or "and associates" shall be permissible.

The court pointed to the state bar's executive director's affidavit, which the bar submitted to the court in support of that rule.
"Commission's concerns over the "nominal presence" of law firms in the state, the proliferation of "storefront" operations in Nevada, and the overriding notion that Nevada citizens should be informed and aware of the identity of their counsel. Also in the trade name context, the Commission was concerned about the public's potential confusion between licensed attorneys operating under trade names and non-lawyers who use trade names to prey upon the public and as a shield for the unauthorized practice of law."

Id. at 1152-53 (internal citation omitted). The court rejected this worry, and ultimately held that Nevada’s total prohibition on trade names violated the constitution’s guarantee of free speech and equal protection.

Second, some states prohibit only inherently deceptive trade names.

- Florida Rule 4-7.9 cmt. ("If a private firm uses a trade name that includes a geographical name such as 'Springfield Legal Clinic,' an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication.").

- Georgia Rule 7.5(e) ("A trade name may be used by a lawyer in private practice if: (1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and (2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.").

- North Carolina LEO 2004-9 (10/21/04) (prohibiting a lawyer from using the name "North Star Law Office"; explaining that various North Carolina laws "require the official name of a professional corporation or a professional limited liability company to contain the surname of one or more of its shareholders or members (or the surname of one or more lawyers who owned an interest in an immediate predecessor law firm) and prohibit the official name from containing any other name, word, or character with limited exceptions"; also prohibiting the law firm from registering the name "North Star Law Office" as a trade name for the law firm, although the firm used a lawyer’s name in the Articles of Incorporation and Organization; explaining that the use of trade names is permissible generally, but that this trade name would be misleading; noting that "the location of the law firm in the North Star Building, implies that North Star Financial Group and Attorney A’s firm area affiliated. Clients who are referred by the financial planning company to the
law firm for legal services associated with their financial plan may erroneously conclude that they do not have a right to legal counsel of their choice but must use the services of Attorney A. Moreover, clients who use the services of the North Star Financial Group may not understand that the services that they receive from the financial planning company do not carry with them the protections afforded by the client-lawyer relationship such as confidentiality and the prohibitions on conflicts of interest.

- California LEO 2004-167 (2004) (prohibiting a law firm from using the trade name "Worker's Compensation Relief Center," because it implies a relationship with a governmental agency; explaining that a lawyer might be able to use such a trade name by including a prominent disclaimer such as "A Private Law Firm" after the name).

- Maryland LEO 2004-09 (2/26/04) (explaining that a law firm may not use the trade name "USA LAW INC." because it might imply some connection to a public agency).

- Maryland LEO 2004-10 (2/26/04) (prohibiting a lawyer from using the trade name "Consumer Legal Services P.C." because the consumer might believe that the law firm is affiliated "with a public or charitable legal services organization").

- Utah LEO 01-07 (8/29/01) (indicating that a law firm could use the trade names "Legal Center for the Wrongfully Accused" and "Legal Center for Victims of Domestic Violence" -- as long as the law firm used the same trade names in all pertinent matters; explaining that "[s]elective use of the trade names in question, however, opens the door to abuses that could intentionally or unintentionally mislead others. By using the name 'Legal Center for the Wrongfully Accused' only in limited situations where the law firm deems it 'appropriate,' the law firm affirmatively represents that some of its clients are 'wrongfully accused,' while others are not.

- Virginia Rule 7.5(a) ("A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 and 7.2.").

- Virginia Adver. Op. A-0103 (5/26/93) (allowing the use of a corporate, trade, or fictitious name as long as the lawyer actually practices under that name).

- Virginia LEO 937 (6/18/87) (a professional corporation may practice law under a fictitious name).

- Virginia LEO 935 (6/11/87) (a law firm may call itself "'Accident Adjustment Service, PC' or 'Attorney's Accident Adjustment Service, PC'.").
A January 2011 Fifth Circuit decision overturning some of Louisiana’s lawyer marketing rules upheld Louisiana’s prohibition on lawyer marketing communications "utilizing a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." Public Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *32 (5th Cir. Jan. 31, 2011).

- Public Citizen, 2011 U.S. App. LEXIS 1922, at *29-30, *31 (pointing to satisfactory evidence supporting the prohibition; "The court is satisfied that there is reliable and specific evidence on the record sufficient to support the restriction imposed by Rule 7.2(c)(1)(L). First, the survey and focus group responses consistently reveal that the advertisements containing these mottos misled the public, improperly promised results, and implied that the advertising lawyers could manipulate Louisiana courts. Second, they present the perceptions of a significant number of people from each of the two pools of respondents. One-half of each survey was directed at the use of mottos and nicknames in attorney advertisements. Participants were either shown existing attorney advertisements making use of mottos or asked whether they recognized specific mottos. Finally, the questions asked about the shown or recognized advertisements were not abstract or hypothetical. They targeted the specific elements of commercial speech implicated by this rule and sought and received the reactions of the public and Bar Members to that type of speech. The result is evidence that directly pertains to and supports the restriction set forth in Rule 7.2(c)(1)(L). The court holds that LADB has met its burden to show that this rule will advance its substantial interest in preventing consumer confusion." (footnote omitted); also noting that the Louisiana rule does not completely prohibit all nicknames or mottos, and therefore represents a constitutional "narrowly drawn" restriction).

In the Public Citizen decision, the Fifth Circuit acknowledged that just one year earlier the Second Circuit had found New York's similar prohibition unconstitutional.

- Alexander v. Cahill, 598 F.3d 79.94-95, 95 (2d Cir. 2010) ("[T]he Task Force Report did not recommend outright prohibition of all such trade names or mottos -- it simply acknowledged that such names are often misleading. Defendants' rule, by contrast, goes further and prohibits such descriptors -- including, according to the Attorney General, Alexander & Catalano's own 'Heavy Hitters' motto -- even when they are not actually misleading. The Task Force Report therefore fails to support Defendants' considerably broader rule."); "There is a dearth of evidence in the present record supporting the need for § 1200.6(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that..."
is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.6(c)(7), and so have failed to meet their burden for sustaining this prohibition under Central Hudson [Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557 (1980)], cert. denied, 131 S. Ct. 820 (2010).

However, the Fifth Circuit found that the Louisiana Bar had presented adequate evidentiary support for its prohibition, while the New York Bar apparently had not presented similarly convincing evidence to the Second Circuit. Public Citizen, 2011 U.S. App. LEXIS 1922, at *32-33.

Typically, Florida has a humorously detailed rule.

- Florida Rule 4-7.9 cmt. ("Subdivision (c) of this rule precludes a lawyer from advertising under a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name.").

(b) For obvious reasons, a law firm’s name may not violate some other ethics rules -- including the rules governing unverifiable comparisons between the lawyers in that firm and lawyers in other firms. ABA Model Rule 7.1 cmt. [3].

It is unlikely that any bar would approve a law firm name that contains the word "best."

(c) Law firms may use domain names.

However, only a few states have addressed the ethics issues that such domain names might raise.

- New York Rule 7.5(e) ("A lawyer or law firm may utilize 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 clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules.").
• New York Rule 7.5(f) ("A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.").

• North Carolina LEO 2005-14 (1/20/06) (holding that a law firm could register a URL "that does not include words or language sufficient to identify it as the address of a website of a law firm" -- "provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm"; "Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.").

• New Jersey Adver. Op. 32 (5/23/05) ("a law firm may adopt a domain name for its Internet Uniform Resource Locator ('URL'), that does not include the firm's name or that of any individual attorney within that firm; provided that the Internet web site to which the browser is directed clearly and prominently identifies the actual law firm name and its address; the domain name must not be false or misleading; the name must not imply that the lawyer has been recognized or certified as a specialist other than as provided by rules of professional conduct; and, the domain name must not be used in advertising exclusively as a substitute identifier of the firm"; noting that other states have allowed domain names as long as they are not misleading; also indicating that "a firm may use a different form of its name for purposes of Internet access and retrieval of information about the firm and its services").

• Arizona LEO 01-05 (3/2001) (explaining that "[a] trade name may not be used by a lawyer in private practice" (citing Arizona Rule 7.5(a)), but that a law firm could use a domain name; indicating that a law firm could not use the secondary domain name "countybar.com" because it would "erroneously suggest that this private law firm has some special affiliation with the local bar
association."; also noting that a law firm could not use the top level domain suffix ".org" -- because such a top level domain suffix would create "a false impression that the firm either is a non-profit or is in some way specifically affiliated with a non-profit.").

**Best Answer**

The best answer to (a) is **MAYBE**; the best answer to (b) is **PROBABLY NO**; the best answer to (c) is **YES**.
Law Firm Associations and Other Relationships

Hypothetical 11

As the managing partner of a medium-sized firm, you have read all the articles about the difficulties of medium-sized firms surviving in the next decade. Over the last six months, you have spoken with a number of managing partners of similar firms, and you have just unveiled your plans for a network of medium-sized firms throughout the Southeast. You envision sharing library resources, certain computer hardware, and other non-confidential materials.

You see the main benefit as being able to claim that you are "affiliated" with other law firms that combined would have over 300 lawyers. However, you do not plan to actually merge with the other firms. Instead, you intend to remain independent in the selection and representation of clients -- although you expect there to be some joint clients and multiple referrals among members of the group.

(a) May you indicate on your website and in other places that you are "affiliated" with the other law firms in the group?

MAYBE

(b) Will your firm be able to take cases against clients represented by the other firms in the group?

MAYBE

(c) Will such an arrangement render your firm potentially liable for the malpractice of the other firms in the group?

YES (PROBABLY)

Analysis

This hypothetical highlights the risks inherent in law firms' increasing willingness to establish relationships with other law firms.
As one would expect, lawyers who share offices and hold themselves out as partners risk a judicial finding that the malpractice of one will render the other liable.\(^1\) This hypothetical involved a more attenuated relationship among the lawyers.

(a) The ABA has addressed this issue in two LEOs.

In 1984, the ABA indicated that firms could use words like "associated" and "affiliated" as long as the firms treated themselves as the same firm for conflicts of interest and confidentiality purposes. ABA LEO 351 (10/20/84). However, ten years later, the ABA indicated that using words like "affiliated," "associated," "correspondent," and "network" violate the anti-fraud provision of ABA Model Rule 7.1 -- unless the firms make a full and meaningful explanation of the terms to any prospective clients (in the retainer letter or elsewhere). ABA LEO 388 (12/5/94).

States' approach to the use of these terms reflects the ABA's increasing skepticism.

Some states permit law firms to use the terms, as long as they provide sufficient explanation.

- Philadelphia LEO 2006-3 (6/2006) (holding that two law firms may form a partnership with each other while maintaining their separate operations, but requiring them to: treat the two firms as one for conflicts purposes; obtain client consent to disclose confidential information to the other firm; and advise clients of any fee-sharing; insist that their lawyers disclose their affiliation on letterhead and elsewhere).

- Virginia LEO 1813 (3/16/05) (explaining that law firms may use the term "affiliated" or "associated" in describing their relationship, as long as one firm is "closely associated or connected with the other lawyer or firm in an ongoing

\(^1\) See, e.g., Estate of Holmes v. Ludeman, No. L-00-1204, 2001 Ohio App. LEXIS 4501, at * 8 (Ohio Ct. App. Oct. 5, 2001) (denying a summary judgment motion by a lawyer sued for malpractice as a result of the misappropriation of an estate's funds by a lawyer with whom the defendant shared an office; noting such facts as the defendant's indication on an insurance application that he and the wrong-doer were "partners").
and regular relationship."; explaining that the terms are analogous to the "of counsel" relationship, which "must be close and regular, continuing and semi-permanent, and not merely that of a forwarder-receiver of legal business."; holding that it may be necessary for the law firms to use "[m]ore descriptive language" if the relationship between them involves one firm's limited availability to handle certain types of matters, or availability to handle matters in another state; also explaining that law firms using these terms must also ordinarily handle conflicts as if they were one single firm).

Some states go even further, and completely prohibit use of the term "associated" or "affiliated."

- New Jersey LEO 694 (11/3/03) (prohibiting two law firms from using the term "affiliated" because it is misleading; forbidding the two firms from entering into an agreement for mandatory referrals; explaining that reciprocal fee sharing would be unethical absent client consent; noting that the sharing of facilities by the two firms might create confidentiality problems).

- New York City LEO 82-28 (undated) (reiterating that "the listing of the office of a separate law firm on a letterhead or in an announcement as an 'associated,' 'affiliated,' 'correspondent,' or 'foreign' office is misleading and a violation of the Code of Professional Responsibility"; holding that the terms are misleading when used in connection with a foreign law firm that is not authorized to practice law in New York, even if it they are accompanied by a detailed explanation or disclaimer about the lack of a partnership relationship and the inability of the other firm to practice law in New York).

- New York City LEO 81-78 (undated) ("The designation 'associated' is misleading. . . . The designation is not recognized by the Code of Professional Responsibility. . . . It conveys no precise meaning. It tells the public and other lawyers nothing about the relationship between the two firms or the respected divisions of responsibility").

- New York City LEO 81-72 (undated) ("The listing of 'affiliated' or 'corresponding' lawyer is improper, because such listings do not convey a sufficiently precise description of the lawyer's relationship to the listing lawyer or law firm and thus are misleading"). The Florida Bar also takes this position. These bars only allow use of the terms "partner," "associate," and "of counsel."

(b) The court in Mustang Enterprises, Inc. v. Plug-In Storage Systems, Inc., 874 F. Supp. 881 (N.D. Ill. 1995), disqualified the plaintiff's law firm because it listed itself as "affiliated" with a law firm that performed work for the defendant.
Whatever benefits Hill Firm [the plaintiff's firm] and Bachman Firm [defendant's patent counsel] may view themselves as deriving from holding each other out as an "affiliated firm," the price that must be paid for deriving those benefits is the inability of either firm to litigate against clients of the other firm under circumstances such as those presented here.

Id. at 890. Under this approach (which probably represents the correct analysis), law firms which advertise themselves as "affiliated" probably will be deemed to be the same firm for conflicts purposes. For this reason, law firms that cooperate in some informal way generally require their participants to include disclaimers whenever the law firms mention their membership in the group.

(c) In addition to the ethics risks mentioned above, law firms identifying other firms as their "affiliates" also risk being considered the same firm for malpractice purposes.

In Johnson v. Shaines & McEachern, P.A., 835 F. Supp. 685, 688 (D.N.H. 1993), a number of lawyers created a "law group" that jointly marketed to and serviced clients, although each firm in the group maintained "its separate legal practices, including separate clients." Each firm advertised the other firms as "affiliated offices." A disgruntled client of one firm sued another "affiliated office." That firm moved for summary judgment, claiming that the client was never a "joint" client -- but rather an individual client of the firm that had committed the alleged malpractice. However, the court denied the summary judgment motion.

Such a frightening scenario leads most law firm groups to insist that their members include strict disclaimers whenever they mention their membership in the group.
Best Answer

The best answer to (a) is MAYBE; the best answer to (b) is MAYBE; the best answer to (c) is PROBABLY YES.
Use of Individual Titles

Hypothetical 12

As your law firm has grown from about 90 to 900 lawyers, several issues have arisen about what titles lawyers may use when referring to themselves in marketing materials and elsewhere. Coincidentally, two issues involving titles arose this morning.

(a) May a retired judge joining your firm refer to herself as a "retired judge" on letterhead and business cards?

**NO (PROBABLY)**

(b) May one of your lawyers who deals frequently with university professors refer to himself as "Dr." (like every other lawyer at your firm, this lawyer received a juris doctor degree)?

**MAYBE**

Analysis

As in other areas, states take differing positions on lawyers' use of titles.

(a) The rules governing the use of titles such as "judge" implicate the prohibition on misleading prospective clients into thinking that the lawyer has some special advantage or power over the judicial process.

Some states prohibit former judges from using their title in formal communications such as law firm names, letterheads, or business cards.

- Michigan LEO RI-327 (9/21/01) (prohibiting a former judge from practicing law using the title "Honorable XXX Doe and Associates").

- Ohio LEO 93-8 (10/15/93) (indicating that a retired judge may include in announcement cards and law directory listings a "factual statement of prior judicial positions held," but may not use the following terms on business cards: "Judge"; "Honorable"; "Former Judge").

- Illinois LEO 92-10 (1/22/93) (a former judge now practicing as a lawyer may not refer to himself as "judge" in "business negotiations or professional..."
conversations," and may not include the term "Retired Judge" on business cards).

However, other states allow the use of titles on letterhead and business cards.

- Arizona LEO 87-1 (1/13/87) (allowing a firm that has an "of counsel" relationship with a retired judge to include the judge's name and the term "Judge" on the firm's letterhead).

Beyond that basic rule, there are a number of subtleties that make the analysis more difficult.

For instance, the ABA has indicated that retired judges can use the title if they will be engaged in a profession or business other than practicing law. In ABA LEO 391 (4/24/95), the ABA indicated that a former judge should not use the title "Judge" when acting as an expert witness or otherwise in the courtroom or "in connection with legal proceedings." The ABA also concluded that:

it is improper for a former judge who returns to the practice of law to refer to himself, or encourage others to refer to him, by any title that refers to his former judicial status.

ABA LEO 391 (4/24/95) (emphasis added). The ABA explained that:

We believe that the use of the title "Judge" in legal communications and pleadings, as well as on a law office nameplate or letterhead, is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield. In fact, there appears to be no reason for such use of the title other than to create such an expectation or to gain an unfair advantage over an opponent. Moreover, the use of judicial honorifics to refer to a lawyer may in fact give his client an unfair advantage over his opponents, particularly in the courtroom before a jury. . . . This Committee joins the majority view among these opinions in concluding that former judges should be barred from using an honorific once they return to the practice of law.

Id. On the other hand, the ABA permitted former judges to explain their former job.
In reaching this conclusion, the Committee emphasizes that it is perfectly proper for a former judge to inform potential clients of his prior judicial experience. For example, if the former judge is seeking to offer his services as an arbitrator, mediator, or similar neutral, roles often undertaken by former judges in the area of private alternative dispute resolution, the ex-judge would certainly be free to describe his judicial experience. So long as the description is accurate, and does not convey an implication of special influence, its use will be consistent with the prohibitions discussed in this opinion.

Id.

(b) States disagree about whether lawyers with a juris doctor degree may call themselves "Dr." in marketing materials.

North Carolina generally prohibits lawyers from using the term, except in academic communities.

- North Carolina LEO 2007-5 (4/20/07) (explaining that "RPC 5 prohibits a lawyer from referring to himself as holding a doctorate or using the title 'doctor' to refer to himself."); "[I]n academic communities, including community colleges and other post-secondary school institutions of higher education, where individuals with doctoral and other advanced degrees comparable to the juris doctor degree are routinely and traditionally referred to as 'doctor,' it is not misleading and not inappropriate for a person holding a juris doctor degree to refer to himself or herself as 'doctor.' The use of the designation 'doctor,' however, is specifically limited: a lawyer may use the designation only when working or otherwise participating in a function associated with a post-secondary school institution of higher education. In all other contexts, a lawyer may not refer to himself or herself as 'doctor.'").

Texas formerly prohibited use of the term, but abandoned the prohibition in 2004 (although keeping some limited restrictions).

