

SEP 18 2008

JOHN L. DAVIDSON

LAW OFFICES

Missouri and South Carolina

JOHN L. DAVIDSON, P.C.

Writer's E-Mail Address:

jldavidson@att.net

11906 MANCHESTER ROAD, SUITE 303

SAINT LOUIS (DES PERES), MISSOURI 63131

www.JohnLDavidson.com

314-725-2898
314-966-3095 (fax)

September 13, 2008

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

Matter: "Rules" on Advertising

Dear Sir or Madam:

I write for several reasons.

First, the present rule, if we retain any rule on advertising beyond what I mention, below, should be amended to provide a deep, wide harbor for direct, in-person solicitation of all business or commercial legal work.

I do not advertise, but the present rules substantially restrict my ability to compete and it therefore narrows the choices available to clients. I have spent 30 years developing very sophisticated skills about highly complex, narrow areas of the law. The consumers of such services—or similar services which I could grow my firm and offer—are sophisticated businesses and business people; there is no reason to prohibit direct, in person solicitation of such potential clients, yet the present rule and proposed rule each do such and are unconstitutional. *Fane v. Edenfield*, 507 U.S. 761 (1993). If the Committee is going to venture into advertising, the first task it should undertake is to correct this unconstitutional restraint and create a broad deep safe harbor for direct solicitation of all business or commercial legal work or representation.

As for the rest of the story, the premise that lawyer advertising has hurt an image is just silly. The evidence is overwhelming that so-called "Tort Reform" and the trend of courts over last 25 years to protect big business, the wealthy, and insurance companies has paralleled any growing negative impression. The public has the good sense to know that the law and the law business are for the rich and

The Missouri Bar

September 13, 2008

Page 2

powerful in our society, not the public. Changing the advertising rules will not change that accurate assessment. Moreover, any legal advertising is but a drop in the bucket in a sea of media comment on the law and lawyers, most all of its negative. Let's be blunt about who is behind the effort—it is those who see it in their economic interest, or that of their clients, to restrict advertising.

However, if we are going to have a rule, I would propose an entirely different rule, as set forth below.

The present rule starts with a preamble statement that we are members of a profession.

If we are a profession we would not need rules, whatsoever, as I explain below. I appreciate those who work on the bar committees, for they have the best of intentions. But we all know what road is paved with good intentions, albeit few understand why. Hopefully this letter will explain.

In this case, the rule will fail because of the incongruity of the message. Detailed rules of the sort proposed belie any claim that those to whom they are subject are professionals. Instead such rules are overwhelming evidence that service provider is debased and untrustworthy. Any consumer, knowing of the rules, would refuse, if at all possible, to do business with any lawyer because of the justifiable fear created from asking, Why are such rules necessary? What do I have to fear of such people?

If we are going to have a rule, why not have a universal rule that says the following and nothing more:

With respect to any legal matter, or matter involving legal rights or relationships, or involving the law, or the application of law, no person, lawyer or non-lawyer, shall:

- a) make a false or misleading communication; or
- b) omit from any communication information, such that the communication becomes false or misleading

The Missouri Bar

September 13, 2008

Page 3

And, back this rule up by creating a cause of action for any person damaged by such, with actual and punitive damages, prejudgment interest, and attorneys fees.

And, why not required every communication from and lawyer or non-lawyer to include such a warning and notification of the right to bring a civil action?

There is at least a rationale for such a rule. Such a broad rule, applicable to lawyers and non-lawyers alike, would permit lawyers to compete every day with non-lawyers who also provide legal services. *E.g., In re First Escrow*, 840 S.W.2d 839 (Mo. 1992).

Any law that restricts communications by a lawyer must extend to non-lawyers. Otherwise, over time, the competitive advantage gained by non-lawyers will drive lawyers from the business, as has happened, for example, in the real estate closing market.

This proposition is an aspect of human psychology, illustrated by Gresham's law—bad money drives good money out of circulation.

Gresham's law is an observation about human psychology, well enough explained here: http://en.wikipedia.org/wiki/Gresham%27s_Law

What the law says is that in a marketplace, what is believed good will be retained and what is believed to be bad well be rejected.

