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FACSIMILE TRANSMITTAL SHEET

TO: Special Committee On Lawyer Advertising	FROM: Jane Cohen
COMPANY: Missouri Bar	DATE: 8/8/08
FAX NUMBER: 573-635-2811	TOTAL NO. OF PAGES INCLUDING COVER: 14
PHONE NUMBER: 573-635-4128	SENDER'S REFERENCE NUMBER:
RE: Comments on Proposed Changes to Rule 4-7 on Lawyer Advertising	YOUR REFERENCE NUMBER:

NOTES/COMMENTS:

Attached are my comments on the Proposed Amendments to Rule 4-7 on Lawyer Advertising.

Jane Cohen

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The Missouri Bar

Attn: Special Committee on Lawyer Advertising

326 Monroe St.

Jefferson City, MO 65102

Telephone: 573-635-4128

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My comments are noted below.

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Jane Cohen

**Special Committee on Lawyer Advertising
Proposed Amendments to Rule 4-7**

The changes to current Rule 4-7 are indicated by underlining for language to be added and ~~strikethrough~~ for language to be deleted.

Preamble: The purpose of lawyer advertising is to provide prospective clients with accurate advice and to help facilitate intelligent selection of an attorney. The following rules have been drafted with a recognition that the practice of law requires the complex balance of sometimes competing interests in representing clients zealously, within the bounds of ethical constraint, promoting the public welfare of the courts and our judicial system, and earning a reasonable livelihood for ourselves and our families. The intent of the following rules is to benefit the public and to allow lawyers to engage in constitutionally protected commercial speech. All members of the Bar should, however, note that the privilege of being a profession carries with it the responsibility of conducting ourselves as professionals. Members of the Bar are encouraged to consider that, although a particular advertisement may satisfy constitutional requirements, the advertisement may nonetheless convey to the public a negative impression of our profession, and that such an advertisement should be avoided in the interest of our profession and in the public's confidence in our legal system.

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RULE 4-7.1: COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

A communication is false if it contains a material misrepresentation of fact or law.

A communication is misleading if it:

- (a) omits a fact as a result of which the statement considered as a whole is materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) contains any reference in any advertisement to past successes or results obtained unless the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery or was primarily responsible for the settlement or verdict;

~~(e)~~ (d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

~~(f)~~ (e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

~~(g)~~ (f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

~~(h)~~ (g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(i) contains any testimonial about or endorsement of the lawyer by a celebrity unless the celebrity is a client or former client;

~~(j)~~ (h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

~~(k)~~ (i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

~~(l)~~ (j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or

(m) (k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case;

(n) vilifies any other potential party or adversary.

COMMENT

This Rule 4-7.1 governs all communications about a lawyer's services, including advertising permitted by Rule 4-7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

SUPPLEMENTAL MISSOURI COMMENT

This Rule 4-7.1 is not intended to alter the definition of "competence" as defined in Rule 4-1.1.

Rule 4-7.1 prohibits false or misleading communications. False and misleading statements have never enjoyed the limited first amendment protection afforded to other forms of commercial speech by *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

Rule 4-7.1 (c) allows a verifiable statement regarding the number of cases tried or handled in a particular area without the disclaimer language of Rule 4-7.1(c).

Rule 4-7.1(i) (h) addresses the practice of using testimonials and endorsements by entertainers, sports figures, or other well-known persons. Rule 4-7.1 (j) requires the disclosure of the fact that a payment was made to obtain a the testimony or endorsement, thereby giving the public an opportunity to evaluate the credibility of the statement.

Rule 4-7.1(k) (i) deals with simulations primarily utilized in the electronic media. Rule 4-7.1(k) (i) permits simulations of a lawyer, client, victim, scene, or event if the advertising indicates that it is a simulation that is being portrayed. The simulation must contain a disclosure that it is a simulation in order to counteract any suggestion that the representation is a portrayal of actual fact. Rule 4-7.1(k) (i) also permits a communication to contain a picture or other representation of the lawyer or lawyers providing the legal services that are the subject of the advertisement.

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.