- Texas LEO 550 (5/2004) (abandoning a prohibition on lawyers referring to themselves as "Dr."); "The Committee is of the opinion that under the Rules the use of the title "Dr.," "Doctor," "J.D." or "Doctor of Jurisprudence" is not, in itself, prohibited as constituting a false or misleading communication. The Committee recognizes that other professions, such as educators, economists and social scientists, traditionally use [the] title "Dr." in their professional names to denote a level of advanced education and not to imply formal
medical training. There is no reason in these circumstances to prohibit lawyers with a Juris Doctor or Doctor of Jurisprudence degree from indicating the advanced level of their education. However, while use of the title alone is generally permitted, the context in which the title is used may cause use of the title to be a false or misleading communication. For example, a lawyer otherwise qualified to use the title of "Dr." who advertises as "Dr. John Doe" in a public advertisement for legal services in connection with medical malpractice or other areas involving specialized medical issues may be making a misleading statement as to the lawyer's qualifications and may be creating an unjustified expectation about results the lawyer can achieve. Unless accompanied by an appropriate, prominent statement of qualifications and disclaimers, such use of the title "Dr." could readily mislead prospective clients and thus violate the Rules.

Florida allows use of the title, with a disclaimer.

- Florida Rule 4-7.2 cmt. ("Another example of a misleading omission is an advertisement for a law firm that states that all the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the same claim.").

**Best Answer**

The best answer to (a) is **PROBABLY NO**; the best answer to (b) is **MAYBE**.

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Areas of Practice

Hypothetical 13

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than retain a law firm because of its general reputation. You and your marketing director want to highlight your firm's lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

(a) "Limits her practice to domestic relations matters"?

YES

(b) "Specializes in anti-trust issues"?

MAYBE

(c) "Certified specialist in patent law"?

YES

(d) "Certified by the Texas Supreme Court as a trial lawyer"?

MAYBE

Analysis

As in most areas, most states have a core consensus rule governing lawyer descriptions of practice, but on the margins take widely varying approaches.

(a) Most states allow lawyers to provide accurate information about limitations in their practice.
At least one state specifically prohibits use of the word "specialize."


Another state prohibits use of the term only if it implies that the lawyer is a certified specialist.

- Virginia LEO 1425 (9/16/91) (it is not per se unethical for a lawyer to advertise a specialty in a certain area as long as the advertisement does not indicate that the lawyer is a recognized or certified specialist).

- Virginia LEO 1231 (5/2/89) (using the word "specialize" in an advertisement does not automatically imply that a lawyer is a "recognized" or "certified" specialist, but it would be preferable for a lawyer to explain that the lawyer has limited his or her practice to certain areas).

- Virginia LEO 1107 (8/1/88) (a lawyer may use a brochure indicating that the lawyer "specializes" in certain areas, because the advertisement does not say that the lawyer is a "recognized or certified" specialist).

Courts have also dealt with these issues.

In Walker v. Board of Professional Responsibility, 38 S.W.3d 540 (Tenn. 2001), the Tennessee Supreme Court examined the following scenario:

In February 1995, Walker placed an advertisement for divorce services in the Chattanooga News Free Press TV Magazine. The ad was published over the week of February 12 through 18, 1995 and states in its entirety: "DIVORCE, BOTH PARTIES SIGN, $ 125 + COST, NO EXTRA CHARGES, Ted Walker, [address & telephone number]."

On March 29, 1995, the Board's Disciplinary Counsel filed a complaint against Walker alleging that this advertisement listed divorce as a specific area of practice but did not include the disclaimer required by DR 2-101(C) of the Code of Professional Responsibility.

Id. at 542. The Disciplinary Board reprimanded Walker because he had not included a disclaimer indicating that he had not been certified by the Tennessee Commission on
Continuing Legal Education and Specialization. The appellate court upheld a private reprimand.

The regulation before us requires that whenever a lawyer advertises his services in a particular area of law for which certification is available in Tennessee, he must disclose in the ad whether he is certified. DR 2-101(C). Since Walker was not certified as a civil trial specialist (which then covered the area of divorce law) yet he specifically mentioned divorce law in his ads, the disciplinary rule mandates that his ads include the following language: "Not certified as a civil trial specialist by the Tennessee Commission on Continuing Legal Education and Specialization." DR 2-101(C)(3). This regulation does not prohibit or limit speech; instead it requires more speech by way of an explanatory disclaimer.

Id. at 545.

In In re Robbins, 469 S.E.2d 191 (Ga. 1996), the Supreme Court of Georgia upheld a public reprimand against a lawyer for describing himself as a "specialist."

Robbins, the sole shareholder of William N. Robbins, Attorney at Law, P.C., prepared and published a newsletter entitled Legal Beagle, copies of which were mailed to Robbins' former clients, as well as his and his employees' family and friends. An edition of the newsletter, announcing the return of a former attorney, stated, in part: "WELCOME TO Joe Maniscalco -- Joe is an attorney who has returned to the firm with a specialty in personal injury and litigation."

The newsletter further stated: DON'T FORGET, we specialize in automobile accidents, motorcycle accidents, bicycle accidents, medical malpractice, workers' compensation and social security cases. Be sure to tell your friends about this. We appreciate referrals from our clients.

Robbins has significant experience in handling the types of cases listed in the newsletter, and practices only in those areas.

Id. at 192-93.
On the other hand, the Supreme Court of Kentucky reversed the bar's disapproval of a television advertisement using the phrase "injury lawyers."

The fundamental predicate of the decision by the Advertising Commission was that the phrase "injury lawyers" implies that the lawyers are specialists in representing injured people. Certainly reasonable minds can differ when considering such an implication. As argued by Hughes & Coleman, they are lawyers who can and do handle injury cases. The ads consequently contain truthful information and the Board and Commission do not challenge such an assertion.

None of the ads use any form of the prohibited phrases such as "certified", "specialist", "expert", or "authority" at any time or in any manner. We are persuaded that they fall into the category of otherwise permitted comments such as "international lawyers", "corporate attorneys", "litigation attorneys", "bankruptcy-debtor-creditor rights attorneys" and "a full service business law firm."

In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 544, 544-45 (Ky. 2001) (emphases added). The Kentucky Supreme Court held that the bar "paints with too broad a brush." Id. at 545.

(c) As in so many other areas, states differ in their approaches to lawyers claiming certification as specialists.

The ABA Model Rules simplified its approach several years ago. ABA Model Rule 7.4(d) now prohibits lawyers from claiming that they are certified as a specialist unless the certifying organizations is clearly identified in the communication, and has itself been approved by an appropriate "state authority" or accredited by the ABA. ABA Model Rule 7.4(d).¹

¹As in the earlier versions of the ABA Model Rules, lawyers may communicate that they do or do not practice in particular areas of law, and may use designations such as "patent attorney" or "admiralty" where truthful. ABA Model Rule 7.4(a)-(c).
Most states have specific rules governing advertisements that explicitly or implicitly claim that the lawyer "specializes" or is "certified" in a certain specialty. For example:

- Florida allows an advertisement describing a lawyer as a certified specialist if the lawyer is certified as a specialist by the Florida Bar or an organization having substantially the same standards as the Florida Bar. Florida Rule 4-7.2(c)(6).

- Florida Rule 4-7.2 cmt. ("[N]o lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or [by] an organization accredited by The Florida Bar may be described to the public as a 'specialist' or as 'specializing,' 'certified,' 'board certified,' being an 'expert' or having 'expertise in,' or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.").

- Georgia Rule 7.4 ("A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.").

- Georgia Rule 7.4 cmt. [2] ("A lawyer may truthfully communicate the fact that the lawyer is a specialist or is certified in a particular field of law by experience or as a result of having been certified as a 'specialist' by successfully completing a particular program of legal specialization. An example of a proper use of the term would be 'Certified as a Civil Trial Specialist by XYZ Institute' provided such was in fact the case, such statement would not be false or misleading and provided further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide professional entity.").

- Illinois prohibits lawyers from using terms like "certified," "specialist," "expert," or other similar terms, unless (1) they are referring to "certificates, awards or recognitions"; and (2) they include a disclaimer that the Illinois Supreme Court does not recognize the certifications of specialties. Illinois Rule 7.4(b) and (c).

- Illinois Rule 7.4(c) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group,
organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.

- Maryland prohibits lawyers from publicly holding themselves out as specialists. Maryland Rule 7.4.

- New York Rule 7.4(c)(1) ("A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows: . . . A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: 'The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.'").

- North Carolina prohibits lawyers from communicating that they are certified specialists, unless the certification comes from the North Carolina State Bar, or the communication mentions a certifying organization that is approved by the North Carolina State Bar or by the ABA. North Carolina Rule 7.4(b)(1)-(3).

- North Carolina Rule 7.4 cmt. [2] ("A lawyer may, however, describe his or her practice without using the term 'specialize' in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a 'concentration' or an 'interest' or a 'limitation.'").

- Pennsylvania prohibits lawyers from communicating that they are certified specialists, unless the certified organization is approved by the Pennsylvania Supreme Court or the lawyer is engaged as a patent or admiralty lawyer. Pennsylvania Rule 7.4(a), (b).

- South Carolina Rule 7.4(b) ("A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these rules. To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall

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be strictly factual and shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority' except as permitted by Rule 7.4(d)."

- Virginia Rule 7.4 ("Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1, Rule 7.2, and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows: (a) [a] lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation 'Patent Attorney' or a substantially similar designation; (b) [a] lawyer engaged in Admiralty practice may use as a designation 'Admiralty,' 'Proctor in Admiralty' or a substantially similar designation; (c) [a] lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., 'certified mediator' or a substantially similar designation; (d) [a] lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.").

State bars' legal ethics opinions provide additional explanation.

- Illinois LEO 03-05 (1/2004) ("An associate attorney with Firm A and is also a Certified Trust Financial Advisor (CTFA), having received that accreditation from the Institute of Certified Bankers (ICB). Rule 7.4(c) limits the use of certifications as they relate to 'qualifications as a lawyer,' or 'qualifications in any subspecialty of the law'; "With respect to the prohibition against listing subspecialties of the law in Rule 7.4, the committee opines that CTFA certification is neither a subspecialty of the law nor does it describe a qualification as a lawyer.").

- Illinois LEO 03-03 (1/2004) ("A lawyer may list the certification 'Capital Litigation Trial Bar' on letterhead without the disclaimer that 'the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law.'").

- Illinois LEO 96-08 (5/16/97) ("It is not misleading for a law firm to hold itself out as concentrating its practice in intellectual property law despite the fact that it does not do patent work. However, it may not hold itself out as 'specializing' in any field of practice."); "In the present instance, the firm holds itself out as concentrating (see later discussion regarding 'specializing') in the field of intellectual property law. This appears appropriate, despite the fact that it does not do patent work. The term 'intellectual property law' is broader than the practice of patent law, and encompasses several practice areas including patent law, copyright law, trademark law, trade secrets, licensing,"
etc. The fact that a lawyer may practice in one or more, but not all of these areas, does not render his holding himself out as concentrating his practice in intellectual property law as false or misleading. Thus, we believe that the present designation of the firm as concentrating in intellectual property law is not misleading under Rule 7.1(a), and is appropriate under Rule 7.4(a). However, the firm's holding itself out as 'specializing' in any given area of practice is improper. Rule 7.4(c) provides: Except when identifying certificates, awards or recognitions issued to him by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' or 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualification in any subspecialty of the law.

Lawyers upset at falling short of the requirements for certification sometimes seek relief through litigation. In early 2011, the Eleventh Circuit rejected a disgruntled Florida lawyer's due process allegation.

- Doe v. Fla. Bar, No. 10-11974, 2011 U.S. App. LEXIS 1115, at *1, *4, *4-8, *20 (11th Cir. Jan. 19, 2011) (affirming the dismissal for lack of subject matter jurisdiction of a Florida lawyer's due process lawsuit complaining of the Florida Bar's denial of her status as a board-certified marital and family law "specialist": starting its analysis with a reference to a Gilbert and Sullivan operetta; "This case reminds us of the observation of the Grand Inquisitor in Gilbert and Sullivan's The Gondoliers. Upon finding that all ranks of commoners and servants have been promoted to the nobility, he protests that there is a need for distinction, explaining that: 'When everyone is somebody, then no one's anybody.' The same is true of a state bar's certification process. If every attorney who practices in an area is certified in it, then no one is anybody in that field. The easier it is to be certified, the less that certification means." (footnote omitted); explaining that Zisser [plaintiff] had been certified as a specialist several times before, but that in Florida that status expires after five years, and that Zisser's efforts to be recertified were unsuccessful -- due mostly to peer review criticism based (in part) on her "tendency to over litigate [her] cases" (internal citation omitted); not explicitly noting the irony, but pointing out that Zisser (1) appealed the initial denial to the Florida Bar, (2) re-filed an entirely new application the next year, (3) notified the Florida Bar "of her intention to submit additional documentation", (4) "requested and was granted an extension of time to prepare a rebuttal", (5) sent the Florida Bar committee a "nine-page letter that contested the peer review findings and also provided the names of additional lawyers and judges for the Committee to contact", (6) sent in other information over the course of the next several months, (7) "requested an opportunity to appear before the Board to challenge its decision", (8) submitted "extensive documentation" before the hearing, including a "Motion to Remand" her application to the Committee for reconsideration", 118
(9) sent a nine-page "Memorandum of Law" challenging the denial, (10) appeared at the Board hearing accompanied by counsel, (11) filed "two more internal appeals with the Board, first to the Certification Plan Appeals Committee and then to the Bar's Board of Governors itself!", (12) filed a twenty-five page petition with the Florida Supreme Court (which included thirty-seven appendices), (13) filed a lawsuit in federal district court, (14) participated in a bench trial before that court, and (15) appealed the district court's judgment to the Eleventh Circuit; ultimately relying on the Rooker-Feldman doctrine in ruling that federal courts do not have subject matter jurisdiction over a final state court decision absent some federal constitutional issue; finding that Zisser's due process claims had no merit, because Zisser could practice law without a certification as a specialist, and that failure to be certified is not "stigmatizing.").

(d) States vary widely in their rules governing specific references to particular certifications (see above).

Best Answer

The best answer to (a) is **YES**; the best answer to (b) is **MAYBE**; the best answer to (c) is **YES**; the best answer to (d) is **MAYBE**.

b 2/11
Use of Terms Like "Expert" and "Authority"

Hypothetical 14

The firm's chairman has asked you to review your lawyers' website biographies to make sure they comply with applicable ethics rules.

(a) Can one of your lawyers call herself an "expert" in securitization transactions?

**NO (PROBABLY)**

(b) Can one of your lawyers describe himself as an "authority" in the ethics rules?

**NO (PROBABLY)**

(c) Can one of your lawyers who handles all or most of a corporate client's work call herself the company's "General Counsel" in marketing material?

**MAYBE**

Analysis

Several states have adopted specific prohibitions on lawyers using certain words when describing themselves in marketing materials.

(a) Several states have prohibited lawyers from calling themselves "experts."

- Florida Rule 4-7.2(c)(6) ("A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is 'certified,' 'board certified,' a 'specialist,' or an 'expert.'").

- [*Fla. Bar v. Doane*, 43 So. 3d 640, 640 (Fla. 2010)](http://example.com) (enjoining respondent lawyer from "the use of the term 'Expert' or 'Experts' in all legal advertisements and any trade name.").

- [*In re Anonymous Member of the S.C. Bar*, 687 S.E.2d 41, 46 (S.C. 2009)](http://example.com) ("Respondent's use of the words, as outlined in the report of the Hearing Panel, clearly violated Rule 7.4(b), which expressly prohibits use of 'any form' of the words 'expert' and 'specialist.'").
- In re PRB Docket No. 2002.093, 868 A.2d 709, 710, 712 (Vt. 2005) (privately admonishing a lawyer who used the term "'INJURY EXPERTS'" and "'WE ARE THE EXPERTS IN [certain areas of law]'" in yellow page advertisements; finding that use of the term "experts" violated the Vermont ethics rules "by placing an advertisement that implicitly compared his firm's services with those provided by other lawyers in a way that can not be 'factually substantiated.' The panel noted that the phrase 'the experts' was 'an implicit statement of superiority' as compared with other firms, and had a 'serious potential to mislead the consumer, since there is no objective way to verify the claim.'"; pointing to an Ohio case prohibiting lawyers from using the phrase "'passionate and aggressive advocate'").

- Ohio LEO 2005-6 (8/8/05) (holding that Ohio lawyers may not engage in a television station's "Ask the Expert" television program; finding that the term "expert" as applying to a lawyer was improper; allowing lawyers to participate in the program if the word "expert" was removed).

- At least one state has specifically prohibited lawyers from using the word "authority" when describing themselves. South Carolina Rule 7.4(b)(advertisements "shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority'").

- At least some states have indicated that a lawyer may use the term "General Counsel" in these circumstances.

- New York Rule 7.5(a)(4) ("A lawyer or law firm may be designated as 'General Counsel' or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client.").

- Ohio LEO 2009-5 (6/12/09) ("A lawyer or law firm may be listed as 'General Counsel' or similar reference on the letterhead of a client organization and may use the designation in signing correspondence written on behalf of the client organization if the lawyer or law firm represents the client organization in all or most of the client's legal matters, devotes a substantial amount of professional time to the client organization, and is given the title by the client organization. A lawyer's or law firm's designation as 'General Counsel' on the letterhead of a client organization and use of the designation in signing correspondence written on behalf of the client organization is proper under Prof. Cond. Rules 7.5 and 7.1, provided the communication is truthful -- not false or misleading or nonverifiable.").
Best Answer

The best answer to (a) is PROBABLY NO; the best answer to (b) is PROBABLY NO; the best answer to (c) is MAYBE.
Inclusion in Honorary Lists Such as "Best Lawyers in America" and "Super Lawyers"

Hypothetical 15

You have been trying to improve your firm's marketing efforts, and have asked each of your firm's lawyers to send you their individual honors and recognitions to include in various marketing brochures. Now you have to decide which honors to include in the brochures.

(a) May your marketing brochure indicate that one of your lawyers has an "AV" listing by Martindale-Hubbell?

YES

(b) May your marketing brochure indicate that one of your lawyers has been listed in "The Best Lawyers in America" and "Super Lawyers" for the last two years?

YES

(c) May your marketing brochure indicate that one of your lawyers was listed in "The Best Lawyers in America" in 1998 (but not since then)?

YES (WITH AN EXPLANATION)

(d) May your marketing brochure indicate that one of your lawyers is listed as a "Super-Duper Lawyer" by the North Reston Litigator Lunch Bunch (composed of eight lawyers)?

NO

(e) May your marketing brochure indicate that one of your lawyers received a "Life Time Achievement" Award from your law firm's public finance group?

MAYBE

Analysis

The recent increase in various honorary lawyer lists have generated debate among bars about what honors lawyers may legitimately mention in their marketing.
The difficulty comes from determining the legitimacy of the group honoring the lawyer, and the completeness of the lawyer's reference to that honor.

(a) For many years, Martindale-Hubbell provided the main (if not the only) rating system for lawyers. Courts have therefore recognized lawyers' ability to boast of a high Martindale-Hubbell "AV" rating. See, e.g., Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000).

As in other areas of lawyer marketing, the use of new technology has had an impact. One state bar has held that a list of specializations in Martindale-Hubbell did not have to be accompanied by a required disclaimer while Martindale-Hubbell was in print form only (and thus primarily directed to lawyers), but did have to be accompanied by the disclaimer now that Martindale-Hubbell is available on-line (and thus available to the general public). Tennessee LEO 99-F-144 (6/14/99).

(b) Bars have struggled with new lawyer lists that have sprung up in recent years -- especially "The Best Lawyers in America" and "Super Lawyers."

The obvious question is whether these lists represent legitimate peer honors, or haphazard collections of names put together largely to sell advertising space, plaques, etc. to those lucky enough to be picked.