Gresham's law is part of a much larger body of psychological principles, often counterintuitive, best understood and applied by Mr. Warren Buffett and Mr. Charles Munger. THE PSYCHOLOGY OF HUMAN MISJUDGMENT (Speech, Harvard Law School, 1995).¹

Let us talk about the present market for real estate closing services, a market in which lawyers and non-lawyers may both legally operate. *In re First Escrow, supra.*

¹Of which many versions are freely available on the Internet.
http://vinvesting.com/docs/munger/human_misjudgement.html

The Missouri Bar

September 13, 2008

Page 4

In this market, lawyers can do very little to advertise or solicit business, except engage in expensive traditional media advertising. Even here lawyers are at a substantial disadvantage, for the cost of capital for lawyers is much higher than for non-lawyers providing the same service. The top title insurance companies are all national, public companies, having ready access to the public capital markets and therefore substantially lower costs of capital. Lawyers, on the other hand, must borrow capital, risking personal ruin if the adventure fails, or generate capital from retained earnings, both alternatives being substantially more expensive than public capital costs. For example, GE's cost of capital, today, is 4.40% (shareprice divided by dividend)

An alternative to traditional advertising is the direct telephone call as an obvious marketing tool. Title insurance companies may pay real estate professionals for leads and then place direct calls to either buyers or sellers, offering closing services. Lawyers may not do such.

The result—the market for closing real estate transactions has been almost entirely taken over by non-lawyers. This is not the intended result of the prohibition of lawyer advertising but it is what happens in a market where advertising competition is asymmetric. A similar market are fire claims adjusters who show up after a fire. Residential real estate contracts is a third example.

This asymmetry is why lawyers who don't advertise complain about lawyers who do advertise taking business. *Just as lawyers who don't advertise loose business to lawyers who do, lawyers who don't advertise loose business to non-lawyers who do.*

What the Committee needs to ask is, What is the implied message from such a regulatory scheme as we have now or which we propose to further constrict? What message does the consumer implicitly receive when they get a call from a title insurance company but not a lawyer's office? Isn't part of the message, "You can trust the title insurance company that calls you, but we don't trust lawyers and so we forbid them from doing such?"

The Committee needs to think long and hard about this sort of implied communication, as it looks at the proposed rule. Shouldn't the message be reversed and the regulatory scheme prefer lawyers over non-lawyers?

The Missouri Bar

September 13, 2008

Page 5

Another example of these psychological factors at work is the rule limiting contact with accident victims or others when they are most in need of legal services, while permitting insurers and defendants ready access. This has twin evils.² First, the message sent is that lawyers who want to communicate may not be trusted. The second is that we, as a profession, want you, the consumer, to lose your most valuable rights due to ignorance, so that we can feel noble about ourselves.

One personal story will explain. When I first came to St. Louis I had to take over a wrongful death case, involving a split rim truck wheel. A young roofer with a family went to work early and was asked to drive across the street and inflate a rear truck tire that had gone flat over night. It exploded. The injuries were horrible—he was not killed instantly. The family spent weeks at the hospital as the young man lay dying, with no one hired to look after the truck, investigate the event, and most importantly, identify the wheel at fault and secure its chain of custody.

The consequence of such on the economics of the family was devastating. By the time a law firm was hired, it was impossible to discern which truck wheel had “exploded.” Examination of the wheels suggested at least two had defects, other than design defects, that would could have caused the event. However, since we could not prove which wheel exploded, we could not use this evidence and were limited to a design defect theory of liability, which substantially reduced the value of the case, costing the family hundreds of thousands if not millions of dollars. Also, different wheels were manufactured by different makers, precluding us from naming all responsible parties.

The direct result of all this and of the advertising rules was that three children grew up without either a father or adequate financial support, yet one of our major automobile manufacturers saved lots of money.

²I know this has been held constitutional, but that is a red herring. That something is constitutional does not mean that it is wise or sound public policy.

The Missouri Bar

September 13, 2008

Page 6

I continue to look upon these events as the low point of my professional career. You can be sure that my horse snickers³ when I read of or hear certain members of the bar or others talk about it being unseemly to communicate important information at such times, especially when the investigators and adjusters are at work on the opposite side. Oddly, this solicitude for the victim and family never reappears later and is notably absent from appellate court opinions.

Numerous insurers and others will immediately call investigators to the scene, often within moments of receiving notice. If we are going to keep lawyers away then we should also keep away defense efforts of all shapes and sizes. Fair is fair.

Last, but most importantly, I want to comment on both the conspicuous language requirement and the requirement that an advertisement of any sort include something like the following:

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

Since we cannot, and should not prohibit legal advertising, the long term result of this message will be to further debase the public's trust for lawyers. Who else in our society has to put such a statement on any communication. Contrary to what some well intentioned⁴ people deluded themselves into thinking, it is this sort of communication that is responsible for the public's attitude about lawyers. **This screams, lawyers cannot be trusted.** If anyone doubts such, why don't we ask for the same disclosures from used car salespeople or policemen or federal agents?

