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The Missouri Bar
Attn: Special Committee on Lawyer Advertising
326 Monroe St.
Jefferson City, Missouri 65102

By First-Class Mail and Facsimile to (573) 635-2811

I am grateful for the opportunity to provide comments on proposed changes to the Rules of Professional Conduct related to lawyer advertising as a member of the Missouri Bar. The scope of some of the proposed amendments raises serious constitutional concerns that the Missouri Bar should consider.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Eastern Missouri is an affiliate of the ACLU and enjoys a membership of more than 4,800 individuals. The protection of the First Amendment's guarantee of free speech is at the core of the ACLU's mission.

The right to free speech under the First Amendment is fundamental, *Morse v. Frederick*, 127 S.Ct. 2618, 2648 (2007), and the loss of a First Amendment freedom constitutes an irreparable harm, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 340 (1985). Advertising and other commercial speech is encompassed by the First Amendment and may not be abridged without a showing of an actual credible and factual justification for the rule. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Some portions of the proposed amendments appear to impinge on individuals' rights under the First Amendment. They are an overreaction to a largely imagined problem. But, in any event, the restrictions are unreasonable because there are equally effective, more narrowly tailored means to address the perceived harm. The rules give the appearance that their true purpose is to discourage advertising, not to protect consumers.

Proposed Amendments to Rule 4-7.1

The proposed amendments to Rule 4-7.1 raise serious First Amendment concerns because they would bar certain truthful speech. Suppressing truthful messages is an illegitimate objective of advertising regulation. *Virginia State Board of Pharmacy*, 425 U.S. at 772. Although the Supreme Court has expressed reservations about expanding this ruling to our profession, the basis of the concern was the possibility of confusing or deceptive advertising. *Id.*

The proposed amendment labels certain terms as misleading even when they are, in fact, truthful. It is not uncommon for an attorney to offer services at a discounted rate or to offer a discount to customers who pay with a check rather than a credit card. Under the proposed rules, attorneys would not be allowed to advertise true discounts. Where a firm offers a discount or the lowest prices, there is nothing confusing or misleading about saying so. Truthful statements are non-deceptive, and many of the statements banned by the proposed rule are readily understood by the average consumer. Because the proposed amendment bars truthful speech, it is in direct conflict with the First Amendment.

Proposed Amendments to Rule 4-7.2(c)

The proposed amendments to Rule 4-7.2(c) would create an undue burden on attorneys who engage in commercial speech without advancing the government's interest addressed by the existing Rule. "[I]f the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002). Here the less-restrictive means are in place and there is no evidence to support the notion that placing additional burdens on speech will achieve any further purpose.

The government may well have an interest in maintaining records of attorney advertising. This interest is satisfied by the existing Rule 4-7.2(b). The additional requirements in the proposed amendments would not alleviate any additional harm but would greatly burden speech by requiring additional tasks and fees. There is no evidence that the current rule does not satisfactorily address any legitimate concerns, nor is there evidence that more requirements would prevent false or misleading advertising. On the other hand, there is no question but that the proposed amendments would erect barriers to speech.

Proposed Amendments to Rule 4-7.2

Warnings and disclaimers may be permissible to make advertisements non-confusing or non-deceptive. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). However, "unjustified or unduly burdensome disclosure requirements might offend

the First Amendment by chilling protected commercial speech." *Id.* Disclosure requirements must be reasonably related to the government interest in preventing the deception of consumers. *Id.*

The disclaimer requirements of the proposed Rule 4-7.2(g) do not make advertisements non-confusing. Members of the public are aware that the choice of a lawyer is an important decision, and like other commercial activities, the public is aware that they need not make a choice based solely upon advertisements. The decision to choose a particular lawyer is based upon many factors, such as, for example, location, type of practice, cost, services, and expertise, many of which are illustrated through the use of advertisements. These factors are considered by consumers when they engage in commercial activity. Advertisements are a means of providing consumers with information so that the consumer can make a better, more informed decision as to what they should do. Consumers do not base their decisions solely on advertisements, but on the information provided to them by the advertisements. There is no evidence that consumers of lawyers' services do not understand this. There is no indication that viewers of attorney advertising believe as a result of the advertising that choosing a lawyer is not an important decision or that it should be made on the sole basis of an advertisement.

There is also no deception that the disclaimer would cure. Attorney advertising does not claim that the choice of lawyer is *not* important.

Because the proposed amendments to Rule 4-7.2(g) do not make advertisements non-confusing or non-deceptive, compelling an unnecessary disclaimer raises a significant First Amendment concern.

Proposed Amendments to Rule 4-7.3(b)

Certainly the government may have a legitimate interest in preventing the solicitation of prospective clients who already have lawyers. This is the goal of current Rule 4-7.3(b)(9). The proposed amendments would go significantly further despite a dearth of evidence showing the current rule is insufficient or ineffective. If accepted, the proposed amendments would effectively end the use of direct mail to notify consumers of attorneys who might be available to handle their case. The public relies on such information to know it has choices when it comes to selecting an attorney.

The proposed amendments would place attorneys in an impossible position. They would not be able to send direct mail unless they know or reasonably believe that the person is not represented. In effect an untrue presumption would be created: that, unless one knows otherwise, an individual is already represented by an attorney. Persons who require but do not have an attorney would be deprived of information they want and need because attorneys would be chilled from utilizing any direct mail in the state.

Regulations must directly and materially advance the government interest. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). The proposed amendments go well beyond what is necessary to prevent lawyers from advertising to individual who already have obtained counsel and, in the process, deprive those in need of counsel of vital information.

Respectfully submitted,

Anthony E. Rothert
Legal Director