At least two courts have struggled with this issue. In Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614 (E.D. Va. 2003), a well-known plaintiffs' personal injury law firm successfully sought a preliminary injunction barring the Virginia State Bar from enforcing a prohibition on the law firm's use of the following phrase in its marketing (which followed an accurate reference to three of the firm's lawyers receiving "The Best Lawyers in America" honors):
"[C]all the lawyers other lawyers have called the best. Allen, Allen, Allen and Allen. The strength of family. The best in personal injury."

Id. at 618. Not surprisingly, the complaint about the advertisement came from "five competitors of the Allen firm." Id. at 619. Despite the Virginia Bar's efforts to show that it did not immediately intend to enforce its ban on such language, the court entered a preliminary injunction.

The Virginia Bar ultimately resolved its disputes with the Allen firm, and issued an advertising opinion allowing references to individual lawyers' inclusion in "The Best Lawyers in America" list -- but prohibiting the law firm from bragging about itself, and also requiring additional disclosure if the lawyer has been "de-listed" by such publication. Virginia Adver. Op. A-0114 (8/26/05) ("Lawyers may advertise the fact that they are listed in a publication such as The Best Lawyers in America."); noting the process under which the list is compiled; also noting that "[t]here is no financial benefit or quid pro quo of any kind between the listed lawyer and the publisher of The Best Lawyers in America"; also noting that the "publication enjoys respect from bar leaders and can be found in most law school libraries, and in numerous city, county and court libraries and libraries maintained by private law firms"; warning that "[i]f, for whatever reason, a lawyer is de-listed by a publication such as The Best Lawyers in America, the statements or claims in the advertisement must accurately state the year(s) and/or edition(s) in which the lawyer was listed"; holding that a lawyer rated as "A.V." in Martindale-Hubble "may properly include the descriptive characterization that 'A.V.' represents 'the highest rating' that particular service assigns"; warning that lawyers must be careful how they use their inclusion in The Best Lawyers in America list; "For
example, as noted above, although an attorney may properly characterize inclusion in
the reference work *The Best Lawyers in America* by stating that he or she is among
those lawyers 'whom other lawyers have called the best,' an attorney may not properly
characterize their inclusion with such statements as 'since I am included in the book,
that means that I am in fact the best lawyer in America.' Attorneys must also use care in
crafting language for advertising so as not to impute the credentials bestowed upon
individual attorneys to the entire firm. For example, a law firm cannot make statements
or claims that imply or suggest that the law firm has been rated 'the best' in a practice
area simply because some lawyers in the firm have been included in the publication *The
Best Lawyers in America.* Such a statement or claim is also prohibited because *The
Best Lawyers in America* only rates and lists individual lawyers, not law firms.

Thus, the Virginia Bar pointed to the fact that "The Best Lawyers in America"
publication "enjoys respect from bar leaders." The Virginia Bar did not explain how it
could distinguish between a legitimate group like "The Best Lawyers in America" and an
illegitimate group which could not be given the same respect.

Several years later, New Jersey wrestled with the same basic issue. The New
Jersey Bar originally prohibited lawyers from listing their inclusion in "The Best Lawyers
in America" list -- or even participating in the selection process. The New Jersey
Supreme Court relied on constitutional principles to reject the bar's prohibition.¹

¹ *In re Comm. on Attorney Adver.*, 961 A.2d 722, 725, 729, 728 (N.J. 2008) (rejecting an earlier
conclusion by the New Jersey Committee on Attorney Advertising that New Jersey lawyers could not
advertise that they were selected for lists of lawyers such as the *Best Lawyers in America*; agreeing with
the Special Master that such advertisement should be judged as commercial speech; "In commercial
speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the
expression is protected by the First Amendment. For commercial speech to come within that provision, it
at least must concern lawful activity. Next, we ask whether the asserted governmental interest is
substantial. If both inquiries yield positive answers, we must determine whether the regulation directly
Like the Virginia Bar, the New Jersey Supreme Court limited its conclusion to honors conferred by "a legitimate professional organization with verifiable criteria that are available to consumers" -- but did not carefully define how to make such a determination. The New Jersey Bar eventually amended its rules to allow such marketing under certain conditions (discussed below).

More recently, states have taken one of four basic approaches.

First, some bars permit lawyers to boast about their inclusion on such lists.

- Illinois Rule 7.4(c)(1)-(2) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.").

- Iowa LEO 07-09 (10/30/07) (holding that the peer review process undertaken by Best Lawyers in America and by Super Lawyers satisfies Iowa's standards for such ratings, and allowing Iowa lawyers to include in their marketing and advertisements their inclusion on such lists).

- Tennessee LEO 2006-A841 (9/21/06) (not for publication) ("[L]aw firms and lawyers are permitted to advertise the facts that certain lawyers have been selected by and listed within the above publications, as long as the lawyers

advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (citation omitted); listing various "components" of acceptable advertising, such as "[t]he advertisement must state the year of inclusion in the listing as well as the specialty for which the lawyer was listed": noting the Special Master's Report concluded that "state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine. Clearly, mere consumer unfamiliarity with a privately conferred honor or designation does not establish that advertising such honor or designation is actually or inherently misleading so long as the honor or designation is actually issued by a legitimate professional organization with verifiable criteria that are available to consumers."; recommending that New Jersey redraft its lawyer advertising rules to reflect the court's conclusions).
do not go further and refer to themselves subjectively as "super" or "the best" on the basis of such designations contained within these publications.

Second, at least one state has allowed lawyers to boast of their inclusion, but "recommended" that the lawyer also explain the criteria used by the organization.

- Michigan LEO RI-341 (6/8/07) (holding that Michigan lawyers may advertise their designation as a "Super Lawyer"; explaining the factors used to determine legitimacy of an organization whose selection of the lawyer can be advertised by the lawyer; "We agree with these opinions that pertain to publications that rate or certify lawyers, all of which place some importance on the presence of certain factors or conditions. These are: 1. The rating or certifying organization has made inquiry into the lawyer's qualifications, and considered those qualifications in selecting the lawyer for inclusion. 2. The rating or certification is issued discriminately. In the case of Super Lawyers, listing is limited to the top 5% of lawyers in the state measured by a selection system uniformly applied. 3. The rating or certification is not issued for a price; it may not be bought or conditioned on purchase of a book, plaque or other goods. 4. The rating or certifying organization provides a basis on which a consumer can reasonably determine how much value to place in the listing or certification. 5. The basis of selection should be verifiable. That is, if peer review is claimed, it should be verifiable that it was conducted. This factor does not preclude subjective evaluation of the information about the lawyer by the rating or certifying organization. It is recommended by some that the lawyer include in his advertising a reference where the reader can ascertain the standards for inclusion. 6. The lawyer may state truthfully that he is listed in the specific publication (e.g., '2006 Super Lawyer, Super Lawyers Magazine'), and that he is thus included among those whom other lawyers have called the best; but may not state that because he is so listed, he is the best, or super. 7. If the lawyer is delisted, he must limit his claim to listing to the editions or years of the listing."; explaining that an organization need not use a peer review process; "Other bar opinions have noted the existence of peer review in the process of selection, but we cannot say that is a required factor in advertising listing in a publication. Peer review would permit a statement that the lawyer has been considered as a 'super lawyer' by other lawyers, but is not essential to advertising a listing in a publication that has satisfied the research and evaluation criteria expressed."; expanding the reasoning to other similar designations; "[W]e conclude a lawyer who is listed as a 'Super Lawyer' in that publication may refer to such designation in advertising that otherwise complies with MRPC 7.1. However, we believe that such a limited opinion would not adequately provide guidance to the bar. Accordingly, the opinion we express herein applies to listings and certifications that meet the conditions expressed, which would include (by example and not limitation) Martindale Hubbell, Who's Who, Best Lawyers and Chambers, as well as Super Lawyers.

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Michigan's LEO provides perhaps the best example of how a bar should determine the legitimacy of the entity preparing the lawyer list.

Third, New Jersey (whose experience is discussed above) allows lawyers to tout their inclusion on such lists -- as long as the "standard or methodology" is available to public inspection.

- New Jersey Rule 7.1(a)(3) (defining as "false and misleading" a statement which "compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; explaining in an official Comment adopted on November 2, 2009 that "[a] truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.").

Fourth, several bars have required (not just recommended) that a lawyer's reference to inclusion on such a list explain the criteria.

- Pennsylvania LEO 2005-125 (9/2/05) ("You have inquired on your law firm's behalf whether a proposed form of advertisement featuring four of your law firm's lawyers complies with the Pennsylvania Rules of Professional Conduct. The advertisement refers to the "Super Lawyers" designation published under the auspices of Law & Politics and Philadelphia Magazine. The proposed form of written advertisement consists of four paragraphs, with some background on the law firm and a quotation from a named partner noting that it is "an honor" to have received the Super Lawyers designation. With respect to the background information concerning the designation, the advertisement explains that those lawyers so designated were named after a legal publication mailed over 36,000 ballots to Pennsylvania lawyers who have been in practice for at least five years. The ballots asked the lawyers to name the best lawyers they had personally observed in action. A blue ribbon panel was then formed to review each individual lawyer's reputation and professional record. Super Lawyers were then chosen from this group").
Philadelphia LEO 2004-10 (12/2004) ("It is the opinion of the Committee that, although an attorney advertisement may state that an attorney has been designated a 'Super Lawyer,' it may only do so when the advertisement contains sufficiently detailed information about that process and criteria for the reader to whom the advertisement is directed, to determine the manner and context within which the designation was made. Blanket statements that do not provide accurate and sufficient contextual information concerning ratings or other similar appellations do not comply with the Rules of Professional Conduct, currently and as amended January 1, 2005. ").

Thus the trend has clearly been in favor of permitting lawyers to market their inclusion on the best-known lawyer lists.

(c) Several state bar opinions (and the most recent opinions) have required that lawyers explicitly provide additional information about their inclusion on a lawyer list -- such as the area of law and the years of inclusion.

Alaska LEO 2009-2 (5/5/09) ("A lawyer does not act unethically in advertising his or her selection or ranking in a commercial publication, including Super Lawyers and Best Lawyers of America, so long as the complete context is provided -- meaning that the lawyer's advertising must state accurately the publication by which he or she was ranked, the year of the ranking, and the field of the ranking, if one was specified. . . . A lawyer's mentioning his or her ranking or selection by a professional publication does not violate Rule 7.2, so long as the lawyer did not pay to be selected. Super Lawyers, Best Lawyers IN America, Chambers, and Martindale-Hubbell do not charge a lawyer to be ranked. They may charge a lawyer to be listed or to advertise in the publication, and paying for such a listing or advertisement is not prohibited." (emphasis added)).

North Carolina LEO 2007-14 (1/25/08) ("The Ethics Committee therefore concludes that an advertisement that states that a lawyer is included in a list in North Carolina Super Lawyers, or in a similar listing in another publication, is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied; to wit: (1) the publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing; (2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication's website is adequate if the standards are published therein); and (3) no compensation is paid by the lawyer, or the lawyer's firm, for inclusion in the listing."; "In addition, the advertisement must
make clear that the lawyer is included in a listing that appears in a publication which is identified (by using a distinctive typeface or italics) and may not simply state that the lawyer is a 'Super Lawyer.' A statement that the lawyer is a 'Super Lawyer,' without more, implies superiority to other lawyers and is an unsubstantiated comparison prohibited by Rule 7.1(a). Finally, since a new listing is included in each annual edition of the Super Lawyers supplement and magazine (and, it is presumed, in other similar publications), the advertisement must indicate the year in which the lawyer was included in the list." (emphasis added)).

- Delaware LEO 2008-2 (2/29/08) ("It is permissible for a lawyer to advertise that she has been designated a 'Super Lawyer' or 'Best Lawyer' as long as the lawyer states the year and particular specialty or area of practice of the designation and the advertising otherwise remains within the bounds of Rules 7.1, 7.2 and 7.3." (emphasis added)).

(d) Every state presumably would prohibit lawyers from referring in their marketing to inclusion on the list of an obviously illegitimate group.

(e) No bar seems to have dealt with lawyers' mention of honors given by their own law firms. Bars presumably would permit such references for lawyers working at well-known firms, but might well balk at similar marketing by less well-known law firms.

**Best Answer**

The best answer to (a) is YES; the best answer to (b) is YES; the best answer to (c) is WITH AN EXPLANATION YES; the best answer to (d) is NO; the best answer to (e) is MAYBE.
Past Successes

Hypothetical 16

You have enjoyed a successful and varied career as a commercial litigator. Your firm’s new marketing director wants to highlight your experience both in firm brochures and on your firm’s website.

May you do the following as part of your firm's marketing efforts (assuming that the descriptions are accurate):

(a) Describe one of your cases (in which you represented a plaintiff) as resulting in the “largest verdict in the history of the state”?

MAYBE

(b) Describe some of your successful jury trial results?

MAYBE

(c) List all of your litigation wins and litigation losses?

MAYBE

(d) Link to judicial decisions in a number of cases in which you were successful?

MAYBE

(e) Describe some transactions that you have successfully handled?

MAYBE

Analysis

States generally frown on any marketing that describes past successes. Bars' analyses of such advertisements are interesting, because they discuss the ways in which a completely accurate statement about some case result nevertheless may mislead potential clients. The bars reason that such admittedly truthful
advertisements might mislead potential clients because the large judgment might have actually fallen short of a pre-trial settlement offer from the adversary, the judgment was obtained against a defendant who cannot pay it, etc. In addition, the bars worry that potential clients might expect the same results in their cases, even though the factual context could be dramatically different from the advertised cases.

In contrast, the ABA Model Rules deleted ABA Model Rule 7.1(b), which prohibited statements that are “likely to create an unjustified expectation about results the lawyer can achieve.” In its place, the ABA Model Rules now contain Comment 3, which explains that

> [a]n advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. . . . The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.


Thus, the ABA has moved away from a total prohibition on lawyers describing their past successes. This softening of the ABA’s position might ultimately be reflected in state bars’ approach, but for now most bars continue to take a very strict view of advertisements that describe a lawyer’s past successes.

This debate obviously has constitutional implications. For instance, in January 2011, the Fifth Circuit found unconstitutional a Louisiana rule prohibiting any marketing statements providing factual descriptions of a lawyer’s past successes.
- Public Citizen Inc. v. La. Attorney Disciplinary Bd., No. 09-30925, 2011 U.S. App. LEXIS 1922, at *18, *19, *21 (5th Cir. Jan. 31, 2011) ("Rule 7.2(c)(1)(D) prohibits communications 'containing a reference or testimonial to past successes or results obtained.' The plain language of this rule imposes a blanket ban on all references or testimonials to past results in attorney advertisements."); providing an example of such prohibitive statements: "A statement that a lawyer has tried 50 cases to a verdict, obtained a $1 million settlement, or procured a settlement for 90% of his clients, for example, are objective, verifiable facts regarding the attorney's past professional work."; finding the total ban unconstitutional; "Rule 7.2(c)(1)(D) prohibits statements 'of opinion or quality and . . . [those] of objective facts that may support an inference of quality.' (citation omitted); "To the extent that Rule 7.2(c)(1)(D) prevents attorneys from presenting 'truthful, non-deceptive information proposing a lawful commercial transaction,' it violates the First Amendment." (citation omitted)).

(a)-(b) States take one of four basic approaches to marketing that describes a lawyer's past successes.

First, some states flatly prohibit any marketing that describes past successes.

- Florida Rule 4-7.2(c)(1)(F) ("A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it . . . contains any reference to past successes or results obtained.").
- Connecticut LEO 88-3 (2/25/88) (prohibiting advertisement that contains a news article about a specific jury award in a personal injury case).
- Nassau County LEO 86-39 (9/11/86) (prohibiting reference in an advertisement to "a certain number of successful previous representations of defendant clients," because the statistic is deceptive).

Second, some states permit lawyers to describe their past successes, but require specific disclaimers.

- Mo. Rules of Prof'l Conduct R. 4-7.1(c) (2006) (allowing lawyers to describe past results, as long as they also include a disclaimer "that past results afford no guarantee of future results and that every case is different and must be judged on its own merits").
- New York Rule 7.1(e)(3) (requiring a disclaimer that "[p]rior results do not guarantee a similar outcome.").
Virginia Rule 7.2(a)(3) (prohibiting an advertisement which "advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.").

Third, some states permit lawyers to describe their past successes, but insist that they put the successes in context (without demanding a specific disclaimer).

Georgia Rule 7.1 cmt. [2] ("Communications Concerning a Lawyer's Services of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.").

North Carolina LEO 2009-6 (7/24/09) ("The consumer of legal services benefits from the dissemination of accurate information in choosing legal representation. See D.C. Legal Ethics Comm., Op. 335 (2006). Lawyers also benefit from the dissemination of accurate information when seeking to enlist the aid of co-counsel in a particular matter. A consumer researching law firms on the Internet expects a law firm's website to include information about the firm's past successes, and many firm websites currently include a 'verdict and settlements' section. The law firm's duty is to provide that information to the consumer without creating an unjustified expectation about the results the lawyer can achieve. However, the requirements set out in 2000 FEO 1 [earlier North Carolina LEO] may be so burdensome that they discourage lawyers from providing any information about verdicts and settlements and thereby effectively prevent consumers from getting helpful information. Therefore, a website may include a 'case summary' section if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a). Some of the required disclosures set out in 2000 FEO 1 should be included in the case summary section of the website. The summary should reference the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment. Providing specific information about the factual and
legal circumstances of the cases reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that the webpage is likely to create unjustified expectations or otherwise mislead a prospective client.

- North Carolina LEO 2000-1 (4/14/00) (holding that a law firm’s web page must comply with the marketing rules; “To put a verdict record in context, information about the lawyer’s or law firm’s record must include disclosure of the following: the lawyer’s or firm’s history of obtaining unfavorable, as well as favorable, verdicts and settlements; the lawyer’s or firm’s success in actually collecting favorable verdicts; the types of cases handled and their complexity; whether liability and/or damages were contested; and whether the opposing party or parties were represented by legal counsel. In addition, the verdict record must disclose the period of time examined. Finally, the communication must include a statement that the outcome of a particular case cannot be predicated upon a lawyer’s or law firm’s past results.”; “If information to be disclosed is voluminous, the communication may state that list of all cases handled by the lawyer or law firm during a disclosed time period, including the required background information and explanation, will be mailed free to charge upon request. However, the availability of such a mailing does not relieve the lawyer or the law firm of the obligation to provide a context in an advertisement or communication if it contains any reference to a verdict record.”; “In the instant inquiry, Law Firm’s web page appropriately discloses that most of its cases were defended, that the cases involved complex medical issues, that all verdicts obtained were collected, and that past success is not a predictor of future success in any particular case.”; "However, subjective statements, such as references to Law Firm as 'enormously successful' and 'consistently obtaining verdicts and settlements' as well as the statement that Law Firm’s verdicts and settlements are 'among the largest reported in North Carolina each year,' are misleading. Although Law Firm has made an effort to avoid creating unjustified expectations, the web page does not provide enough explanation of Law Firm's record to avoid misleading a visitor to the website. Providing a complete record by mail, disclosing the number of cases handled each year, the number of favorable and unfavorable settlements obtained, and the time frame examined, are necessary to bring the web page into compliance with the requirements of the Revised Rules of Professional Conduct.”).

