

Advisory Committee of the Supreme Court of Missouri

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Overseeing Ethical Conduct
of Lawyers in the State of Missouri

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November 13, 2008

Thomas M. Burke, President
The Missouri Bar
326 Monroe St.
P. O. Box 119
Jefferson City, MO 65102

Re: Proposed Advertising Rules

Dear Tom,

I am writing to submit comments on the proposed advertising rules on behalf of the Advisory Committee.

Preamble No other individual rule or set of rules has a preamble. Therefore, if the preamble is adopted, it should be incorporated into the preamble for the Rules of Professional Conduct, as a whole. The proposed version of the preamble is not worded in a manner that is appropriate for adoption by the Court. It is written from the perspective of attorneys and should be reworded if it is to be submitted to the Court.

7.1(d) This would be difficult to enforce. It will be very difficult, in some instances, to identify one "lead" counsel or which attorney(s) were "primarily responsible for the settlement or verdict."

7.1(i) It appears this provision is intended to prohibit lawyers from using celebrities in advertisements. However it is only worded to prohibit endorsement or testimonial by celebrities. It would not prohibit all advertising in which a non-client celebrity appears. For example, this proposed rule would probably not prohibit the majority of the ads featuring Robert Vaughn. (These are the ads that imply that the insurance company will immediately want to settle, once they learn a particular firm is representing the plaintiff.) If it were worded so that it would accomplish that goal, it is doubtful whether it would be constitutional. Additionally, there is an issue of how to determine whether a person is a "celebrity."

7.1 Paragraph 6 of the Missouri Supplemental Comment states: "Characterization of rates or fees chargeable by the lawyer or law firm such as 'cut-rate,' 'lowest,' 'giveaway,' 'below cost,' 'discount,' and 'special' is misleading." Although it is only in the comment, this provision is

probably unconstitutional. If the attorney is, in fact, giving away the services or offering them at a discount, etc., it is difficult to understand how it can be defined as misleading.

4-7.2(c) This provision is likely to greatly add to OCDC's storage costs and is likely to require additional OCDC staff. Even though it says that OCDC is not required to do anything with the advertising materials, some organized system of storage and retrieval would have to be established. Additionally, if OCDC is not required to do anything with it, why OCDC should be burdened with receiving the material? It is difficult to see what purpose this accomplishes.

4-7.2(g) We don't see a public protection purpose in requiring attorneys to use the exact words of the rule in a separate sentence. Some of the ads where firms have incorporated the content of the disclaimer in to their advertising message make the message of the disclaimer much more prominent than this rule would require.

4-7.2 Paragraph 7 of the Supplemental Missouri Comment states: "The provisions of Rule 4-7.2 shall apply to any lawyer who advertises for clients in this state. See Rule 4-8.5." We have several concerns about trying to extend the jurisdiction of our rules to these attorneys simply because their ads come into Missouri through national airwaves or publications. We believe there may be concerns under the 1st Amendment and we believe the application of the Interstate Commerce Clause should be researched regarding this issue.

4-7.3(b)(3) This provision would require the following language in all targeted solicitation letters: "ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE OFFICE OF THE CHIEF DISCIPLINARY COUNSEL, 3335 AMERICAN AVENUE, JEFFERSON CITY, MISSOURI 65109-1079, (573) 635-7400;" Many solicitation letters that are currently sent comply with the requirements of Rule 4-7.3. Nevertheless, people don't like them and, therefore, have complaints about them. This provision is likely to burden OCDC with responding to complaints about letters that comply with the rules. Encouraging people to complain when there is no reason to believe they have a valid complaint is only likely to result in a reduction credibility of the attorney discipline system in the eyes of those who file such complaints.

4-7.3(b)(10) Similar to our comment on proposed Rule 4-7.2(c), we believe the requirement to file all solicitation letters with OCDC will require time and expense for no obvious purpose.

We also note that there are situations in which former judges (often social security or workers compensation) who wear a robe or show the judge sitting at a bench in a courtroom with some statement like "Put the law on your side -- see Judge ___ for your disability claim." We do not believe the current rules clearly address such situations.

Thank you for the opportunity to submit these comments.

Sincerely,



Jennifer Gille Bacon
Chair

c Special Committee on Advertising
Keith Birkes
Alan Pratzel