A communication is false or misleading if it states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

(Adopted September 28, 1993, effective July 1, 1995. Amended September 19, 2005, effective January 1, 2006, Rev. July 1, 2007)

RULE 4-7.2: ADVERTISING

(a) Subject to the requirements of Rule 4-7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. The record shall include the name of at least one lawyer responsible for its content unless the advertisement or written communication itself contains the name of at least one lawyer responsible for its

content.

(c) "A copy of any television, radio or other transitory audio or video advertising subject to the disclosure requirements of Rule 4-7.2 (g) shall be deposited within seven days of its first publication with the Office of Chief Disciplinary Counsel who shall maintain such advertising for a period of one year, and shall make such advertising available for inspection by the public on such reasonable terms as the Office of Chief Disciplinary Counsel may prescribe. Nothing in this Rule shall be construed to require the Office of Chief Disciplinary Counsel to inspect, approve, catalog or otherwise act upon such advertising."

(d) (e) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:

(1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;

(2) a lawyer may pay the reasonable cost of advertising, written communication, or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and

(3) a lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-9.1 or other not-for-profit legal services organization.

(e) (d) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer. Similarly, in any communications such as television, radio, or other electronic programs purporting to give the public legal advice or legal information, for which programs the broadcaster receives any remuneration or other consideration, directly or indirectly, from the lawyer who appears on those programs, the lawyer shall conspicuously disclose to the public the fact that the broadcaster has been paid or receives consideration from the lawyer appearing on the program. A lawyer shall not compensate or give anything of value to a representative of the press, radio, television or other news medium in anticipation of or in return for professional publicity in a purported news item.

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(f) (e) A lawyer or law firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week, or

(2) the advertisement states:

(A) the days and times during which a lawyer will be present at that office, or

(B) that meetings with lawyers will be by appointment only.

(g) (f) Any advertisement or communication made pursuant to this Rule 4-7.2, other than written solicitations governed by the disclosure rules of Rule 4-7.3(b), shall contain the following conspicuous disclosure:

“The choice of a lawyer is an important decision and should not be based solely upon advertisements.” This disclosure shall be made separately and in a single complete sentence containing only the foregoing words.

Conspicuous disclosure means:

- (i) With regard to printed matter, in font on high-contrast background at least one-third the size of the largest font displaying a telephone number made in a type size and manner that is reasonably legible to persons reading the advertisement;
- (ii) With regard to radio or other audio presentation, spoken orally in a cadence not faster than the slowest statement of a telephone number or, in the absence of a telephone number, audibly in a clear and understandable manner;
- (iii) With regard to television, both spoken orally in a cadence not faster than the slowest statement of a telephone number or, in the absence of a telephone number, audibly in a clear and understandable manner and in font on high-contrast background at least one-third the size of the largest font displaying a telephone number, displayed for at least as long as the longest display of a telephone number or, if none, in a type size and manner that is reasonably legible to persons watching the advertisement displayed for a sufficient amount of time that a reasonable person can read and comprehend the disclosure.

(h) ~~(g)~~ The disclosures required by Rule 4-7.2(f) ~~(e)~~ and ~~(g)~~ ~~(f)~~ need not be made if the information communicated is limited to the following:

- (1) the name of the law firm and the names of lawyers in the firm;
- (2) one or more fields of law in which the lawyer or law firm practices;
- (3) the date and place of admission to the bar of state and federal courts; and
- (4) the address, including e-mail and web site address, telephone number, and office hours.

(i) Any words or statements required by Rules 4-7.1, 4-7.2 or 4-7.3 to appear in an advertisement or direct mail communication must appear in the same language in which the advertisement or direct mail solicitation appears. If more than one language is used in an advertisement or direct mail communication, any words or statements required by this subchapter must appear in each language used in the advertisement or direct mail communication.

*(j) The provisions of Rules 4-7.2, and 4-7.3 shall not apply to services provided by a not-for-profit organization funded in whole or in part by the Legal Services Corporation established by 42USC Sec. 2996b or to pro bono services provided by a not-for-profit organization, a court annexed program, a bar association or an accredited law school.