- North Carolina LEO 99-7 (7/23/99) (prohibiting a lawyer from including the following paragraph in targeted direct letters to traffic accident victims: "If you need a lawyer to represent you in connection with your recent accident, look no further. Our firm has obtained jury verdicts and settlements for individual clients in excess of $1,000,000.00. Although there is no guarantee of any recovery in your case, we will provide you with aggressive and comprehensive legal services to protect your rights and interests and maximize your chances of recovery.”; explaining that "Rule 7.1 of the Revised Rules of Professional Conduct prohibits a lawyer from making a false or
misleading communication about the lawyer’s services. Paragraph (b) of the rule defines a false or misleading communication, in part, as a communication that ‘is likely to create an unjustified expectation about the results the lawyer can achieve. . . .’ Comment [1] to the rule specifies that the prohibition in paragraph (b) ‘would ordinarily preclude advertisements about the results obtained on behalf of the client, such as the amount of damage award or the lawyer’s record in obtaining favorable verdicts. . . .’ A general representation about past results without additional information that puts the past results in context is misleading. In the direct mail letter in this inquiry, the statement that ‘there is no guarantee of any recovery in your case’ is not sufficient to mitigate the unjustified expectations created by the advertisement of jury verdicts proscribed by the comment to Rule 7.1.”).

Fourth, some states follow the ABA approach, which generally allows lawyers to describe past successes unless their reference would otherwise violate the anti-deception standards.

- Illinois Rule 7.1 cmt. [3] ("An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.”).

(c) Although it is difficult to imagine why any bar would prohibit a lawyer from providing a full and accurate list of all wins and losses, the Ohio Bar prohibited a lawyer from doing so.

- Ohio LEO 2003-2 (4/11/03) ("A law firm would like to provide attorneys, business clients, and potential business clients with statistics as to the number of intellectual property matters won, lost, and settled by the law firm. The law firm’s statistics would include all results, unfavorable as well as favorable, for the last eleven years for intellectual property matters. The statistical report would include a statement that the statistics are historical data, not predictors of the future outcome of any particular case." (emphases added); "the Board advises that the proposed listing of statistics as to the
number of intellectual property matters won, lost, and settled by a law firm, is also improper under the advertising rules. First, the reporting of 'wins' and 'losses' in intellectual property is misleading. Such statistics imply that wins and losses depend solely upon the law firm's skill and expertise, without regard to the merits that may more heavily influence the outcome. Second, the proposed use of the statistics is self-laudatory. Although, the statistical report clearly states that the data is historical data and not a predictor of future outcome of a particular case, the report creates unjustified expectations that the law firm is able to control the outcome of cases." (emphasis added)).

(d) Although it might not make sense for a state bar to prohibit a lawyer from advertising specific results of cases while allowing the lawyer's website to link to published decisions reflecting the results of those cases, the Ohio Bar indicated that "[a] law firm's web site may provide a link from an attorney's biography to published opinions of cases in which such attorney participated." Ohio LEO 2000-6 (12/1/00) (emphasis added).

(e) Although some states limit their prohibition to "case results" (presumably litigation), a Florida rule specifically prohibits any communication that "contains any reference to past successes or results obtained" -- presumably transactional results. Florida Rule 4-7.2(c)(1)(F) (emphasis added).

Best Answer

The best answer to (a) is MAYBE; the best answer to (b) is MAYBE; the best answer to (c) is MAYBE; the best answer to (d) is MAYBE; the best answer to (e) is MAYBE.
Referral Arrangements

Hypothetical 17

Several years ago, you moved from a large city big firm practice to a much smaller firm located in the town where you were born and raised. In addition to what you see as lifestyle advantages, you think that the move will allow you to market your services by calling upon your relationships with childhood friends who now enjoy prominent positions in many professional service firms in your hometown. Because you never had to confront marketing issues like this in your previous big-city practice, you want to make sure that you do not violate any ethics rules in taking such steps.

May you do the following:

(a) Establish an informal referral arrangement (without any written agreement or obligation on either side) with a financial planner you have known since childhood?

YES

(b) Arrange a formal "referral agreement" under which you agree to refer your legal clients to a small accounting firm managed by a high school classmate, with the accounting firm agreeing to refer to you any of its clients requiring legal advice?

NO (PROBABLY)

(c) May your law firm add its name to a for-profit Internet "referral service" that lists lawyers practicing in certain substantive areas?

MAYBE

(d) If so, may you pay the Internet "referral service" based on the number of "hits" on your website?

MAYBE

Analysis

A number of bars have analyzed the type of referral arrangements that pass ethical muster.
Informal referrals between lawyers and non-lawyers have undoubtedly existed as long as there have been lawyers. Of course, lawyers must refer their clients to others (either lawyers or non-lawyers) who will provide the best service to the clients in the situation -- even if those other service providers never return the favor by referring any business back to the lawyer.

The ABA rules permit lawyers to refer clients to another lawyer or non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and the nature of the agreement.

ABA Model Rule 7.2(b)(4).

Most bars are fairly generous in addressing such informal referral arrangements.

- Illinois Rule 7.2(b)(4)(i)-(ii) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.").

- Rhode Island LEO 96-25 (9/12/96) (allowing a lawyer to join what is called a "Leads Group" under certain conditions: "Therefore the inquiring attorney may participate in such a group as long as referring prospective clients to the attorney is not the sole purpose of the group, the attorney does not accept referrals from members in exchange for the attorney's referring his/her clients to other members, the attorney does not solicit members of the group, and there are no improper fee-sharing or referral payments involved in the arrangement.").

- Maine LEO 135 (11/10/93) (allowing a lawyer to join a non-profit national network of mortgage foreclosure lawyers who periodically meet, discuss matters of mutual interest, and prepare a network directory).
In contrast to the informal referral situation discussed above, state bars condemn any kind of formal referral arrangement with an explicit or implicit quid pro quo.

- Virginia LEO 1846 (2/2/09) (explaining that lawyers may not join a lead-sharing organization in which membership "is often dependent on the number of leads a member passes," because such "reciprocal" referrals amounts to a "quid pro quo payment for services" in violation of the prohibition on providing something of value in return for a referral; such participation "may put the client's interests at risk" because the lawyer "may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs"; the lawyer faces a personal conflict of interest because the lawyer may not feel free "to choose the most appropriate specialty provider for a client"; "[t]he mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client."; also explaining that a lawyer may own an interest in a company that is such a lead-sharing organization "as long as the lawyer is not a member."; noting that lawyers may also engage in voluntary referrals to other lawyers and professionals, but may not join "a hypothetical organization which bases membership on the commitment to provide referrals.").

- Massachusetts LEO 08-01 (3/6/08) ("A lawyer may not participate in a private business networking organization that requires members to cross-refer potential clients to one another. Under Rule 7.3(f), a lawyer may not 'give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client,' provided that he or she may 'request[] referrals from a lawyer referral service operated, sponsored, or approved by a bar association' or 'cooperat[e] with any qualified legal assistance organization.' A for-profit business networking organization, however, is not an authorized 'lawyer referral service' or a 'qualified legal assistance organization' for purposes of the Massachusetts Rules of Professional Conduct, and a lawyer's commitment to provide business referrals to other organization members in return for their agreement to refer potential clients to him or her represents the 'giv[ing] . . . of value' to those other members in contravention of Rule 7.3(f).").

- North Carolina LEO 2006-7 (10/20/06) ("[A] lawyer may participate in a networking organization, such as the one described in this inquiry, only if making referrals to other members of the organization is not a condition of membership and the lawyer is not required to fill out referral 'tickets.' If the lawyer refers a client to another member of the organization, he may only do so upon receiving the informed consent of the client, and after determining that the client would benefit from the referral, the other member's credentials"
are legitimate, and the other member is qualified to provide services to the client. The lawyer is prohibited from making a referral to another member of the organization on a quid pro quo basis. The lawyer must emphasize to the other members of the organization that any referral to him should be based upon the member's independent analysis of his qualifications.; answering further questions with fairly restrictive answers: "May Attorney provide his/her business cards to other members for distribution to third parties? . . . No, because of the risk of in-person solicitation by the other members on the lawyer's behalf. . . . May Attorney ask other members to refer business to Attorney? . . . No. However, Attorney may provide the other members with information about his qualifications.").

- New York LEO 791 (2/1/06) ("A lawyer may not participate in an organization that requires the lawyer to refer potential clients or customers to other lawyers or to nonlawyer members in exchange for their referral of legal business, or charges membership fees and other fees and requires nonlawyer members to refer potential clients to the lawyer.").

- Maryland LEO 05-11 (3/21/05) (holding that Maryland lawyer may not join a "networking and referral organization" consisting of "various professionals and business people who seek to obtain referrals and learn marketing techniques"; noting that the referral organization earns a profit through annual membership fees; also noting that there are no required referrals, no quotas and no "quid pro quo" referrals; holding that "[a]rrangements of this nature create undisclosed conflicts of interest, compromise an attorney's professional independence and risk violation of the rule prohibiting in-person solicitation"; noting that lawyers cannot engage in in-person solicitation of clients and therefore would not be able to pass around their business cards to others in the organization; also finding that the proposed arrangements would involve lawyers giving "something of value" in return for a referral, because the organization "clearly promotes the concept of "[y]ou distribute my cards, and I'll distribute yours").

- Ohio LEO 2004-9 (10/8/04) (prohibiting a lawyer from entering into "an agreement with the chiropractor for mutual referral of clients"; explaining that the lawyer and the chiropractor can refer clients to each other, but indicating that "there be no mutual referral agreements, no rewards or compensation for recommendations or referrals, and no improper self-recommendation of legal services").

- New Jersey LEO 694 (11/3/03) (prohibiting two law firms from using the term "affiliated" because it is misleading; forbidding the two firms from entering into an agreement for mandatory referrals; explaining that reciprocal fee sharing would be unethical absent client consent; noting that the sharing of facilities by the two firms might create confidentiality problems).
Montana LEO 960227 (1996) (prohibiting a lawyer from joining what is described as a "network group" because "the referrals or 'leads' exchanged among members of the group [are] things of value which are given by one member to another who recommends his services. . . . Referrals are valuable to this scheme, where 'backscratching' is both compulsory and profitable.").

New Jersey LEO 681 (7/17/95) (prohibiting a U.S. law firm from entering into an arrangement with a foreign law firm in which each firm pledges to use its best efforts to promote the other and refer clients to the other, with fees divided in proportion to the work performed by each firm under a specified formula; finding that such a system of mutual referrals may satisfy the fee-sharing provisions but amounts to an impermissible rewarding for a recommendation).

(c) Lawyers can participate in approved non-profit referral services.

However, a number of states have prohibited lawyers from participating in for-profit referral services.

Kentucky LEO E-429 (6/17/08) (holding that Kentucky lawyers may not participate in a for-profit referral service that matches clients with lawyers or refers clients to lawyers).

Washington LEO 2106 (2006) (holding that an Internet referral service would violate various ethics rules if it indicated that the lawyers listed on the service had been "verified" and had a "superior professional background").

Arizona LEO 06-06 (9/2006) ("An online service that matches prospective clients with potential lawyers based on the appropriate geographic and practice areas, makes representations about the qualifications of its member lawyers, and provides a monetary satisfaction guarantee, is a 'lawyer referral service' within the meaning of ER 7.2(b). Unless the service is a non-profit service or is approved by an appropriate regulatory authority, Arizona attorneys may not pay a fee to participate.").

Texas LEO 561 (8/2005) (holding that Texas lawyers may not pay a fee to an Internet service that forwards client information to certain lawyers or recommends certain lawyers, and which has not been approved by the Texas bar).

Iowa LEO 00-07 (12/5/00) (holding that Iowa lawyers may not participate in an Internet referral service that collects information from potential clients and forwards it to certain lawyers on the list (and who pay to be on the list)).
(d) Because an increasing number of consumers use the Internet to search for professional services, a number of bars have addressed ways in which law firms can participate in "referral services" operated by Internet companies.

The cardinal principle must of course be to avoid any false or misleading statements or implications. For instance, it would be improper for Internet referral sites to imply that lawyers were selected for participation based on their skill or reputation, if in fact lawyers were allowed to add their names to the referral service simply by paying a fee.

- New Jersey LEO 36 (12/26/05) (holding that New Jersey lawyers may participate in an Internet service that lists lawyers, and limits the number of lawyers in each geographic area -- as long as the service contains "a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that "all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.").

Determining the ethical propriety of payments to such Internet referral site requires a more complex analysis. Several states' legal ethics opinions have dealt with this issue.

- District of Columbia LEO 342 (11/2007) ("Lawyers may participate in both not-for-profit and for-profit lawyer Internet-based referral services where the services require a flat fee for participation, a flat fee for transmitting the lawyer's name to a potential client, and/or a flat fee for every client secured as a result of a referral."); noting that D.C. Rule 7.1 does not share the ABA Model Rule's limitation of the payment of fees only to not-for-profit or otherwise "qualified" lawyer referral services).

- Oregon LEO 2007-180 (11/2007) (holding that a lawyer may pay an Internet advertising service by the "hits" on the Internet, but not based on referrals that the lawyer receives; "In the context of advertising, Oregon RPC 5.4 thus precludes a lawyer from paying someone, or a related third party, who advertises or otherwise disseminates information about the lawyer's services based on the number of referrals, retained clients, or revenue generated from the advertisements. By contrast, paying a fixed annual or other set periodic
fee not related to any particular work derived from a directory listing, violates neither RPC 5.4(a) nor RPC 7.2(a). A charge to Lawyer based on the number of hits or clicks on Lawyer’s advertising, and that is not based on actual referrals or retained clients, would also be permissible.

- Washington LEO 2106 (2006) (holding that a lawyer may not participate in a legal marketing plan operated by a company which describes itself as an "attorney/client matching service" rather than a referral service; pointing to various other states’ legal ethics opinions in concluding that "it appears that the Company’s system is a referral service. In particular, the ‘verified’ attorneys are recommended above others, a logo appears next to their profile, and their responses are presented above those from ‘standard’ attorneys. Thus, the Company makes ‘subjective judgments,’ and provides more than ‘ministerial services.’"; holding that the process violates the ethics prohibition on a lawyer making payment for a referral).

- New York LEO 799 (9/29/06) ("Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client’s problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact."; finding that the arrangement amounted to an improper lawyer referral service; finding that the arrangement would not constitute improper solicitation if both the potential client specifically has to check a box in order to "authorize telephone contact" by a lawyer).

- Arizona LEO 05-08 (7/2005) ("A lawyer may not pay to participate in the for-profit client/attorney internet matching service described in this opinion (referred to hereinafter as "the Service") because the Service substantially functions as, and holds itself out as, a referral service and because the information presented by the Service on behalf of participating lawyers is materially misleading"; explaining that "[t]he home page of the Service web site states that a prospective client will provide information just as he or she would during an initial consultation with an attorney and that this information will be sent to lawyers in the specific practice areas and geographic locations selected by the prospective client. The prospective client is also told that the participating lawyers are licensed and in good-standing with their state bars. They are not told that lawyers pay a substantial sum of money to participate."; finding that Arizona rules prohibit a lawyer from paying a for-profit entity for a referral; explaining that Arizona had earlier approved a slightly different arrangement: "In Ariz. Op. 94-04, this Committee approved payment to a for-profit program that shared some of the characteristics of the Service. That program charged a one-time fee to participating lawyers and referred inquiring potential clients to a participating lawyer or lawyers in their geographic area. That program differed from the Service in that a
subscription fee was paid by participating organizations, such as unions, that entitled their members to use the program, the program derived its profits from these subscription fees, and lawyers discounted their fees to members. The reason that we approved this program, however, is no longer valid. In so doing, we applied former ER 7.1, which unlike the present version of ER 7.2 did not proscribe payment to a for-profit referral service unless the service is approved by an ‘appropriate regulatory authority,’ see ER 7.2(b)(2), ER 7.1(r)(4) (1994). The determinative inquiry under the present version of the Ethical Rules is whether the for-profit entity is a referral service." (footnote omitted); disagreeing with North Carolina LEO 2004-1, which held that an online case matching system was not a referral service "because it provides the client with the kind of information and options provided by a lawyer directory along with what could be seen as a referral"; holding that "[a]lthough the Service provides the sort of information found in a lawyer directory, this does not cure the fact that the Service both functions and holds itself out as a referral service. Substantial appearance of impropriety remains because the Service suggests that it is unbiased and client oriented when, in fact, it is profit motivated and a lawyers’ primary qualification to participate is a willingness to pay a substantial fee."; also finding that the website was misleading because "it fails to disclose that lawyers pay a substantial fee to participate in the Service").

- Rhode Island LEO 2005-01 (2/24/05) (allowing lawyers to participate in an Internet site called "LegalMatch.com"; noting that the annual fee "is not a percentage of, or otherwise linked to, a participating attorney’s legal fees"; also noting that "[t]he proposed arrangement is not a referral service. LM.com does not recommend, refer, or electronically direct consumers, i.e. potential clients, to a specific attorney; and all requests for legal services by consumers are accessible to every attorney who registers to receive them. After viewing the various advertisements on the website, or upon receiving a lawyer’s reply to a request for legal services, a consumer contacts a participating attorney directly. Attorney-client relationships are established off-line and without LM.com’s participation. On the basis of these facts therefore, the annual membership fee does not appear to the Panel to be a payment ‘for recommending the lawyer’s services’ prohibited by Rule 7.2(c)."; finding that the membership fee was a cost of advertising).

- North Carolina LEO 2004-1 (4/23/04) ("A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity”; "A participating lawyer is charged a one-time registration fee that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An annual fee is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. The amount of the annual fee varies by lawyer based on a number of components, including the lawyer’s current
rates, areas of practice, geographic location, and number of years in practice."; "Only participating lawyers can access the information posted by a prospective client on the website. A local participating lawyer who is interested in a posted case may list his qualifications and send the prospective client an offer message setting forth an explanation of the services he can provide and his qualifications. The prospective client can review offer messages from lawyers and learn more about these lawyers by reviewing the company's on-line lawyer profiles and consumer rating information. If a lawyer has a website, the prospective client may also visit it. Using this information, the prospective client selects a lawyer and contacts the lawyer at which time the prospective client reveals his identity."; a lawyer may participate in this service, provided there is no fee sharing with the company in violation of Rule 5.4(a), and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user. This on-line service has aspects of both a lawyer referral service and a legal directory. On the one hand, the on-line service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers' qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation."; "It appears that the on-line service satisfies all of the conditions of Rule 7.2 except that it is operated for a profit, potential clients are charged a fee if they chose the priority service, and the website does not include a statement on how the names of all participating lawyers may be obtained."; "[T]he potential harm to the consumer of a pure lawyer referral service is avoided because the company does not decide which lawyer is right for the client.").

- South Carolina LEO 01-03 (6/1/01) (approving an arrangement under which a lawyer made payments to the company operating an Internet referral website "based either on a set monthly or yearly fee or based on the number of hits or referrals from the service to the lawyer," although the lawyer could not actually pay the company a portion of the fees received from the clients; analogizing such result-based payments to different advertising charges based on proven market penetration and coverage; holding that the arrangement was proper only if the website was open to all lawyers; indicating that the ethics rules would prohibit a for-profit referral service that limited the number of lawyers listed under specific subject matters; citing that Nebraska and the Association of the Bar of the City of New York have taken the same position on this issue).
Maryland LEO 2001-03 (5/16/01) (prohibiting an arrangement under which an Internet site designed "to bring lawyers and potential clients together" required the lawyers to pay a referral fee for any engagement and name both the participating lawyer and a lawyer for the company that operated the website to be named as lawyers for the client; finding that the arrangement amounted to fee-splitting without the client's consent).