³Any member of the Committee not familiar with Carl Sandburg's poem, The Lawyers Know to Much, will be under the mistaken impression that the complaints driving this are of recent origin.

⁴The last person to whom the Committee should be paying attention is bar counsel, whose economic interest is in building up its power and influence belies any claim at objectivity on these issues.

The Missouri Bar

September 13, 2008

Page 7

In closing, I realize this letter is written in vain. Like the American public, the Bar is no longer comprised of serious people who can carefully consider and resolve issues with judgment and discretion. This issue was put to bed two years ago, but is now back. Why?

The Bar and its committees are fatally infected with what Munger calls a “man-with-a-hammer syndrome: to the man with a hammer, every problem tends to look pretty much like a nail.” To lawyers, especially, the solution to all problems is another rule. When you add the bias and interest of bar counsel in more power, a bigger office and staff, and higher salaries, the mixture is deadly—a steady progression of ever more useless rules.

Two examples in the proposed rules prove my point. First, a proposed rule reads, **“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.”** This is a most flagrant First Amendment violation. It is not for us to decide the rules by which the media does business. If KMOX radio wants to sell access to its station, as long as the information is true, then so be it. If KMOX mentions people who buy advertising favorably in other contexts, so be it.

Second, look at the discriminatory effect. Given what it pays for advertising, I do not understand why Brown & Crouppen hasn’t already just bought some form of traditional media, or gone together with our firms nationwide and done such. If the First Amendment permits Rupert Murdoch to manipulate Fox and the Wall Street Journal, it surely permits Terry Crouppen to own a newspaper and report if he ~~has~~ a courtroom victory. Any contrary rule would just reward the Murdoch’s of the world, in competition with Crouppen.

This sort of rule and the others you propose will drive Brown & Crouppen, or other stronger more powerful firms to do something in response. I am, truly amazed, when I click through Greta Van Susteren or others similar programs in the evening I don’t see her interviewing Terry Crouppen explaining the tort of the day, now. **Terry will have no problem being interviewed, if it is his network!!!**

My second example on this point is the proposed amendment reading, “a lawyer shall not send a written solicitation regarding a specific matter unless the lawyer

The Missouri Bar

September 13, 2008

Page 8

knows or reasonably believes that the person to whom the solicitation is directed is unrepresented by a lawyer in the matter . . .”⁵

My two cents is that this proposed rule change is criminal, in violation of Federal and State antitrust laws (and also the rules and regulation of the FTC). In Missouri, all lawyers contracts are “at will.” A client may fire his or her lawyer for any or no reason at any time. Therefore, no lawyer has a protected interest in keeping other lawyers from talking to his client about being hired to provide legal representation. This is a naked restraint of competition. It is pernicious in many different ways. Lets consider the two extremes.

First, today, several law firms write persons charged criminally or with traffic violations. This is healthy competition, giving consumers information and choices and options. Once the letters start arriving the consumer is learning that there are lots of lawyers and lots of choices in the market, not only for this but for other legal problems. The lawyers who send these letters cannot possibly investigate whether the people already have a lawyer. And, why should they?

At the opposite extreme, a young recent graduate of one of our law schools might also have great skills in computer science and artificial intelligence, such that she has or can write computer software that would dramatically cut insurance defense costs. This rule would prohibit or chill her, on graduating from law school, from writing to State Farm and asking for the opportunity to demonstrate her skills and abilities. I know many insurance defense firms who will smile, but those who benefit from restraints of trade always do such.

In closing, it is time for all of us to apply Albert Einstein’s wisdom on Insanity: doing the same thing over and over again and expecting different results. For 50 years the Bar has been insane, obsessed with Rules and Codes of Conduct, of which the only demonstrated effect is that the public likes us less and less.

There are 50 States in the Union. Let’s experiment and remove all restraints on advertising for five years, save the simple one above, and see what happens. I know this will lead to comments such as one already posted who said that advertising, will lead consumers to being “be preyed upon by who knows what sorts of law license holders.” This could be a good thing. The present system is

⁵I object to (10) for the same reasons.

The Missouri Bar

September 13, 2008

Page 9

not identifying these individuals, if they exist in great number (which I doubt).
Open, robust advertising would lead them out into the open or (many time more
likely), drive them out of business and out of the profession.

Thank you for your attention.

Sincerely yours,



John L. Davidson

JLD/ahd

cc: file