*The committee did not take a position for or against the suggested revision to Rule 4-7.2(j).

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Paying Others to Recommend a Lawyer.

[2] A lawyer is allowed to pay for advertising permitted by this Rule 4-7.2, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Rule 4-7.2(d) (e) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Rule 4-7.2(d) (e) also does not prohibit paying a person for making a testimonial or endorsement in compliance with Rule 4-7.1(j) (h).

SUPPLEMENTAL MISSOURI COMMENT

Advertising concerning a lawyer's services should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of appropriate counsel. Information communicated in advertising should be disseminated in an objective and understandable fashion and should be relevant to a prospective client's ability to choose a lawyer. A lawyer should strive to communicate such information without undue emphasis upon advertising stratagems, which serve to hinder rather than to facilitate intelligent selection of counsel. Tasteful advertising is a matter of subjective interpretation. However, in all communications concerning a lawyer's services, a lawyer should avoid advertising that serves to denigrate the dignity of the profession or trust in courts, of which every lawyer functions as an officer.

Rule 4-7.2(e)(d) and (f)(e) have been added to jointly address the problem of advertising that experience has shown misleads the public concerning the location where services will be provided or the lawyer who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

Rule 4-7.2(f)(e) also prohibits advertising the availability of a satellite office that is not staffed by a lawyer at least on a part-time basis. Rule 4-7.2 does not require, however, that a lawyer or firm identify the particular office as its principal one. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay

personnel.

Rule 4-7.2(f)(e) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise, low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that lawyers not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, Rule 4-7.2(e)(d) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Rule 4-7.2(e)(d) also requires disclosure if a broadcaster receives remuneration from a lawyer appearing on any television, radio, or other electronic program purporting to give the public legal advice.

In the case of television, the disclosure required by Rule 4-7.2(g)(f) ~~may~~ must be made orally ~~or~~ and in writing. In the case of radio, the disclosure must be made orally. The disclosure required by Rule 4-7.2(g)(f) may, at the option of the advertiser, include the following language: "This disclosure is required by rule of the Supreme Court of Missouri." This disclosure is only required for advertisements in Missouri.

The provisions of Rule 4-7.2 shall apply to any lawyer who advertises for clients in this state. See Rule 4-8.5.

(Amended June 21, 1994, effective January 1, 1995. Amended December 1, 1994, effective July 1, 1995. Amended August 1, 1995, effective January 1, 1996. Amended November 25, 2003, effective January 1, 2004. Amended September 19, 2005, effective January 1, 2006., Rev. July 1, 2007)

RULE 4-7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

This Rule 4-7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) In-person solicitation. A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative.

(b) Written Solicitation. A lawyer may initiate written solicitations to an existing or former client, lawyer, friend, or relative without complying with the requirements of this Rule 4-7.3(b). Written solicitations to others are subject to the following requirements:

- (1) any written solicitation by mail shall be plainly marked "ADVERTISEMENT" on the face of the envelope and all written solicitations shall be plainly marked "ADVERTISEMENT" at the top of the first page in type at least as large as the largest written type used in the written solicitation;

(2) the lawyer shall retain a copy of each such written solicitation for two years. If written identical solicitations are sent to two or more prospective clients, the lawyer may comply with this requirement by retaining a single copy together with a list of the names and addresses of persons to whom the written solicitation was sent;

(3) each written solicitation must include the following:

“Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri.” 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.”

(4) written solicitations mailed to prospective clients shall be sent only by regular United States mail, not registered mail or other forms of restricted or certified delivery;

(5) written solicitations mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents;

(6) any written solicitation prompted by a specific occurrence involving or affecting the intended recipient of the solicitation or family member shall disclose how the lawyer obtained the information prompting the solicitation;

(7) a written solicitation seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the client’s legal problem;

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

~~(9) a lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter. a lawyer shall only send a written solicitation regarding a specific matter if the lawyer knows or reasonably believes that the person to whom the solicitation is directed is unrepresented by a lawyer in the matter; and,~~

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