Ohio LEO 2001-2 (4/6/01) (indicating that lawyers could advertise in a law-related commercial website, assuming that the advertisements were not false or deceptive, and as long as the company operating the website did not engage in the unauthorized practice of law by offering services "that go beyond merely a ministerial function of providing a legal form to Users"; explaining that the law firm could pay for the advertisement, but could not pay the website for referrals (which would be prohibited under Ohio DR 2-103(B)); acknowledging that distinguishing between these two types of payments would be difficult, but reminding lawyers that an improper payment for referral would likely consist of payments "based upon the actual number of people who contact or hire the attorney or an amount based upon a percentage of the fee obtained for rendering legal services.

Arizona LEO 99-06 (6/1999) (prohibiting lawyers from participating in an internet referral service which required them to share fees).

South Dakota LEO 98-10 (1/12/99) (lawyers may not join an internet referral service that charges a set advertising fee and also collects 10% of any fees over $100 received from representations referred by the service).

New York City LEO 1998-2 (12/21/98) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).

**Best Answer**

The best answer to (a) is YES; the best answer to (b) is PROBABLY NO; the best answer to (c) is MAYBE; the best answer to (d) is MAYBE.
Coupons and Gifts

Hypothetical 18

You have been trying to think of ways to catch potential clients’ attention, and jotted down some ideas that you thought might be worth exploring.

(a) May you include in newspaper or yellow pages advertisements a coupon for a “free consultation”?

MAYBE

(b) May you include in your direct mail marketing an offer to send the recipient a coffee mug if the recipient calls your office in response to your direct mail?

MAYBE

Analysis

State bars’ approach to various marketing efforts have been confusing and at times illogical.

(a) The Ohio Bar dealt with “free consultation” coupons in 2005 -- noting the national debate about the issue, and ultimately prohibiting such coupons. Ohio LEO 2005-9 (12/2/05) ("DR 2-101(A)(5) of the Ohio Code of Professional Responsibility explicitly prohibits the characterization of fees and rates as 'discount' or 'special.' . . . "[T]his Boards [sic] advises that a lawyer may not advertise legal services with coupons for free consultation or dollars off the cost of legal services. Advertising legal services with fee coupons is a characterization of the fees as "discount" or "special" and does not comply with DR 2-101(A)(5)."; Across the nation, opinions differ as to the use of coupons in legal advertising. Some advisory committees view lawyers' advertisements with coupons for discounts on legal services as improper. See, Nassau Cnty. LEO Op.
Some advisory committees view coupons for discounts on legal services as proper. See, Alabama LEO 87-134 (1987); Connecticut LEO 94-23 (1994); Michigan LEO CI-704 (1981); Philadelphia LEO 92-12 (1992); South Carolina LEO 96-27 (1997). Some committees view coupons for free initial consultation as proper. See Cincinnati LEO 91-92-02 (undated); Texas LEO 452 (1987) (may use if advertisement is in compliance with provisions on advertising and solicitation).

Interestingly, one court permitted lawyers to use discount coupons, as long as they didn't hand them directly to potential clients (and thus presumably violate that state's solicitation rules).

- **In re Anonymous Member of the S.C. Bar, 687 S.E.2d 41, 43 (S.C. 2009)** (analyzing the following: "Respondent testified that he began distributing discount coupons in 2005. The coupons provided discounts of $100 off for his legal services for those buying or refinancing property, or $50 off for those selling property. The regular charges for this work before the application of any discounts were also specified on the coupons. According to Respondent, he initially put the coupon only on his website, but realtors and lenders who were printing them out to give to clients started asking him for printed versions, so he printed them up as a paper coupon."; finding use of such coupons acceptable, because the lawyer would not hand them directly to any potential clients).

(b) Surprisingly, not many states have dealt with lawyer's gifts to clients.

One bar explicitly indicated that such gifts are permissible. Utah LEO 02-02 (2/11/02) ("[T]he firm, either at seminars or other events, provides promotional items such as golf balls, flashlights, pens, and the like which have the firm's logo on them."; "[I]tems such as pens, flashlights, golf balls and the like displaying the firm's logo do not constitute a written communication soliciting professional employment. The firm's logo does not extol the firm's expertise, encourage the recipient to contact the firm, or
otherwise request employment. As a result, such items do not need to contain the words "Advertising Material" on them.

At least one bar prohibited even such nominal gifts for clients who respond to direct mail marketing. North Carolina LEO 2004-2 (4/23/04) (holding that a lawyer "may include promotional merchandise of minimal value (i.e., magnets and pens) in targeted direct mail letters"; but may not include in any direct mail to accident victims an "offer to send the recipient free promotional merchandise, such as a calculator, key chain, pen, coffee mug or similar object, if they call his office in response to the direct mailing").

**Best Answer**

The best answer to (a) is MAYBE; the best answer to (b) is MAYBE.
Money-Back Guarantees

Hypothetical 19

You have found that many clients seem reluctant to sign a retainer arrangement calling for an hourly rate. One of your partners suggested that you add a "money-back guarantee" to your retainer arrangements.

May you offer clients a "money-back guarantee" if you are not successful?

MAYBE

Analysis

In 2003, the Ohio Bar prohibited Ohio lawyers from using such "money-back guarantees" in their marketing.

- Ohio LEO 2003-2 (4/11/03) ("[T]he law firm would like to offer money-back guarantees to clients in intellectual property matters. For example, if based on its statistics the law firm believes there is a sixty five percent or greater chance of winning an intellectual property matter, the law firm will offer a money-back guarantee to the client. If based upon its statistics the law firm believes that a trademark will be registered, the law firm will offer a money-back guarantee if the law firm does not register the trademark."; "[T]his Board advises that it is improper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters. Money-back guarantees violate DR 5-103(B) because the lawyer acquires a prohibited proprietary interest in the cause of action or subject of litigation. Money-back guarantees also create a conflict of interest between the lawyer and the client under DR 5-101(A), because when the agreed upon outcome is not reached the lawyer has a strong financial incentive to claim that the client did not comply with conditions of the guarantee and is not entitled to a refund. Money-back guarantees also create an unjustified expectation under DR 2-101(C)(2) that the lawyer has improper control or influence over the legal system." (emphasis added)).

Best Answer

The best answer to this hypothetical is MAYBE.
General Rules for Direct Mail

Hypothetical 20

You just started your own firm with two law school classmates, and you think that direct mail marketing can provide "more bang for the buck" than television or media advertising. However, before you get started you want to make sure you understand the ethics rules.

(a) May you send targeted direct mail to people involved in serious automobile accidents (and whose names appear in the newspaper)?

MAYBE

(b) May you send direct mail marketing to folks who have just declared bankruptcy (and whose names appear in the newspaper)?

YES (PROBABLY)

(c) Will your direct mail marketing have to comply with any specific requirements, include disclaimers, etc.?

YES

Analysis

States have taken to heart the United States Supreme Court's invitation to regulate details of direct mail marketing materials.

States that take a "one-size-fits-all" approach to lawyer marketing necessarily apply the same direct mail restrictions to a personal injury lawyer sending direct mail pieces to those injured in automobile accidents and to a Wall Street law firm seeking business from sophisticated consumers of the law firm's skills and experience in reverse triangular mergers.

One well-respected commentator on lawyer marketing has criticized such rules.
Attempts at heavy-handedness meet with mixed results in states such as Florida, New York, Connecticut, Louisiana, Missouri and New Jersey (to name a few). In recent years, some of the world’s largest and most prestigious corporate law firms were forced to either scrap or change the way they sent out informational client alerts, due to the implied need to slap the phrase "ATTORNEY ADVERTISING" on the subject line of an e-mail. Pardon me, but I highly doubt the recipient, perhaps the general counsel of General Electric Co. or Johnson & Johnson, is hornswaggled (a legal term of art) by the trickery of a tax law update from Sullivan & Cromwell. I think the "this is not legal advice" disclaimer on the bottom probably would suffice.


(a) Not surprisingly, every state prohibits lawyers from sending direct mail to clients whom the lawyer knows to be vulnerable, emotionally distraught, etc.

Some bars have adopted additional restrictions on certain types of direct mail. For instance, some states restrict direct mail to certain recipients for a specified amount of time after the incident giving rise to their need for legal advice.

- See, e.g., Florida Rule 4-7.4(b)(1)(A) ("A lawyer shall not send . . . an unsolicited written communication . . . to a prospective client for the purpose of obtaining professional employment if . . . the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication.").

In a rare federal statutory intrusion into lawyer marketing issues, a federal law restricts direct mail marketing to airplane crash victims or their families for a specified amount of time.

§ 1136. Assistance to families of passengers involved in aircraft accidents.

...
(g) Prohibited actions. . . . In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

49 U.S.C. § 1136(g)(2).

One New Jersey lawyer found to his regret that this federal law trumped a less restrictive New Jersey rule.

- Henry Gottieb, Lawyer Fined for Soliciting Families of Air-Crash Victims Within Banned Period, N.J. Law Journal, Sept. 3, 2009 ("Richard J. Weiner, a prominent New Jersey personal injury lawyer, paid a $5,000 federal civil penalty for sending solicitation letters to families of passengers killed in the February crash of commuter jet in Buffalo, New York, authorities announced Wednesday."); "A federal statute bars unsolicited contacts by lawyers with victims or their families within 45 days of an air-carrier accident. Weiner admitted in a settlement with the United States Attorney's Office in Buffalo that he sent the families letters within that time."); "The letters included the line, 'please consider giving me the opportunity to sit down with you and discuss your rights with regard to this tragedy.'"; "Weiner says he sent 12 or 13 letters and that he made the mistake because he was unaware of the 45-day requirement. The New Jersey Rules of Professional Conduct require a 30-day wait. Indeed, the federal law also had a 30-day period until 2008 when 15 days were added."); "I guess my mistake was not reading all the fine print of the federal regulations,' Weiner says.").

Interestingly, one court addressed the possibility that a symbol on the outside of a direct mail piece might disclose the nature of the recipient's legal problems -- which it justifiably wanted to prevent.

- Fla. Bar v. Gold, 937 So. 2d 652, 654, 655-56 (Fla. 2006) (addressing a brochure that the bar alleged to have violated a specific Florida rule prohibiting any direct mail from disclosing on its face the nature of the recipients' legal problems; "The outside of the brochure contains the addressee's name and address; the name of Gold's firm, The Ticket Clinic,
which appears on a diamond shape resembling the outline of a traffic sign with the drawing of a roadway disappearing into the distance; a drawing of a stop sign; and the words 'Don't Just Roll Over Fight Back.' The Bar alleges the outside of Gold's brochure expressly reveals the nature of the recipient's specific legal problems, in violation of rule 4-7.4(b)(2)(K). That rule provides: 'A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.'
ultimately finding that the direct mail did not violate the Florida rule; "The outside of the brochure contained the names and addresses of the recipients. The sender was identified as The Ticket Clinic, the name of Gold's law practice. In addition, there was a picture of a stop sign and a roadway, along with the words: 'Don't Just Roll Over Fight Back.' While it is possible that someone seeing the outside of Gold's brochure might guess that the recipient was being targeted by a law firm, there is nothing that would lead inescapably to the conclusion that the recipient had indeed been charged with a particular offense. There is certainly nothing on the outside of the brochure to indicate the recipient had actually been charged with DUI. In fact, there was nothing to distinguish the outside of the brochure from numerous other unsolicited, seemingly random bulk mail advertisements which are mailed and delivered regularly in the hopes of gaining, by chance alone, some new customers or purchasers. Accordingly, the referee's report is approved insofar as it granted summary relief in favor of Gold on the rule 7.4(b)(2)(K) claim.").

Lawyers obviously must comply with the most restrictive rule.

Bar disciplinary regulators severely punish lawyers who violate these restrictions.

- In re Shapiro, 780 N.Y.S.2d 680, 682-83 (N.Y. App. Div. 2004) (suspending a lawyer for one year because, among other things, the lawyer sent an improper letter to an accident victim; "The letter sent by respondent states, in pertinent part, 'We are holding a letter containing valuable information regarding your legal rights. . . . When you are well enough to exercise such judgment, please call me.' We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel." (emphasis added)).

- Ky. Bar Ass'n v. Mandello, 32 S.W.3d 763, 764 (Ky. 2000) (suspending for six months a lawyer who improperly wrote a letter soliciting a representation in a medical malpractice case by sending a letter to a woman whose husband had recently died at a hospital; finding among other things that the lawyer violated the prohibition on self-laudatory claims by stating: "While I would like to
represent you and feel that my background provides me with a strong basis of knowledge with which to protect your interests, I must say that in this particular situation, it is not who you choose to represent you, but that you choose someone”).

(b) Most states would permit such targeted mailing, because the potential client has not been involved in a personal injury or wrongful death incident.

For instance, ABA Model Rule 7.3(c) does not prohibit targeted "written, recorded or electronic communication[s]" to any particular potential client, although the ABA Model Rules require that the words "Advertising Material" be included on the "outside envelope, if any, and at the beginning and ending of any recorded or electronic communication" (unless a communication is to a lawyer or to someone who "has a family, close personal, or prior professional relationship with the lawyer.").

Although not every state takes the very liberal approach of the ABA Model Rules, courts sometimes overturn direct mail restrictions that extend beyond accident victims.

For instance, in March 2010, the Western District of Texas found unconstitutional a Texas statute limiting direct mail marketing to criminal defendants. The court explicitly distinguished between restrictions on direct mail sent to accident victims and to others.

- McKinley v. Abbott, Cause No. A-09-CA-643-LY, 2010 U.S. Dist. LEXIS 33499, at *14, *14-15, *15 (W.D. Tex. Mar. 25, 2010) (holding unconstitutional a Texas statute that prohibited written solicitation to potential criminal clients; "Villasana [plaintiff] challenges Section 38.12(d)(2)(C) as it relates to written solicitations made by attorneys to individuals recently arrested or served with a summons."); distinguishing the Texas limitation from other state statutes prohibiting solicitation of accident victims; "Persons recently arrested or served by a summons, however, do not possess the same need for privacy protection. 'While a criminal or traffic defendants [sic] may be shaken by his arrest, what he needs is representation, not time to grieve.'" (citation omitted); "This Court finds the Fourth Circuit's reasoning [in Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997)] persuasive and proper to apply to the 30-day ban on attorneys' written solicitations to individuals arrested or served with a summons under Section 38.12(d)(2)(C). Section 38.12(d)(2)(C) neither directly or materially advances a substantial state interest nor is it narrowly

Just a few weeks earlier, the Second Circuit upheld New York's fairly broad restriction on marketing (including direct mail) to accident victims.

- **Alexander v. Cahill, 598 F.3d 79, 102, 103 (2d Cir. 2010)** (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; ultimately upholding the constitutionality of New York State's 30-day moratorium on certain direct marketing in wrongful death and personal injury cases; "[W]e conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to 'an untargeted letter mailed to society at large,' which 'involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession' as direct mail solicitations." (citation omitted); "Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion.

Because other types of clients are not as likely to be susceptible to improper lawyer conduct, at least one circuit court had earlier declared unconstitutional restrictions on direct mail marketing to criminal clients.

- **Ficker v. Curran, 119 F.3d 1150, 1151, 1153, 1154, 1156 (4th Cir. 1997)** (analyzing the following situation: "Robin Ficker, a Maryland attorney, and Natalie Boehm, the owner of a direct-mail advertising company, challenged the constitutionality of a Maryland law forbidding lawyers from targeted direct-mail solicitation of criminal and traffic defendants within thirty days of arrest. We agree with the district court that the Maryland ban encroaches impermissibly on First Amendment rights."); explaining that "as the Supreme Court has already recognized, targeted letters do not carry the same potential for undue influence as in-person solicitation, and such letters are no more likely to overwhelm the judgment of a potential client than an untargeted letter or newspaper advertisement."); "We will not resolve this battle of studies, nor will we credit or discredit state interests based on the shifting sands of polling data, which change according to techniques, sample populations, and even
the phrasing of the questions. It is hardly clear, however, that where criminal and traffic defendants, in need of timely legal advice and representation, receive just such information in the mail, they will hold the legal profession in low esteem." (footnote omitted); ultimately holding that "a thirty day ban on attorney advertising to defendants charged with crimes and incarcerable traffic offenses cannot stand.").

(c) The following are examples of the specific requirements that some states have included in their ethics rules.

- **Florida Rule 4-7.4(b)(2)(B)** ("The first page of such written communications shall be plainly marked 'advertisement' in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red 'advertisement' mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the 'advertisement' mark in red ink shall appear on the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet.").

- **Florida Rule 4-7.4(b)(2)(D)** ("Every written communication shall be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.").

- **Florida Rule 4-7.4(b)(2)(E)** ("If a contract for representation is mailed with the written communication, the top of each page of the contract shall be marked 'SAMPLE' in red ink in a type size 1 size larger than the largest type used in the contract and the words 'DO NOT SIGN' shall appear on the client signature line.").

- **Florida Rule 4-7.4(b)(2)(F)** ("The first sentence of any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall be: 'If you have already retained a lawyer for this matter, please disregard this letter.'").

- **Florida Rule 4-7.4(b)(2)(I)** ("Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule shall be specific enough to help the recipient understand the extent of the lawyer's knowledge regarding the recipient's particular situation.").
• Georgia Rule 7.3(b) ("Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked 'Advertisement' on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.").

• Illinois Rule 7.3(c) ("Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).").

• North Carolina Rule 7.3(c)(2) ("Electronic Communications. The advertising notice shall appear in the 'in reference' block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large or larger than the lawyer's or law firm's name in any masthead on the communication.").

• North Carolina Rule 7.3(c) & (c)(3) (requiring that the words "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" be displayed on the outside envelope and the beginning of the material "in print as large or larger than the lawyer's or law firm's name.").

• North Carolina Rule 7.3(c)(1) ("Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.").

• South Carolina Rule 7.3(c) ("Any lawyer who uses written or recorded solicitation shall maintain a file for two years showing the following: (1) the basis by which the lawyer knows the person solicited needs legal services; and (2) the factual basis for any statements made in the written or recorded communication.").

• South Carolina Rule 7.3(d)(1) ("The words ‘ADVERTISING MATERIAL,’ printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such
recorded communication shall clearly state both at the beginning and at the end that the communication is an advertisement.

