

Report to The Missouri Bar Board of Governors

From the Civil Practice and Procedure and Tort Law Committees

November 20, 2008

On November 20, 2008 the Civil Practice and Procedure and Tort Law Committees held a joint meeting and presented a panel discussion and opportunity for public comment on the proposed changes to rules 4-7. Approximately 40 lawyers attended the meeting. They came from all parts of the state and provided comments and discussion regarding the proposed changes. Several members of the Special Committee on Advertising attended and discussed the proposed changes. The purpose of this report is to provide a synopsis of the comments made by lawyers who attended the meeting. The comments can be categorized into three main areas: 1) why any changes are being considered; 2) concerns about the addition of an oral disclaimer to radio and television commercials; and 3) concerns regarding additional restrictions or requirements to direct mail solicitation.

Concerns why any changes are being considered

Several attorneys expressed concern as to why any changes are being considered to the rules that were last amended in 2005. They asked for empirical data and documentation of any public harm that may exist by virtue of advertising that is permitted under the current rules. They commented on the perceived small number of complaints made to the disciplinary counsel's office regarding advertising. They also asked if disciplinary counsel's office kept a record of whether complaints were made by the public, or instead, by lawyers. A representative from the disciplinary counsel's office was present on the panel and responded that complaints are not tracked by type of complainant. Various concerns were voiced that the proposed rules appear to be restraints on speech as well as helping the public. Several expressed the belief that the public is better off by knowing about products that may be defective and knowing who and how to contact a lawyer. Several felt that the committee was driven by some who had the agenda to prohibit advertising as a whole. They also expressed concern that the changes were not designed to prevent harm to the public but instead were more in the nature of regulating taste. Several asked for empirical data to be compiled before seeking to amend the rules.

Concerns regarding the addition of an oral disclaimer

Much of the discussion related to the requirement of adding the requirement for an oral disclaimer to radio and television commercials. Several lawyers from various parts of the state expressed strong opposition to the proposed requirement of an oral disclaimer. Several expressed dissatisfaction with having to include the written disclaimer (as is currently required) because they thought that the notion of the choice of a lawyer being important was obvious and common sense. Some suggested a more meaningful disclaimer, such as making sure the lawyer has experience. The most vocal opposition was to the requirement of the oral disclaimer. Many said it would effectively destroy the ability to have a 15 second commercial, as the bulk of the time would be taken up with the disclaimer language. They said that 15 second commercials are a vital part of their marketing and losing that opportunity would be devastating. Another vocal part of the opposition was that out-of-state attorneys comprise the bulk of television advertising and they would not follow the rules and thus the effect of the new rule would be that Missouri lawyers would lose business to out-of-state lawyers. The consensus of those present was to eliminate the oral disclaimer requirement. They were not necessarily opposed to the additional requirements (font size and color) of the written disclaimer.

Concerns regarding additional restrictions or requirements for direct mail solicitation

Comments and concerns were made regarding the new requirements for direct mail solicitation. Several expressed the importance of using direct mail solicitation in their practice. Several said that direct mail solicitation was vital to their practice and the requirement of involving the disciplinary counsel's office in the process would essentially destroy their ability to market this way. They also expressed the point that they had never received a complaint from anyone regarding their mailings, in fact, they had experienced the opposite. They feel their mailings provide an important service to people in need. They reinforced the fact that direct mail is the most cost-effective for smaller law offices and for younger attorneys just starting out in practice. Providing copies of the mailings to the disciplinary counsel's office was costly and not efficient. The representative from the disciplinary counsel's office said that the office was opposed to the rule provision that would make it the repository for the mailings.

Conclusion

This report does not contain the comments by the members of the special advertising committee regarding the proposed rule changes. Since the purpose of the joint meeting was to solicit and facilitate public comments on the proposed rules, only the comments from lawyers not on the committee are included. The clear consensus of those present is that they are opposed to any modification or amendment of rule 7-4 without objective documentation of the need for change in the name of protecting the public from harm. They are opposed to restrictions that sound like attempts to monitor taste. They are opposed to rule modifications that will effectively destroy the right to market and advertise (specifically referring to the oral disclaimer and direct mail solicitation issues above described).

Susan Ford Robertson, Chair, Civil Practice and Procedure Committee

Daniel A. Thomas, Chair, Tort Law Committee