

RMF LITIGATOR

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SPECIAL EDITION: LAWYERS AND THE MEDIA

Message From The Co-Chairs



Mark S. Mulholland



Douglas J. Good

Welcome to a Special Edition of *The RMF Litigator*, which focuses on Lawyers And The Media. Our cover story offers a first-person interview with veteran newspaper reporter Claude Solnik of Long Island Business News, offering tips and insights to help attorneys interact effectively with the press. A subsequent article discusses the new NY State advertising regulations implemented in February that, at this writing, have already been successfully challenged in court, with an appeal pending.

The RMF Litigator is published as a service to our fellow members of the Bar. We encourage your feedback and welcome your ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. For over 35 years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Ruskin Moscou Faltischek litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. We are committed to unswerving focus on our clients and their legal needs. Contact us if we can be of assistance.

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Smart Counsel. Straight Talk.

Dealing Effectively with the Media: A Reporter's Perspective



Claude Solnik

Claude Solnik, Special Sections editor for Long Island Business News, has plied his trade as a business reporter for more than 20 years. Here are the highlights from a wide-ranging interview with Senior Litigator and Co-Managing Partner Douglas A. Cooper and Litigation associate Kimberly B. Malerba, in which Solnik shares his insights on what makes for a great — as well as a less-than-great — interview, what to expect when speaking to the press and the challenge of making weekly stories both compelling and accurate.

Q You've told us that newsletters are helpful in identifying story ideas. The RMF Litigator happens to go to attorneys, but still it is written in a very understandable format.

A: That is always helpful. To write a story, you need a topic. You need an expert and you need a way to localize it. Those are essentially the three things the publication needs.

Q Maybe the thing for us to consider is the timing of a particular issue. Maybe a phone call goes to you at the early stage of the process.

A: You said something that is really important. When I am working on a topic, time matters a lot. If I can reach people, that is the most important thing — and reach them quickly.

Q When you are interviewing a lawyer, what are the kinds of things that make you cringe in an interview? Are there some basic "no-no's" in terms of being interviewed?

A: I will tell you something from my perspective — law has its own language and reporters have their own language. That is mostly plain English and it's mostly simple. What really hits me is when people are using terms that are so much 'legalese'. But lawyers are extremely accurate. Often I will have a conversation with a lawyer who will make reference to something. I won't even necessarily ask, and I then I get an e-mail. I don't know if it's wired into the profession, but I have had people send me actual cases and references. I really appreciate it even if I don't need it. Lawyers are good at following up. Sometimes, you get nice e-mails. If you make a mistake with lawyers, law firms can be tough and, you know, I guess that's life.

Q If you ask a question and it's clear the attorney doesn't want to answer, it's embarrassing, it's intrusive, it's irrelevant . . .

A: Then we are doing our job.

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Q I am sure you are. But if, for whatever reason, I do not want to answer, what is the most appropriate way to communicate that to you?

A: With lawyers, this happens all the time. You can't talk about things because of confidentiality, so people understand. There are different ways to handle it. What people say is, "Look, I can't talk about it. I'd like to tell you but I can't talk about it without client consent." In some cases people say, "Let me see if my client will talk with you about it."



Douglas A. Cooper

Q Let's assume you are doing an article about a law firm that is merging or breaking up and now you have got a real story. Let's say you are on the phone interviewing one of the partners and he really doesn't want to go into it.

A: If you really don't want to talk about it, you shouldn't. And you don't have any obligation to tell anybody anything.

Q If I come across a nasty reporter and he asks that kind of question, from your professional experience, how do I handle that?

A: You could just give a kind of non-quotable answer. I know that there are public relations firms who write answers for disasters before they happen. And then after the disaster happens, you give a boilerplate answer that doesn't say very much. There are ways to answer without giving anything that would cause a problem.

Q Is there something that makes an interview great in your mind? Are there qualities that are identifiable that make it great?