- Virginia Rule 7.2(d) (requiring any written or e-mail communication to "be identified by conspicuous display of the statement in upper case letters 'ADVERTISING MATERIAL.' The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, 'ADVERTISING MATERIAL.' Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

Ethics opinions provide additional explanation:

- Nebraska LEO 09-04 (2009) (addressing the following question: "With respect to email communications which require the inclusion of the words 'This is an advertisement,' where must these words appear when the newsletter is included as an attachment to an email message?"; answering as follows: "With respect to newsletters emailed as attachments, where the words 'This is an advertisement' are required, it is sufficient if those words are included in the subject line of the email message and at the end of the email message. It is not necessary to include those words in the attached newsletter."); also addressing the following question: "May a law firm mail or email a newsletter to present clients, former clients, and persons who request a copy of the newsletter without including the disclaimer 'This is an Advertisement' on either the front of the mailing envelope or within the email?"; answering as follows: "It is not necessary to include the words 'This is an advertisement' for law firm newsletters sent to present clients, former clients, and persons who request a copy of the newsletter."); ("The Committee is of the opinion that an advertisement coupon placed in a mass mailer, which does not state 'This is an advertisement' on the outside of the envelope[,]

- North Carolina LEO 2007-15 (4/25/08) (providing guidance for lawyers sending targeted direct mail; "Rule 7.3(c) allows a lawyer to solicit professional employment from a potential client known to be in need of legal services by written, recorded, or electronic communication provided the statement, in capital letters, 'THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES' (the advertising notice) appears on a specified part of the
communication. If the solicitation is by letter, Rule 7.3(c)(1) requires the advertising notice to 'be printed at the beginning of the body of the letter in a font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.'; [T]he requirement in Rule 7.3(c) that the advertising notice 'be printed at the beginning of the body of the letter' is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter.'; "[I]f the insignia or border is used consistently by the firm in official communications on behalf of the firm, the insignia or border is considered a part of the firm name and may appear next to the firm name in the return address on the front of the envelope provided the advertising notice remains conspicuous.'; "The front of the envelope may contain an insignia with initials that are in a font that is larger than the font used for the advertising notice provided the insignia is used consistently by the firm in official communications on behalf of the firm, the advertising notice is in a font that is the same size or larger than the font used for the firm name, and the advertising notice remains conspicuous.'; also addressing the following question: "ABC Law Firm uses the motto 'Attorneys for Injured People' and prints the motto just below its name in all of its official written communications. May the front of the envelope for a direct mail letter contain a motto connected with the law firm name in the return address on the envelope?"; answering as follows: "No. A motto will detract from the conspicuousness of the advertising notice. However, the motto may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)."; also addressing the following question: "May the URL or website address for a law firm appear in the return address on the front of the envelope for a direct mail letter?"; answering as follows: "No. It may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)." (emphases added)).

- Ohio LEO 2007-5 (6/8/07) ("A lawyer's or law firm's advertising of legal services to a prospective business client through a personalized letter addressed to a contact person at the business is a direct mail solicitation subject to the requirements of Rule 7.3(c). A lawyer or law firm should disclose in the letter how the identity of the prospective client was obtained. A lawyer or law firm should include the recital 'Advertising Material' or 'Advertisement Only' in the text of the letter and on the envelope. And, a lawyer or law firm must refrain from addressing a predetermined evaluation of the merits of any legal matter that the business might pursue." (emphasis added)).

- Maryland LEO 2004-27 (11/10/04) (forbidding Maryland lawyers from using a marketing firm to send mailings or otherwise contact people who have not responded to a lawyer's mailed advertisement).

- North Carolina LEO 97-6 (1/16/98) (holding that a lawyer violated the ethics rules in the way that the lawyer included a disclosure statement in a direct
mail piece; "The disclosure statement must be in a shade of print that contrasts sufficiently with the stationery to be easily read by a recipient. Revised Rule 7.3(c) requires the advertising disclosure statement 'at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name. . . . ' The font size and location of the disclosure are dictated by the rule to insure that the recipients of direct mail letters have notice that the letters are advertisements and may be discarded. This purpose is defeated if the shade of print is so light that the disclaimer cannot be read."; "The omission of a lawyer's address from the stationery used for targeted direct mail letters is a material misrepresentation because a recipient of the letter will not be able to determine whether the lawyer practices in the recipient's community, in another community in North Carolina, or out of state.").

- Illinois LEO 90-37 (5/15/91) ("A lawyer may initiate contact with a prospective client by written communication plainly labeled as advertising material.").

- Illinois LEO 90-22 (1/29/91) ("Labeling marketing materials as 'promotional' materials complies with requirements of the Rules as to the labeling of 'advertising' materials.").

As in other areas, some states have unique rules governing targeted mailings.

For instance:

- Most states require that the lawyer retain a copy of the mailing for a specified amount of time.

- Some states prohibit lawyers from sending written material by registered mail or other forms of restricted delivery.¹

- Florida requires that lawyers prepare a simple fact sheet about the lawyer, which must be sent to the clients with any written communication.²

¹ Florida Rule 4-7.4(b)(2)(C) ("Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery."); South Carolina Rule 7.3(e) ("Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted or certified delivery."); Virginia Rule 7.2(d)(3).

² Florida Rule 4-7.4(b)(2)(D) ("Every written communication shall be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.").
One state requires such mailings to describe how the lawyer learned of the incident in connection with which the lawyer wants to represent the client.

- South Carolina Rule 7.3(g) ("Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.").

One state even requires the mailing to tell the recipients how they can complain about the mailing.

- South Carolina Rule 7.3(d)(2)-(3) ("Each written or recorded solicitation must include the following statements: (A) 'You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll-free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer' and (B) 'The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.' Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication. (3) Each written or recorded solicitation must include the following statement: 'ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, POST OFFICE BOX 12159, COLUMBIA, SOUTH CAROLINA 29211-TELEPHONE NUMBER 803-734-2038.' Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.").

**Best Answer**

The best answer to (a) is **MAYBE**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **YES**.
Different State Rules Governing Solicitation

Hypothetical 21

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want to start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

(a) Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

**NO**

(b) Calling members of your church to see if they would like some estate planning advice?

**MAYBE**

(c) Setting up appointments to see the general counsel of local companies?

**YES (PROBABLY)**

Analysis

The United States Supreme Court has long recognized that in-person solicitation creates a far greater risk of abuse than general advertising or even targeted mailings.\(^1\)

The Supreme Court has therefore given states wide latitude to restrict solicitation.

Most states lump live telephone and real-time solicitation in the same category.

For example, the ABA Model Rules flatly state that

\(^1\) *Ohralik v. Ohio State Bar,* 436 U.S. 447 (1978) (upholding ban on in-person solicitation in personal injury and wrongful death cases because of the potential for overreaching); see also *In re Primus,* 436 U.S. 412 (1978) (holding that in-person solicitation is permissible if the lawyer is motivated by political objectives rather than monetary objectives).
[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

ABA Model Rule 7.3(a). Most states follow this basic formulation.

Many states severely discipline lawyers who violate the anti-solicitation rules, especially in situations where there could be overreaching or coercion.

- **Hamm v. TBC Corp.**, 345 Fed. App’x 406, 410-11 (11th Cir. 2009) (affirming the district court’s sanctions against a law firm for soliciting employees of various companies to file Fair Labor Standards Act cases, under the guise of interviewing them as witnesses; also upholding the magistrate judge’s sanction prohibiting the plaintiff’s law firm from representing employees of these other companies; “[T]he magistrate judge recommended narrowly tailored sanctions to permit SLG [law firm] to continue to represent the named plaintiffs and co-workers of the named plaintiffs (presumably because they most likely learned about SLG and the lawsuit from the named plaintiffs), but prohibited SLG from representing opt-in plaintiffs from other stores.”).

- **Fla. Bar v. Wolfe**, No. SC94226, 2000 Fla. LEXIS 659 (Fla. Mar. 30, 2000) (suspending for one year a lawyer who engaged in unethical in-person solicitation of clients after they were hit by tornadoes).

- **In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein**, 715 A.2d 216, 220, 224, 225 (N.J. 1998) (publicly reprimanding lawyers for personally soliciting clients after a gas explosion at an apartment building; Oleckna and TEAMLAW rented an RV to use as “a mobile office for potential clients at the site” and after a day with no calls, returned with “copies of the advertisement the firm was to run in the weekend paper and taped several copies of it to the windows of the RV.”; “After hearing about the explosion on the radio, Charles Meaden, a solo practitioner, drove to Edison the day after the explosion seeking clients. When he was stopped by the Edison police and told that he could proceed no further by car, he began to walk into Edison.”; “When Meaden went to the Red Roof Inn, he knew that the Inn was temporarily housing many of the victims of the explosion. He also went to the Inn specifically for the purpose of pecuniary gain in the form of obtaining professional employment.”).

One New York state court case involved a type of solicitation that most large law firms would find acceptable -- but which a New York state court judge relied on to
punish what the judge found was an improper attempt to block plaintiffs' ex parte communications with the defendant's current and former employees.

- **Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008)** (in an opinion by Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

Not surprisingly, lawyers cannot use nonlawyers to solicit clients -- which courts traditionally called "running and capping."

- **Samuel Howard, Arent Fox, Elliott Greenleaf Tossed From UBP Ch. 11, Bankruptcy Law360 (Nov. 5, 2010), http://www.law360.com/bankruptcy/articles/207257** (disqualifying the law firm of Arent Fox from representing a bankruptcy creditor's committee, because the law firm had solicited creditors to serve on the committee through an intermediary in China).

- **Philadelphia LEO 2010-12 (10/2010)** (analyzing the following situation: "Physicians employ a consulting firm that monitors police reports and then contacts injured persons to see if they need medical treatment. The consulting firm through an investigator will also obtain relevant photographs and statements from the injured. The representative of the consulting firm inquires as to whether the injured person has an attorney. If not, the representative will obtain an executed fee agreement and forward the
relevant documents to different attorneys on a revolving basis. The assigned
attorney is then required to pay a flat fee to the consulting firm."; finding the
arrangement unethical for various reasons; "There are multiple reasons why
the arrangement as described by the inquirer is unethical. Standing alone,
Rule 7.3(a) prohibits the conduct since an intermediary (the consulting firm) is
engaged in direct solicitation by phone. The rationale behind the prohibition
and its application to this inquiry is made clear by the Comment to the Rule.
It does not matter that the consulting firm is hired by physicians rather than
the inquirer. The consulting firm still is engaging in prohibited telephonic
solicitation as an intermediary for the inquirer as well as any of the other
lawyers who receive clients in this fashion. The specific prohibition in the
Rule on the use of an intermediary (in this case that is professionally trained)
clearly places the inquirer in violation of Rule 7.3a should he accept referrals
that come as a result of the conduct in question."; "The violation is again
present in reviewing Rule 5.3, specifically 5.3(c)(1). By accepting a referral
obtained via unethical solicitation from the consulting firm, the attorney is
ratifying the third party's conduct which conduct is in direct violation of the
Rule. Furthermore, each of these violations is compounded by the
prohibition, contained in Rule 8.3a, which prohibits an attorney from engaging
in unethical conduct through the acts of a third party."; explaining that the
solicitation would be improper even if it were undertaken in writing; "It is clear
under Rule 1.2 that an attorney must clearly communicate with a client what
the scope and goal of representation are from the start of the attorney-client
relationship. The fact that the individual sent out to meet with the prospective
client has that client sign a fee agreement with the attorney before meeting
with the attorney, and in fact acts without any direct supervision from the
attorney, thwarts the requirements of the Rule. There is no way for the
attorney to determine whether the client's stated goal is or is not an
acceptable one. In addition, there is no way for the client to obtain direct
information from the attorney prior to agreeing to the attorney's
representation. Furthermore, since the 'investigatory work' is being done by
an individual prior to the client hiring the attorney, there could in fact be a
problem with an inadvertent waiver of the attorney-client privilege."; finding
that the arrangement also involved an improper fee-split; "Finally, the
Committee has a grave concern regarding the payment by the attorney of the
fee to the consulting firm. Clearly, fee splitting with a non-attorney is
prohibited by Rule 5.4. While the inquiry tries to couch the payment to the
consulting firm for the file as payment for 'investigative services,' that a flat fee
is paid and that non-legal services were provided do not standing alone make
the payment permissible. Other factors which would affect that determination
include the amount of the payment, the amount of time spent by the
investigator, and whether the flat fee is in any way dependent upon the size of
the possible recovery in the case. The payment should be reasonably related
to the value of the services provided. If not, it can easily be seen as a
subterfuge to avoid the prohibition against fee sharing with a non-lawyer.".).
Illinois LEO 97-05 (1/23/98) ("A lawyer is approached by a non-lawyer who proposed setting up a marketing company which would solicit personal injury cases by methods which would violate the Rules of Professional Conduct if employed by a lawyer. The lawyers would receive referrals from the non-lawyer's company. The lawyers would pay a fee to the company for each referral.").

New York LEO 565 (10/1/84) ("May an attorney employ a public relations and marketing firm to solicit potential clients for whom the attorney will provide prepaid legal services and pay such firm as compensation either a salary, commission or percentage of the annual fee charged to such clients by the attorney for legal services where the public relations firm will handle all advertising, inquiries, and initial correspondence on behalf of the attorney as well as the presentation and marketing of the prepaid legal services and such public relations firm will seek out corporations, non-profit organizations and various groups?"; concluding that "any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper. Such form of compensation would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties.").

Ethics rules prohibiting solicitation have been upheld by various courts.

Bergman v. District of Columbia, 986 A.2d 1208, 1211, 1212, 1217 (D.C. Cir. 2010) (upholding the constitutionality of a Washington, D.C., law; explaining that "[t]he Act makes it unlawful for 'practitioner[s]' to solicit business from 'a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.' D.C. Code § 22-3225.14 (a)(1)."; "The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the 'potential client, patient, or customer.' D.C. Code § 22-3225.14 (a)(2)."; analyzing the D.C. law under commercial speech guidelines; concluding that "[w]e are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy, effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances."; noting that the United States Supreme Court upheld a thirty-day prohibition on direct mail solicitation of accident victims in Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995)).

Courts have also upheld (against equal protection claims) state ethics rules that prohibit solicitation in certain situations while permitting it in others.


State ethics rules that permit solicitation in certain circumstances obviously spawn various issues about whether those circumstances exist.

Some states have peculiar rules regarding solicitation. For instance:

Florida Rule 4-7.4(a) ("[A] lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . . The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.").

Georgia Rule 7.3(d) ("A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.").

Illinois Rule 7.3(a)(1)-(2) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.").

New York Rule 7.3(a)(1) ("A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.").
• Virginia Rule 7.3(a) ("A lawyer shall not, by in-person communication, solicit employment as a private practitioner for the lawyer, a partner, or associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if: (1) such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made. In-person communication means faceto face [sic] communication and telephonic communication.").

• Virginia Rules 7.3(f) ("[A] lawyer shall not initiate in-person solicitation of professional employment for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship. In-person solicitation means face-to-face communication and telephone communication.").

• D.C. Rule 7.1(d) ("No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. § 11-2601 (2001) et seq., in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.").

Bars have had the most difficulty wrestling with lawyers’ activities at meetings or seminars, either legitimately or illegitimately scheduled to provide general information about legal issues.

Some of these opinions and cases draw what can only be characterized as ridiculous lines.

• New York LEO 830 (7/14/09) ("A lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.").

• Disciplinary Bd. of Supreme Court v. McCray, 755 N.W.2d 835, 841-42, 843-44, 845, 844 (N.D. 2008) (suspending for six months a lawyer for improperly
soliciting vulnerable client who required legal assistance with financial woes, and who also permitted most of the work to be done by nonlawyers; "The evidence supports this finding. McCray testified he spent between 10 and 40 hours per week working for Bradley Ross Law, P.C. Assuming for the sake of argument McCray worked 40 hours per week during the 10 months or approximately 45 weeks McKenzie was a client, he would have spent 1,800 hours servicing approximately 9,450 clients, including McKenzie. According to our calculations, this results in .19 hours, or less than 12 minutes, McCray spent working for each client during the 10-month period. We agree with the hearing panel that this is an insufficient amount of time to adequately represent McKenzie along with his other clients. . . . We also agree that 'little in the way of meaningful legal work' was performed for McKenzie. It appears the vast majority of the work performed consisted of simply inundating credit reporting agencies with dispute letters written in the consumer's name to trigger the obligation of those agencies under the Credit Repair Organizations Act, 15 U.S.C., § 1679 et seq., to respond to all consumer disputes within 30 days and remove any legitimately challenged item that cannot be verified within the 30-day period. . . . The persons who prepared and mailed the dispute letters were located in Indiana. Moreover, the panel's finding that Bradley Ross Law, P.C., did not until recently verify that work was performed for clients each month they were billed is supported by McCray's own testimony."; also explaining that the lawyer engaging in improper solicitation at "manned booths" at "numerous seminars on the topic of how to improve a person's credit scores"; "McCray had 9,450 clients, and the vast majority of the work performed by Bradley Ross Law, P.C., i.e., mailing dispute letters, was performed by his leased employees in Indiana. McCray could not have given individual attention to all of his clients or sufficiently overseen the work performed by his leased workers in Indiana. In effect, McCray allowed the Indiana employees to practice law under his license."; "A 'seminar . . . is a curious hybrid of advertising and in-person solicitation as well as a pure educational effort . . . ," N. Keilin, Client Outreach 101: Solicitation of Elderly Clients by Seminar Under the Model Rules of Professional Conduct, 62 Fordham L. Rev. 1547, 1548 (1994), but the Rules of Professional Conduct do not expressly prohibit a lawyer's involvement in an educational seminar. However, improper solicitation of clients occurs when a lawyer involves himself with an organization that independently targets and solicits prospects for his representation.").

- North Carolina LEO 2007-4 (4/25/08) (providing guidance on issues "relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements"; explaining that "[a]n attorney may conduct educational seminars for non-clients. See RPC 36. The attorney may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. See Rule 7.2. The attorney may request attendees to complete an evaluation feedback form that includes the attendee’s name, contact, and family information, as
well as check boxes to indicate areas of particular interest. After the seminar, the attorney may not contact an attendee by in-person or telephone solicitation, but must wait for the attendee to contact the attorney. Rule 7.3(a).); also holding that a lawyer may host a social event for non-clients and "allied professionals" who have referred business to the lawyer; "An attorney may host a social function for existing clients, non-clients, or both. See RPC 146. The attorney may invite non-clients, provided the attorney does not solicit business from the non-clients."; also holding that a lawyer may not "send a restaurant or store gift certificate to a client or non-client in appreciation for a referral from that person" because "Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services"; holding that a lawyer may "send gifts of nominal value -- such as holiday fruit baskets, flowers, or gift certificates -- to existing clients or non-clients with whom the attorney has an existing professional relationship . . . as long as a gift is not a quid pro quo for the referral of clients. Rule 7.2(b.)."

- Philadelphia LEO 2007-13 (12/2007) (generally permitting lawyers to be included on a "preferred" lawyer list prepared by a non-profit educational institution; also generally permitting the lawyer to purchase "booth space" at "housing fairs" sponsored by the institution).

- Illinois LEO 06-02 (7/2006) ("Lawyer may make appearances before civil and similar organizations in an effort to obtain clients").

- Ohio LEO 2005-7 (8/5/05) (allowing Ohio lawyers to provide pro bono legal services regarding "advance directive" forms such as living wills and anatomical gift forms, as long as the lawyer was not using the program to solicit clients; warning that it "would be improper if the purpose and modus operandi is in-person solicitation of legal business").

- Nebraska LEO 09-05 (2009) ("[A]n attorney may rent a booth at a Chamber of Commerce event to promote his professional services. This includes offering a drawing for a prize so long as the use of the attorney's services is not required to enter or win the drawing. Listening to a 'pitch' should not be a requirement for entering or winning the drawing."; "[A] lawyer may rent a table or sponsor a booth at a business exposition and not violate Rule 7.3, as long as the lawyer does not approach, accost, or importune members of the public in the area of the table or the booth. A lawyer must not use any deceptive tactics to influence the public's decision to visit or not visit the table or the booth. The decision to make contact must always be made by the public, not by the lawyer. Once members of the public take the initiative to contact the lawyer, the lawyer has the right to respond and to distribute written materials which otherwise comply with the Rules of Professional Conduct, just as the lawyer would be free to do in his or her own office.").
- Maryland LEO 2004-29 (6/24/04) (providing guidance for a lawyer asking whether he could set up a booth at professional conferences and seminars which would allow the lawyer to solicit clients at those meetings; “Solicitation occurs when an attorney initiates personal contact with a potential client with whom the attorney had no previous relationship, for the purpose of pecuniary gain. Whereas you suggest that it is the attendee at a conference who would initiate the contact by choosing to approach the vendor booth, the whole idea of having a booth at the event is to entice attendees to approach your booth and then hire your firm for their needs. Under the circumstances, it would be impossible for the Committee to provide you with a definitive statement as to which actions would, or would not, involve ‘initiation’ of a personal contact. Whether solicitation occurs will depend on the factual context of each case.”; considering as irrelevant “the sophistication of an attendee” at the type of conference the lawyer describes; “the provisions of Rule 7.3 on ‘Direct contact with prospective clients’ (or 7.2 on ‘Advertising’) do not concern themselves with the sophistication of the prospective client in describing conduct which is permissible. Sophisticated and unsophisticated persons are equally off-limits for impermissible advertisement and in-person contact by lawyers.”; concluding that the lawyer’s plan is not a per se violation of the rules but “appears to be fraught with potential problems”).

