

New York Law Firms Struggle With New Restrictions on Advertising

New New York State rules that restrict advertising for lawyers have created headaches for a number of big corporate law firms that are based or have offices in the state.

The rule change, which took effect on Feb. 1, comes from a committee of judges in New York's appellate division who are charged with writing the ethical rules governing the state's lawyers.

Last year, amid complaints about the lack of taste in billboard advertisements by several upstate law firms, the seven judges moved to rein in advertising. The new rules define advertising as "any public or private communication made on behalf of a lawyer or law firm about that law firm's services, the primary purpose of which is for the retention of the lawyer and the law firm."

Many firms have responded by interpreting the new rules to also apply to the client memos on the latest developments in the law sent by e-mail — a practice that most firms consider part service and part marketing.

So the firms have deemed that the e-mail messages must have a note in the subject line stating that it is "attorney advertising," a designation that takes up a large part of the real estate on the subject line and one that can be trapped in the policed traffic of online mail.

"You risk getting shunted off to the spam filter or to the garbage," said Allan Ripp, a New York publicist who represents many large law firms. And if the e-mail makes it past the spam filter, "you might as well have a sign that says 'ignore this,' or take 'this with a grain of salt,' " he said.

Marketers complain that the rules restrict law firms in ways not faced by any other business. The Federal Trade Commission has filed comments objecting to the new rules, complaining that many went too far. And the Ralph Nader group, Public Citizen, has filed a lawsuit seeking to block enforcement of the rules, contending that they violate the free speech protections of the First Amendment.

Still, most firms have interpreted the definition very conservatively. Almost every major law firm in New York has decided to add an advertising disclaimer to every page on its Web site.

For instance, if you click on the Web site for Simpson Thacher & Bartlett, the New York firm that is best known for advising the buyout king, Henry R. Kravis, you will find, prominently, in the text of its site, a note that it is "attorney advertising" and that "prior results do not guarantee similar outcome." The wording, dictated by the new rule, appears directly under the scrolling list of Simpson Thacher deals that have closed recently.

The rules have restricted other Web efforts. For instance, Wilmer Hale had two domain names, IPOLeader.com and M&ALeader.com, that would direct a Web visitor to the law firm's Web site. The firm has taken those sites down for now because the rules forbid a redirect if the domain name implies an ability to obtain results.

"We are being very conservative about interpreting these rules," said Nancy Kostakos, Wilmer Hale's marketing and business development services director. But the firm is keeping the domain names, she said, "because we are hoping this will all go away."

Another big law firm, Wachtell Lipton Rosen & Katz — did nothing immediately after the new advertising rules went into effect on Feb. 1. After the firm was contacted by a reporter, it put up a disclaimer.

"I did that in an overabundance of caution," said Meyer G. Koplow, Wachtell's executive partner. "Somebody was obviously asking questions."

Mr. Koplow said that the firm views its site only as a tool in recruiting law students.

"You're not going to see highlights of our flashy cases," he said. "This is a law firm that has no marketing department, no marketing director and does not engage in advertising activities."

To be sure, Wachtell arguably doesn't need to advertise: It routinely ranks at the top of United States firms in The American Lawyer's annual survey of revenue at the top 100 law firms.

Another prestigious firm, Cravath Swaine & Moore, has not put the "attorney advertising" notice on its Web site. Evan R. Chesler, Cravath's presiding partner declined to comment on the firm's interpretation of the new rules.

An ethics expert, Stephen Gillers, a professor at New York University School of Law, was a consultant to the New York State Bar Association on the new rules.

But he has also advised clients and colleagues that the new rules do not apply to client memos, which he believes are not commercial speech, which has limited protection under the First Amendment.

"If your e-mail is not about the credentials of your firm, but an update on the law," he said, "then that is news and you are a publisher. And you enjoy the protections of the First Amendment, just like a magazine or a newspaper."

In the lawsuit challenging the rules, Public Citizen is representing Alexander & Catalano, a firm in Syracuse of eight lawyers with an advertising campaign that aims to be comical, and depicts its lawyers as giants towering above local buildings, jumping over rooftops and providing legal assistance to space aliens and employing special effects that include wisps of smoke. The new rules forbid such creativity.

The Alexander firm calls itself "the heavy hitters," a name forbidden by the new rules because it cannot be backed up by "bona fide professional ratings."

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