A: Yes, when you find out what you didn't know. When there is drama, there are winners, there are losers, and it really brings the subject to life. When you actually start dealing with the lives of people affected, it becomes much more interesting. Also, most of us talk kind of the same way. But now and then there are people who are very colorful and a lot of fun no matter what they are talking about. The best stories cannot come over the telephone. It is better to meet. It is more of a personal connection face-to-face.

Q And I assume that the converse of that is what makes an interview awful.

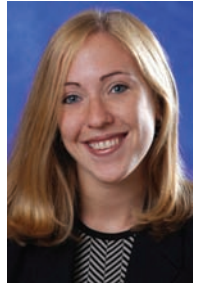
A: Yes. When you are talking with somebody who views the conversation as a way to market their company only, and when you hear company line that's not dealing with the reality and it's kind of talking around an issue, that's not good.

Q Do you find that your definition of the truth has changed as you have gotten more experienced?

A: Yes, I think you are right. I can't remember who — there is some philosopher who said, "You can't know anything until you know everything." You have a sense that the truth changes. Pluto was a planet and now it's not.

Q What do you do with sources that deliberately mislead or lie to you after you rely on them as a source? How do you ferret that out?

A: Well, I don't think I have had that happen too often. It is kind of my job to figure that out. I remember I had somebody lie to me a long, long time ago. When I called up later he explained why he lied to me. He told me I was writing about zoning and he had an application for a building in New York City. And then they built it and they used it for exactly what the community was afraid they would. And I said, "Why did you lie to me?" He told me "Look, I am in business and I am trying to get this done and that is the most important thing to me and I do what I have to do to get it done." But I think people more often just don't say anything.



Kimberly B. Malerba

Q Do you have tips for someone talking to a reporter?

A: Be specific. Be prepared before you talk. Be available. It is pretty simple stuff.

Q You are on deadline. You have got to get something done.

A: The way people feel after an interview is important. I don't want to make people feel badly and vice versa. I still like it when people say, "That's a good question." When someone says that to me, it means they have to think. You are more likely to get something fresh. Fresh is better than frozen.

Q What about mistakes and retractions?

A: I do know that an aggressive, angry approach is just not going to help anyone. Nobody wanted to make the mistake. It can be the reporter who made a mistake; it can be that they didn't have it in writing; it can be that they misunderstood; it can be that it is not a mistake. What should you do? I think you may want to treat different situations differently.

Q Do you think you have an obligation to bring your sense of what truth is to a story or do you have to put your sense of truth aside and let the [facts speak]?

A: I think that there are facts and there is truth. Facts are things everyone agrees on and truth is where you have people, almost by definition, disagreeing. That is a problem when writing about law, because you can end up with two sides of the story, which in some ways is no story, because you don't know what happened. And if you can't tell people what happened, why are you writing anything about it?

Q Claude, we very much appreciate your time and insights, and I'm sure our readers will too.

A: My pleasure.

New Attorney Advertising Rules Already Source of Litigation

By Jennifer Hillman, Esq.



Jennifer Hillman, Esq.

The new rules regarding attorney advertising in New York, enacted February 1, 2007, have already been challenged and are quickly navigating through the federal court system. A Syracuse-based law firm, Alexander & Catalano, in conjunction with Public Citizens Inc., a Washington, D.C.-based consumer advocacy group founded by Ralph Nader in 1971, have filed a Complaint in the Northern District of New York. *Alexander v. Cabill*, 5:07-CV-

117 (N.D.N.Y. filed Feb. 14, 2007) challenges the constitutionality of the laws based upon First and Fourteenth Amendment grounds, as well as 42 U.S.C. 1983, claiming they allow for arbitrary and discriminatory enforcement and impose onerous restrictions on both commercial and noncommercial speech.