- Arizona LEO 02-08 (9/2002) (holding that a lawyer may sponsor a booth at a business exposition and speak personally with visitors, as long as the visitors initiate the contact, are acting in “an atmosphere free of coercion and deception” and are not vulnerable to overreaching).

- Ohio LEO 2002-6 (6/14/02) (permitting out-of-state lawyers to solicit Ohio lawyers in an effort to seek appellate work).

- Illinois LEO 96-1 (7/1996) (“A lawyer may distribute printed material advising persons of their legal rights who are in attendance at public service seminars and to community advocates for personal circulation to interested persons.”; “A lawyer may distribute materials at a seminar and community advocates may distribute the lawyer’s material, which materials must contain at least the name of one attorney responsible for the content. The lawyer would be restricted from giving anything of value to the promoter of the seminar or community advocates for the distribution of the materials.”).

- Illinois LEO 94-4 (7/1994) (“A lawyer or law firm may participate in a seminar relating to advance directive services in which a health care organization (HCO) assists in preparation of materials so long as any payment by the lawyer or firm to the HCO is limited to the costs of preparation of the materials, those materials and their distribution comply with the rules on advertising, and all legal services are rendered solely by the lawyer.”).
Rhode Island LEO 93-30 (5/12/93) (holding that a "common membership" by a law firm's lawyer and a prospective client in a "professional business organization" does not constitute a "prior professional relationship" for purposes of the solicitation rules, meaning that a mailing to such a prospective client must be marked as an advertisement).

State bars having to regulate solicitation have sometimes drawn lines so thin as to be nearly ludicrous. For instance, one bar indicated that lawyers could display law firm brochures at church festivals, but could not hand them out.²

(a) All (or most) states would prohibit telephone calls to accident victims, either because they fall within some explicit prohibition, or because they violate the general ban on inherently coercive solicitation.

(b)-(c) A state bar’s attitude toward these more benign forms of solicitation would depend on the state’s specific rules.

Some states have addressed whether a third person had a "prior professional relationship" with the lawyer, thus permitting in-person solicitation.

Nebraska LEO 09-04 (2009) (addressing the following question: "Is the general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment inapplicable to persons who have engaged the law firm for estate planning in the past?"; answering as follows: "The general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment is inapplicable to persons who have engaged the law firm for estate planning in the past.").

North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement

Ohio LEO 99-5 (10/8/99) (prohibiting lawyers from handing out brochures at church festivals and fairs, but allowing the lawyer to display the brochures on a counter at such events).
presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq.; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).

Most states' ethics rules specifically exempt any restrictions to direct mail sent to lawyers. At least one state reached the same conclusion in an opinion.

- Ohio LEO 2002-6 (6/14/02) (permitting out-of-state lawyers to solicit Ohio lawyers in an effort to seek appellate work).

**Best Answer**

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY YES**.
Characterizing Electronic Communications Mail

Hypothetical 22

After attending an excellent seminar entitled "Lawyer Marketing: An Ethics Guide," you think you understand the basic ethics rules governing your law firm's marketing. However, you have been considering how the basic rules apply to new forms of "electronic" marketing.

(a) Do the rules governing in-person solicitation apply to your e-mails to potential clients?

   NO (PROBABLY)

(b) Do the rules governing in-person solicitation apply to your communications with potential clients during real-time electronic "conversations"?

   YES (PROBABLY)

(c) May you arrange for a vendor to analyze (without human intervention) e-mails that you receive, and automatically send targeted advertising for third parties based on words in the e-mail (for instance, the provider might send an advertisement for travel services to a client who sent an e-mail mentioning a certain hotel's name)?

   MAYBE

(d) May you arrange for an autodial message to be sent to potential clients, ending with a statement indicating that the potential client can speak to a lawyer or lawyer's representative by pressing a number on the telephone?

   MAYBE

Analysis

Not surprisingly, states have had to analyze lawyers' marketing through electronic communications.

States initially struggled with determining whether a law firm's website had such interactive characteristics that it fell under the solicitation rules rather than the general
rules governing print, telephone, or radio advertisements. States eventually found that websites did not fall under the solicitation rules.

- California LEO 2001-155 (6/19/01) ("We conclude that Attorney A's web site is not a 'solicitation' under rule 1-400(B). . . . We further conclude that neither the nature of the website communication nor the nature of the technology it employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.").

- Vermont LEO 97-5 (1997) ("[T]he Committee concludes that the Code of Professional Responsibility's Disciplinary Rules governing advertising and solicitation provides sufficient guidance. An internet 'home page' is similar to the phone book's 'yellow pages' and law firm brochures and is not 'directed to a specific recipient'. See DR 2-103 and DR 2-104.").

- Illinois LEO 96-10, 1997 WL 317367, at *1 (5/16/97) ("The creation and use by a lawyer of an Internet 'web site' containing information about the lawyer and the lawyer's services that may be accessed by Internet users, including prospective clients, is not 'communication directed to a specific recipient' within the meaning of the rules, and therefore only the general rules governing communications concerning a lawyer's services and advertising should apply to a lawyer 'web site' on the Internet.").

- Pennsylvania LEO 96-17, 1996 WL 928126, at *2 (5/3/96) ("It is my opinion that advertising on the Internet via a web site does not constitute in-person solicitation as prohibited under Rule 7.3(a).")

However, courts and bars have continued to debate the exact nature of websites. On February 27, 2009, the Florida Supreme Court addressed the Florida Bar's proposed ethics rules governing electronic marketing. The Florida Supreme Court described the context of its analysis.
Before submitting previous proposed amendments to the Court for consideration, see In re Amendments to the Rules Regulating the Florida Bar - Advertising, 971 So. 2d 763 (Fla. 2007), the Task Force originally concluded that websites are distinguished from general advertising because the typical viewer would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information regarding a specific legal topic. In contrast, the Board of Governors' Citizens Forum disagreed with the Task Force and concluded that attorney websites should be subject to the same general regulations as other forms of lawyer advertising. The Citizen's Forum reasoned that for website advertising, the public should be provided with the same protections (from false and misleading attorney advertising) that are required for more traditional methods of advertising. Thereafter, the Board voted to continue regulating websites pursuant to the general advertising regulations, except for a few specified exceptions.

Afterwards, through its study, the Special Committee determined that each substantive attorney advertising regulation should apply to attorney websites, and that websites should be subject to the same regulation as other forms of media, except websites should be exempt from the requirement that advertisements must be filed with the Bar for review. However, in December 2006, the Board voted against adopting the Special Committee's recommendation that all substantive lawyer advertising rules apply to lawyer websites.

In re Amendments to Rules Regulating the Fla. Bar -- Rule 4-7.6, Computer Accessed Commc'ns, No. SC08-1181, 2009 Fla. LEXIS 271, at *3 n.1 (Fla. Feb. 27, 2009). The Florida Supreme Court quoted the bar's petition as framing the basic issue.

"A website cannot be easily categorized as either information at the request of the prospective client, which is subject to no regulation under this subchapter but is subject to the general prohibition against dishonesty, or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television, radio, or print media. Although some steps must be initiated by the viewer to access a website, the viewer might not necessarily be attempting to access that law firm's website, or a law firm website at all. It
is therefore inappropriate to treat a website as information upon request, because it is not the same as direct contact with a known law firm requesting information. On the other hand, the viewer is unlikely to access a lawyer or law firm website completely by accident."

Id. at *3 (emphases added; internal citation omitted).

The Florida Bar petitioned the Florida Supreme Court to approve rules that would have required a lawyer’s home page to comply "with all the substantive lawyer advertising regulations" -- but which would declined to apply all marketing rules to a lawyer's website "[a]fter the homepage." Id. at *4.

The Florida Supreme Court rejected the Florida Bar's approach.

In contrast to the Bar's arguments, we find that the proposed amendments are not sufficient to make material behind the homepage fall under the concept of information "upon request" (which is exempted from regulation by subchapter 4-7, pursuant to rule 4-7(f)). We recognize, however, that sufficient changes could be made to the rules regulating websites to make pages behind the homepage constitute materials "upon request." For example, a website could require users to complete two steps on webpages before they could access result or testimonial information. First, a user could be required to complete a "Request" page with their name, address, and phone number (all required fields). Second a disclaimer page could appear with the bottom of the page requiring a click on a button to indicate that the user had read the disclaimer (and an option for the user to discontinue the request for information). Only after the user navigated through these two pages would the user be able to obtain the additional information. This process would make obtaining information from a website similar to obtaining information "upon request" from a lawyer, when a potential client picks up a phone and calls a lawyer to ask for information, and then is mailed a DVD or brochure by the lawyer with the requested information.

Id. at *6-7 (emphases added).
Several months after issuing this opinion, the Florida Supreme Court withdrew the opinion -- because the Florida Bar had essentially complied with the Supreme Court's implicit direction to take a different approach about such website pages.

The Florida Supreme Court's difficulty in applying marketing rules to lawyers' websites reflects the unique nature of that type of marketing. States will undoubtedly continue to debate this issue.

(a) A lawyer's e-mail to a prospective client seems to fall somewhere between the less intrusive direct mail communication and the more intrusive telephone call or in-person visit.

Although states have struggled with deciding which rules to apply in such circumstances, most states hold that an e-mail must comply with the direct mail requirements -- not the far more restrictive solicitation rules.

- Florida Rule 4-7.6(c) ("A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless [the e-mail complies with specified requirements].").

- Ohio LEO 2004-1 (2/13/04) (holding that e-mail advertisement sent to prospective clients must be treated as direct mail solicitation under the Ohio ethics rules, including limitations on recipients and requirement of disclaimers such as "ADVERTISEMENT ONLY" in the e-mail).

- California LEO 2001-155 (2001) ("We conclude that Attorney A's web site is not a 'solicitation' under rule 1-400(B). . . . We further conclude that neither the nature of the website communication nor the nature of the technology it employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the
mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.

- West Virginia LEO 98-03 (10/16/98) ("The Lawyer Disciplinary Board also finds that e-mail and messages left in news groups can be a form of written solicitation governed by Rule 7.3(b) and (c). . . . This would require an attorney who is soliciting professional employment from a prospective client to include the words 'ADVERTISING MATERIAL' in the heading for an e-mail or news group communication. That way, when the e-mail message or news group posting comes up, the receiver has the option of opening it or putting [it] in the electronic trash without reading it, just like the recipient of mail has. In the past, the Lawyer Disciplinary Board has interpreted the Rules of Professional Conduct to permit an attorney to omit the words 'ADVERTISING MATERIAL' on the outside of an envelope if the attorney is mailing to a market not necessarily known to be in need of legal services, such as a geographic area or a legally obtained list of customers. Because of the ease and low cost of sending e-mail, the Board has concerns about recipients being inundated with solicitations and being forced to review them all to make sure that a lawyer is not trying to communicate personally with the user on a current matter. The Board therefore strongly recommends that all e-mail messages and news group postings have the 'ADVERTISING MATERIAL' designation as part of the heading.").

- Utah LEO 97-10 (10/24/97) ("The applicability of the Rules of Professional Conduct to e-mail is more difficult to analyze. Because (a) e-mail is in writing (similar to a facsimile transmission), (b) it does not represent a 'live' communication (unlike the chat-room discussions), and (c) the recipient can ignore the message or respond at leisure and after due reflection, we find that e-mail is not an "in person" communication under Rule 7.3(a). However, because e-mail is different from a written advertisement that is delivered through the U.S. Postal Service or other similar services, it may have a different impact due to the speed and mode of transmission and the difficulty of regulation. In addition to the rules discussed above, the lawyer should be aware that the instantaneous nature of e-mail could raise issues regarding Rules 7.3(b)(1) and (b)(3), which prohibit direct solicitation to those who are in such a state that they cannot exercise reasonable judgment in employing a lawyer and solicitations which involve coercion, duress, or harassment." (footnote omitted; emphasis added)).

- Pennsylvania LEO 97-130, 1997 WL 816711, at *6 (9/26/97) ("If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients,
it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.

- Arizona LEO 97-04 (4/1997) ("Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations.").

- Michigan LEO RI-276, 1996 WL 909975, at *1 (7/11/96) ("A lawyer may solicit legal business through an electronic mail communication directed to a specific addressee or group of addressees by following the same ethics rules applicable to general and direct mail solicitation.").

In contrast, Illinois and Tennessee seem to have applied in-person solicitation rules to e-mails.

- Illinois LEO 96-10, 1997 WL 317367, at *1 (5/16/97) ("If a lawyer uses the Internet or other electronic mail service to direct messages to specific recipients, then the rules regarding solicitation would apply.").

- Tennessee LEO 95-A-570 (5/17/95) (not for publication) ("While unsolicited mailing and promotions have been permitted by the Supreme Court, unsolicited phone contacts have not been. The reasoning is that a letter can be thrown away while a phone call or direct personal solicitation is an intrusion into the privacy of the recipient and cannot be so easily ignored. This form of solicitation on the Internet would be an improper solicitation in violation of DR 2-103.").

These opinions are admittedly older now, and these bars might take a different approach if asked again.

(b) The ABA Model Rules now indicate that "real-time electronic contact" be treated as in-person solicitation under ABA Model Rule 7.3(a).

Nearly every state which has dealt with real time "chat rooms" or similar electronic communications has applied the solicitation rather than the direct mail marketing rules.
Florida LEO A-00-1 (8/15/00) (relying on legal ethics opinions from Michigan, West Virginia, Utah, and Virginia in bolstering its conclusion that lawyer participation in a real time "chat room" would amount to prohibited solicitation under Florida Rule 4-7.4(a)).

New York City LEO 1998-2 (1998) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).

West Virginia LEO 98-03 (10/16/98) ("The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.").

Virginia Adver. Op. A-0110 (4/14/98) ("Lawyers who communicate on the Internet in 'real time' chat rooms must abide by the restrictions on solicitation set forth in DR 2-103 [now appearing in Rule 7.3(a)]. 'In-person' communication in personal injury and wrongful death cases is prohibited, subject to certain exceptions, by DR 2-103(F) [now appearing in Rule 7.3(f)]. 'In-person' communications include not only face to face communication but also 'telephonic communication.' The Committee believes that a lawyer who solicits employment in a 'real time' chat room may not solicit employment in personal injury or wrongful death cases by communicating with the victim or their immediate family.").

Philadelphia LEO 98-6 (3/1998) ("The inquirer should be careful that he does not engage in any activity which constitutes improper solicitation. In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such.").

Utah LEO 97-10 (10/24/97) ("'Chat rooms' have become a popular medium of communication on Internet sites. The typical format involves simultaneous participation of several users in a real-time exchange of written messages at a common site that are displayed at each participant's computer terminal. Although these communications can often be reduced to written form, a chat-group communication is more analogous to an in-person conversation due to its direct, confrontational nature and the difficulty of monitoring and regulating it. We, therefore, find that an attorney's advertising and solicitation through a

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chat group are 'in person' communications under Rule 7.3(a) and are accordingly restricted by the provisions of that rule.

- Illinois LEO 96-10, 1997 WL 317367, at *5 (5/16/97) ("On the other hand, lawyer participation in an electronic bulletin board, chat group, or similar service, may implicate Rule 7.3, which governs solicitation, the direct contact with prospective clients. The Committee does not believe that merely posting general comments on a bulletin board or chat group should be considered solicitation. However, of [sic] a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.").

- Michigan LEO RI-276, 1996 WL 909975, at *1 & *3 (7/11/96) ("A lawyer may not solicit legal business during an interactive electronic communication unless ethics rules governing in-person solicitation are followed. . . . A different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such 'real time' communications about the lawyer's services would be analogous to direct solicitation, outside the activity permitted by MRPC 7.3.").

On the other hand, two states declined to apply the in-person solicitation rules to chat rooms.

- California LEO 2004-166 (2004) (holding that the pertinent California rule defines "solicitation" as communication in person or over a telephone line, thus excluding on-line communications -- but noting that most states rely on a broader definition to find that real time on-line communications fall under the definition of "solicitation"; "While an attorney's communication with a prospective fee-paying client in the mass disaster victims Internet chat room described herein is not a prohibited 'solicitation' within the meaning of subdivision (B) of rule 1-400, it violates subdivision (D)(5) of rule 1-400, which bans transmittal of communications that intrude or cause duress. Attorney's communication would also be a presumed violation of Standard (3) to rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel."; noting "that ethics committees in other states, including Florida, Michigan, Oregon, Utah, Virginia, and West Virginia, have concluded that messages delivered via real time Internet communication channels are prohibited solicitations.

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Some of these states, for example, Florida, have a rule more broadly-worded than rule 1-400, which more readily permits its application to chat room situations. However, other states, including Utah and Michigan, have interpreted their rules regulating in person and telephonic communications to encompass 'real time' chat room conversations." (footnotes omitted); concluding that "the 'by telephone' language in rule 1-400(B)(2)(a) does not apply to chat room communications because that would contradict the rule's plain language and undermine fair notice of prohibited conduct").

- Arizona LEO 97-04 (4/7/97) ("ER 7.3 prohibits telephone and in-person solicitation. Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations. . . . In order for this portion of ER 7.3 to apply to a computerized solicitation, the following elements would be necessary: 1) the lawyer must initiate the contact (thus, lawyer responses to questions posed by potential clients in 'chat rooms' or inquiries sent directly to a particular lawyer would not need to comply with this rule); and 2) the potential client would have to have a known legal need for a particular matter. Thus, for instance, solicitations sent to all members of an environmental listserve would not be affected because those members might be interested in environmental issues but not necessarily have a need for representation in a particular environmental case. If those elements exist, then the lawyer must comply with the disclosure obligations set forth in ER 7.3(b)." (emphasis added)).

In 2010, the Philadelphia Bar dealt with this issue. The Bar concluded after a very lengthy and detailed analysis that real-time electronic communications should now be treated under the direct mail provision rather than the solicitation provision -- because "the social attitudes and developing rules of internet etiquette are changing." so that "it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures." Philadelphia LEO 2010-6 (6/2010).