At the heart of this challenge is the prohibitions within the new rules against the portrayal of specific scenes or techniques, including those identified at 22 N.Y.C.R.R. 1200.6(c) which state 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 that is still pending;
- (2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefore;
- (3) include the portrayal of a judge, 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;
- (4) use actors to portray the lawyer, members of the law firm or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;
- (5) rely on techniques to obtain attention that demonstrate a clear or intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;
- (6) be made to resemble legal documents; or
- (7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

The plaintiff law firm is well known throughout the Syracuse region for its commercials that include their attorneys leaping tall

buildings, stomping through downtown Syracuse in Godzilla-like scenes and advising aliens regarding insurance claims. Specifically, the Complaint alleges that these “comical scenes” might be considered “techniques to obtain attention” and include the “portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.” Plaintiffs claim they have been forced to alter their advertising campaign and their ability to market their services has been significantly impaired based upon these and other amendments.

In the litigation, Northern District of New York Judge Frederick J. Scullin, Jr., heard argument on June 18, 2007 and issued a written decision on July 20, 2007. Relying upon *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), the Court assessed each amendment to determine whether (1) a substantial state interest is achieved by the restriction; (2) the restriction materially advances the state interest; and (3) the restriction is narrowly drawn.

The Outcome

The Court issued an injunction prohibiting enforcement of the following amendments:

- 22 N.Y.C.R.R. 1200.6(c)(1) and (c)5 did not materially advance the State’s interests because new disclosure and review requirements as well as enforcement of the existing rules could be utilized instead of content-based restrictions;
- 22 N.Y.C.R.R. 1200.6(c)(3) and (c)(7) provided restrictions which were not narrowly drawn, as a disclaimer could remedy perceived risks;
- 22 N.Y.C.R.R. 1200.6(g)(1) prohibiting pop-up and pop-under advertisements on websites not owned by an attorney or law firm was not narrowly drawn because it prohibited truthful advertising as well.

The Court upheld the following amendments under the *Central Hudson* test:

- 22 N.Y.C.R.R. 1200.7(e) restrictions on attorney and law firm domain names and websites was upheld because an attorney can use any domain name it wants as long as (i) all of the pages include the attorney’s name; (ii) the attorney does not practice law using the domain name; (iii) the domain name does not imply an ability to obtain results; and (iv) the domain name does not violate another disciplinary rule.
- 22 N.Y.C.R.R. 1200.8(g) and 22 N.Y.C.R.R. 1200.41-a, which together contain a thirty-day moratorium on communications to victims, their families, or their representatives relating to a specific personal injury or wrongful death event.

Otherwise, the Court adopted a limited construction of the amendments to commercial advertising.

Stay Tuned...

The State will likely appeal the ruling, and move for a stay of the permanent injunction issued, prohibiting the enforcement of certain amendments.

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About the Firm

Founded in 1968, Ruskin Moscou Faltischek P.C. has emerged as Long Island’s preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With more than 60 legal professionals, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek’s resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the business community and our multidisciplinary approach heighten our value-added services.

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What Every Lawyer Should Know About the New Rules

New York lawyers need to be aware of several other significant changes that could significantly impact the way attorneys market their services.

- “Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. See 22 N.Y.C.R.R. 1200.1(k)
- The words “Attorney Advertising” must appear in all written advertisements, including within the subject line of an email. See 22 N.Y.C.R.R. 1200.6(f). The label “Attorney Advertising” must also appear on a web site’s home page. See id.
- An advertisement that includes statements reasonably likely to create an expectation about achievable results or characterizations of the quality of the legal services must be accompanied by the disclaimer: “Prior results do not guarantee a similar outcome.” See 22 N.Y.C.R.R. 1200.6(e)(3).
- Lawyers and law firms must retain copies of all communications defined as advertisements for a period of one (1) to three (3) years depending upon the delivery method of the communication. See 22 N.Y.C.R.R. 1200.6(k).
- A lawyer or law firm who utilizes a domain name for an internet web site that does not include the name of the lawyer or law firm may only do so if all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm and the domain name does not imply an ability to obtain results in a matter or otherwise violate a disciplinary rule. See 22 N.Y.C.R.R. 1200.7(e)
- A lawyer or law firm may utilize a telephone number that contains a domain name, nickname, moniker or motto as long as it does not otherwise violate a disciplinary rule. See 22 N.Y.C.R.R. 1200.7(f).

The RMF Litigator is published to provide information about developments in litigation matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.

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