- Philadelphia LEO 2010-6 (6/10) (analyzing the categorization of blogs and "chat rooms" for purposes of marketing regulation; noting that Pennsylvania Rule 7.3 defines "solicit" as including "contact in-person, by telephone or by real-time electronic communication," but that the term "solicit" does "not include written communications, which may include targeted, direct mail advertisements"; noting that "[u]ntil January 1, 2005, Rule 7.3 did not include the phrase, or any reference to, 'real-time electronic communication.' That
phrase was added to the Pennsylvania Rule on January 1, 2005."; "The question of whether or not Rule 7.3 barred electronic communication arose before this body before. We opined in late 2004 -- applying the then current, now former Rule 7.3 -- that participation in chat rooms was not barred by 7.3(a), reasoning that the kind of risk inherent in direct communication via telephone or personal interaction was not present in the social medium of a chat room. See, Philadelphia Bar Association Formal Opinion 2004-5. It seemed clear at the time, however, that the opinion would not survive the amendment to the Rule."; after analyzing e-mails, blogging and chat rooms, concluding that "[i]n this respect, each of these kinds of electronic communication is different from in-person direct communication and telephone calls. In the latter kinds of in-person communications with an overbearing lawyer, the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate. In the former, however, as the Supreme Court found even in the case of individually targeted direct mail solicitations, a recipient can readily and summarily decline to participate in the communication. Moreover, each of these kinds of social interactions enables the lawyer using it to make and retain a copy of the communication, as required by Rule 7.2."; ultimately concluding that "[t]he Committee believes that the rationale of the prohibition on direct solicitation, both as explained in the Rule itself and the accompanying comments, and by the Supreme Court's opinion in Shapero [Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988)], lead to the conclusion that usage of these kinds of social media for solicitation purposes is acceptable under Rule 7.3. All of these kinds of social interactions are characterized by an ability on the part of the prospective client to 'turn off' the soliciting lawyer and respond or not as he or she sees fit, and an ability to keep a record of its contents."; rejecting the ABA's approach to "real-time electronic communication"; "We do recognize that Rule 7.3 does specifically refer to 'real-time electronic communication,' and that the ABA Reporter's Explanation states that those words were intended to refer to 'chat rooms.' But we do not feel bound to apply them as the Reporter's Explanation may have intended." (emphasis added); noting that the ABA (in Pennsylvania) did not "refer specifically to 'chat rooms' in the Rule itself"; also explaining that "even assuming that the technological abilities of chat rooms are the same today as they were in 2000, we think it also relevant that the social attitudes and developing rules of internet etiquette are changing. It seems to us that with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes." (emphasis added); "Thus, the Committee concludes that Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer's communication is directed have the ability, readily exercisable, to simply ignore the lawyer's overture, just like they could a piece of directed, targeted mail. Where that is the case those
risks which might be inherent in an individualized, overbearing communication are not sufficiently present to bar the use of such methods of social interaction for any solicitation purposes. Under this view of Rule 7.3, "real-time electronic communication" is limited to electronic modes of communication used in a way in which it would be socially awkward or difficult for a recipient of a lawyer's overtures to not respond in real time. The Committee also concludes that even on line chat rooms of the sort where discussion occurs by typed communications do not constitute real-time electronic media." (emphasis added); ultimately permitting solicitation during real-time electronic "chat rooms").

(c) Perhaps surprisingly, a 2008 New York state legal ethics opinion found this process acceptable, as long as no human reviewed the client's e-mails.

- New York LEO 820 (2/8/08) (analyzing the ethics of a service which reviews lawyers' e-mails and prepares advertisements; "In recent years, some e-mail providers have offered free or low-cost e-mail services in which, in exchange for providing the user with e-mail services -- sending and receiving e-mail and providing storage on the provider's servers -- the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail. As an example, an e-mail that referred to travel to a particular locale might be accompanied by an advertisement for travel service providers in that locale." (emphasis added); "A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to human beings other than the sender and recipient." (emphasis added); "We would reach the opposite conclusion if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order). Merely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content. A lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality." (emphasis added)).

(d) This question comes from a North Carolina legal ethics opinion, which found the process unethical.
In North Carolina LEO 2006-17 (1/19/07), the North Carolina Bar framed the question as follows:

Attorney would like to solicit professional employment by use of a recorded telephone message. He intends to obtain telephone numbers from the census bureau's database of persons who are not on the "do not call" list for commercial solicitations by telephone. Attorney's law firm (or a service hired by the firm) will autodial the people on the list. When a person answers the phone, he will hear the following recorded message:

This is an announcement of the Tax, Estate & Elder Planning Center, a North Carolina law firm. Have you or your loved ones experienced the overwhelming cost of nursing home, assisted living, or in home care? The Tax, Estate & Elder Planning Center would like for you to know more about government programs that may help cover these costs while protecting your savings. If you would like to know more about these programs press one now.

If the recipient presses the number one on the key pad of his phone, he will hear a short pre-recorded informational message on programs such as Medicaid, Special Assistance, and veterans' benefits. Whether the recipient opts to listen to the message or not, he will hear the following recorded message at the end of the phone call:

If you are interested in knowing more about how to qualify for these programs, then press two to be connected with a representative of the Tax, Estate & Elder Planning Center Law Firm. Thanks you for taking time to listen to this announcement.

If the recipient of the phone call follows the prompts, he will be connected with a person at Attorney's law firm.

Id. The North Carolina Bar distinguished between a message that a listener could essentially ignore, and a message that invited the listener to establish a person-to-person or telephonic relationship.
Although it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation and over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

Therefore, Attorney may autodial potential clients and play a recorded message provided the message is truthful and not misleading. He may not, however, include a means for the recipient of the call to be immediately connected with a lawyer (or an agent of the lawyer). Instead, the message may provide a telephone number or other contact information for the lawyer or the lawyer's firm so that the potential client may subsequently call the lawyer or law firm after contemplating the information received from the recorded message.

_Id._ (emphases added).

**Best Answer**

The best answer to (a) is **PROBABLY NO**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **MAYBE**; the best answer to (d) is **MAYBE**.
PROFESSIONAL EDUCATION
BROADCAST NETWORK

LAWYER MARKETING:
AN ETHICS GUIDE

Hypotheticals

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Hypothetical 1

Your state bar recently adopted new marketing rules. You are trying to convince your partner to take the changes seriously. One partner has argued that your law firm's risks are fairly low, because inappropriate lawyer marketing at most brings a "slap on the wrist."

Can inappropriate lawyer marketing result in:

(a) Finding of an ethics violation?

   YES           NO

(b) Suspension of the lawyer conducting the marketing?

   YES           NO

(c) Claims against the lawyer under state consumer protection acts?

   YES           NO

(d) Discipline for violating state and federal laws governing spam faxes?

   YES           NO

(e) Suits against the lawyer for intentional interference with the relationship between another lawyer and her client?

   YES           NO
Hypothetical 2

You practice in a state which recently revised its ethics rules. Among other things, the new rules severely restrict lawyer marketing. You and your partners realize that your state’s bar might challenge some of your firm's marketing under these new rules, and you want to know what standard will apply if the bar takes such action.

If the state bar challenges your law firm’s marketing, will it have to prove that any clients or potential clients have been or might be harmed?

YES  NO
Hypothetical 3

Your firm's chairman just asked you to supervise your firm's marketing efforts in a southern state. Although you do not have an office in that state, several of your Charlotte office partners hold licenses in the state. Your first question is the application of the state's ethics rules to your marketing efforts.

(a) Will the state's ethics rules apply to a print advertisement placed in that state's main business magazine?

   YES          NO

(b) Will the state's ethics rules apply to a print advertisement placed in American Lawyer magazine, which is sold in the state?

   YES          NO
Hypothetical 4

As your law firm's partner chiefly responsible for ethics issues, you field questions and complaints from state bars. You just received calls from two state bars. Each of the bars complained about several statements on your firm's website. Your firm has a two-lawyer office in the capital of one of the states whose bar has complained about your website, and one of your 500 lawyers is licensed in the other state whose bar has complained.

(a) Must your firm website comply with the marketing rules of the state in which you have a two-lawyer office?

    YES   NO

(b) Must your firm website comply with the marketing rules of the state whose bar members include one of your lawyers?

    YES   NO
Hypothetical 5

In checking out some of your competitors’ websites, you notice two interesting websites. First, one local lawyer boasts that he is "published in Federal Reports," and describes himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling case law of the United States." You wonder whether the website statement violates your state's prohibition on false advertising. Second, another local firm’s website includes pictures of what the website implies to be law firm lawyers and staff -- but they all are much more attractive than the lawyers and staff who work at the firm, and thus obviously are paid models.

(a) Does the lawyer’s website reference to being published in the Federal Reports violate your state's prohibition on false advertisements?

YES \hspace{1cm} NO

(b) Does the law firm’s use of models to depict law firm lawyers and staff violate your state’s prohibition on false advertisements?

YES \hspace{1cm} NO
Hypothetical 6

Your firm's executive committee members have become increasingly frustrated by what they perceive to be your law firm's main competitors' aggressive marketing techniques. The committee asked you to assess the ethical propriety of some statements in your competitors' print advertisements.

Do generally applicable ethics standards allow your competitors to include the following statements (or images) in their print advertisements:

(a) The firm's real estate department is "one of the best" in the area?

   YES
   NO

(b) The firm has an anti-trust department that is "second to none" in providing anti-trust advice?

   YES
   NO

(c) The law firm is "a premier personal injury law firm" in its city?

   YES
   NO

(d) The law firm is a "full service firm"?

   YES
   NO

(e) The law firm's lawyers are "committed" to obtain a successful result for their clients?

   YES
   NO

(f) The law firm provides "quality legal services"?

   YES
   NO
(g) The law firm has "30 years of experience" (which represents the combined legal experience of the firm's lawyers)?

YES  NO

(h) The law firm will be a "passionate and aggressive advocate"?

YES  NO

(i) The motto: "Don't settle for less than you deserve"?

YES  NO

(j) The phrase: "Let us take care of you"?

YES  NO

(k) The slogan: "People make mistakes. I help fix them"?

YES  NO

(l) A close-up image of a tiger's eyes?

YES  NO

(m) A photograph of a man looking out a window, representing victims of drunken driving collisions?

YES  NO

(n) An image of a wizard?

YES  NO

(o) The lawyer's membership in the Florida Bar (if the lawyer is a member of the Florida Bar)?

YES  NO
Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

(a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

   YES
   NO

(b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

   YES
   NO

(c) A client testimonial (from a real client) saying that your law firm is "one of the best" that your client ever employed?

   YES
   NO

(d) A client testimonial (from a real client) saying that your firm's lawyers always returned the client's phone call quickly?

   YES
   NO

(e) A reference to your being a client's "preferred" law firm?

   YES
   NO
(f) An endorsement by a well-known local sports figure?

YES  NO

(g) Quotations from a newspaper article praising your law firm?

YES  NO
Hypothetical 8

As one of your firm's newest partners, you have been pushing your firm to hire a consultant who can help with expanding your firm's website. Your firm's managing partner just put you in charge of the job, and now you have a few questions about the pertinent ethics rules.

(a) Will your law firm's website be considered an "advertisement" for ethics purposes?

   YES  
   NO

(b) If so, will your law firm's website have to comply with all ethics requirements governing advertisements?

   YES  
   NO
Hypothetical 9

As part of a total revamping of your firm's marketing focus, you have decided to choose a new name for your law firm. You are considering a number of possibilities, but you want to assure that you comply with the ethics rules.

(a) May a law firm's name include the name of a retired partner who is still alive, but in a nursing home?

   YES  NO

(b) May a law firm's name include the name of a retired partner who lives in Florida and occasionally drafts or revises wills for her friends?

   YES  NO

(c) May a law firm's name include the name of a former partner who is now a state senator?

   YES  NO

(d) May a law firm's name include the name of a former partner who was practicing at the firm when he was suspended from the practice of law?

   YES  NO

(e) May a law firm's name include the phrase "and Associates" if the lawyer practices by herself?

   YES  NO

(f) May a law firm comprised of two lawyer named Keaton start a law firm with the name "Keaton & Keaton" -- when two other lawyers with the same name have been using that name for nearly 40 years in a city 100 miles away?

   YES  NO
(g) May the two sons of the founders of the "Suisman Shapiro" law firm leave their fathers' firm and start their own firm -- using the name "Suisman Shapiro"?

YES

NO

(h) May two law firms include the name of the same practicing lawyer in their names?

YES

NO

(i) May lawyers practice under the name of Smith, Jones & Doe, P.C. -- if Jones and Doe are not shareholders, and do not share in the firm's profits and expenses?

YES

NO

(j) May a law firm's name include the name of a lawyer who is only "of counsel" to the firm?

YES

NO
Hypothetical 10

In an effort to improve your firm's recognition in your community, you want to start using a trade name, and also select a domain name that is likely to draw the attention of the increasing number of clients that are selecting lawyers over the Internet.

May you use the following names for your law firm:

(a) "The West End Law Firm"?
   YES   NO

(b) "The Best West End Corporate Law Firm"?
   YES   NO

(c) "westendlawfirm.com" (as a domain name)?
   YES   NO
Hypothetical 11

As the managing partner of a medium-sized firm, you have read all the articles about the difficulties of medium-sized firms surviving in the next decade. Over the last six months, you have spoken with a number of managing partners of similar firms, and you have just unveiled your plans for a network of medium-sized firms throughout the Southeast. You envision sharing library resources, certain computer hardware, and other non-confidential materials.

You see the main benefit as being able to claim that you are "affiliated" with other law firms that combined would have over 300 lawyers. However, you do not plan to actually merge with the other firms. Instead, you intend to remain independent in the selection and representation of clients -- although you expect there to be some joint clients and multiple referrals among members of the group.

(a) May you indicate on your website and in other places that you are "affiliated" with the other law firms in the group?

   YES       NO

(b) Will your firm be able to take cases against clients represented by the other firms in the group?

   YES       NO

(c) Will such an arrangement render your firm potentially liable for the malpractice of the other firms in the group?

   YES       NO
Hypothetical 12

As your law firm has grown from about 90 to 900 lawyers, several issues have arisen about what titles lawyers may use when referring to themselves in marketing materials and elsewhere. Coincidentally, two issues involving titles arose this morning.

(a) May a retired judge joining your firm refer to herself as a "retired judge" on letterhead and business cards?

YES NO

(b) May one of your lawyers who deals frequently with university professors refer to himself as "Dr." (like every other lawyer at your firm, this lawyer received a juris doctor degree)?

YES NO
Hypothetical 13

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than retain a law firm because of its general reputation. You and your marketing director want to highlight your firm's lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

(a) "Limits her practice to domestic relations matters"?

   YES  NO

(b) "Specializes in anti-trust issues"?

   YES  NO

(c) "Certified specialist in patent law"?

   YES  NO

(d) "Certified by the Texas Supreme Court as a trial lawyer"?

   YES  NO
Hypothetical 14

The firm’s chairman has asked you to review your lawyers’ website biographies to make sure they comply with applicable ethics rules.

(a) Can one of your lawyers call herself an "expert" in securitization transactions?
   YES  NO

(b) Can one of your lawyers describe himself as an "authority" in the ethics rules?
   YES  NO

(c) Can one of your lawyers who handles all or most of a corporate client's work call herself the company’s "General Counsel" in marketing material?
   YES  NO
Hypothetical 15

You have been trying to improve your firm’s marketing efforts, and have asked each of your firm’s lawyers to send you their individual honors and recognitions to include in various marketing brochures. Now you have to decide which honors to include in the brochures.

(a) May your marketing brochure indicate that one of your lawyers has an "AV" listing by Martindale-Hubbell?

   YES
   NO

(b) May your marketing brochure indicate that one of your lawyers has been listed in "The Best Lawyers in America" and "Super Lawyers" for the last two years?

   YES
   NO

(c) May your marketing brochure indicate that one of your lawyers was listed in "The Best Lawyers in America" in 1998 (but not since then)?

   YES
   NO

(d) May your marketing brochure indicate that one of your lawyers is listed as a "Super-Duper Lawyer" by the North Reston Litigator Lunch Bunch (composed of eight lawyers)?

   YES
   NO

(e) May your marketing brochure indicate that one of your lawyers received a "Life Time Achievement" Award from your law firm's public finance group?

   YES
   NO
Hypothetical 16

You have enjoyed a successful and varied career as a commercial litigator. Your firm’s new marketing director wants to highlight your experience both in firm brochures and on your firm’s website.

May you do the following as part of your firm’s marketing efforts (assuming that the descriptions are accurate):

(a) Describe one of your cases (in which you represented a plaintiff) as resulting in the “largest verdict in the history of the state”?

    YES    NO

(b) Describe some of your successful jury trial results?

    YES    NO

(c) List all of your litigation wins and litigation losses?

    YES    NO

(d) Link to judicial decisions in a number of cases in which you were successful?

    YES    NO

(e) Describe some transactions that you have successfully handled?

    YES    NO
Hypothetical 17

Several years ago, you moved from a large city big firm practice to a much smaller firm located in the town where you were born and raised. In addition to what you see as lifestyle advantages, you think that the move will allow you to market your services by calling upon your relationships with childhood friends who now enjoy prominent positions in many professional service firms in your hometown. Because you never had to confront marketing issues like this in your previous big-city practice, you want to make sure that you do not violate any ethics rules in taking such steps.

May you do the following:

(a) Establish an informal referral arrangement (without any written agreement or obligation on either side) with a financial planner you have known since childhood?

   YES  NO

(b) Arrange a formal "referral agreement" under which you agree to refer your legal clients to a small accounting firm managed by a high school classmate, with the accounting firm agreeing to refer to you any of its clients requiring legal advice?

   YES  NO

(c) May your law firm add its name to a for-profit Internet "referral service" that lists lawyers practicing in certain substantive areas?

   YES  NO

(d) If so, may you pay the Internet "referral service" based on the number of "hits" on your website?

   YES  NO
Hypothetical 18

You have been trying to think of ways to catch potential clients' attention, and jotted down some ideas that you thought might be worth exploring.

(a) May you include in newspaper or yellow pages advertisements a coupon for a "free consultation"?

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

(b) May you include in your direct mail marketing an offer to send the recipient a coffee mug if the recipient calls your office in response to your direct mail?

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>
Hypothetical 19

You have found that many clients seem reluctant to sign a retainer arrangement calling for an hourly rate. One of your partners suggested that you add a "money-back guarantee" to your retainer arrangements.

May you offer clients a "money-back guarantee" if you are not successful?

YES

NO
Hypothetical 20

You just started your own firm with two law school classmates, and you think that direct mail marketing can provide "more bang for the buck" than television or media advertising. However, before you get started you want to make sure you understand the ethics rules.

(a) May you send targeted direct mail to people involved in serious automobile accidents (and whose names appear in the newspaper)?

   YES   NO

(b) May you send direct mail marketing to folks who have just declared bankruptcy (and whose names appear in the newspaper)?

   YES   NO

(c) Will your direct mail marketing have to comply with any specific requirements, include disclaimers, etc.?

   YES   NO
Hypothetical 21

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want to start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

(a) Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

YES  NO

(b) Calling members of your church to see if they would like some estate planning advice?

YES  NO

(c) Setting up appointments to see the general counsel of local companies?

YES  NO
Hypothetical 22

After attending an excellent seminar entitled "Lawyer Marketing: An Ethics Guide," you think you understand the basic ethics rules governing your law firm's marketing. However, you have been considering how the basic rules apply to new forms of "electronic" marketing.

(a) Do the rules governing in-person solicitation apply to your e-mails to potential clients?

YES \hspace{1cm} NO

(b) Do the rules governing in-person solicitation apply to your communications with potential clients during real-time electronic "conversations"?

YES \hspace{1cm} NO

(c) May you arrange for a vendor to analyze (without human intervention) e-mails that you receive, and automatically send targeted advertising for third parties based on words in the e-mail (for instance, the provider might send an advertisement for travel services to a client who sent an e-mail mentioning a certain hotel's name)?

YES \hspace{1cm} NO

(d) May you arrange for an autodial message to be sent to potential clients, ending with a statement indicating that the potential client can speak to a lawyer or lawyer's representative by pressing a number on the telephone?

YES \hspace{1cm} NO