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August 29, 2008

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

Re: Lawyer Advertising Rule Changes

Dear Committee Members:

We are writing in response to your recent request for comments on the proposed rule changes to lawyer advertising. In our view, the current restrictions and regulations on lawyer advertising are sufficient to protect the public and maintain a positive public image for the legal profession. For the reasons outlined below, we are opposed to the proposed changes regarding direct mail written solicitations to prospective clients, as suggested in proposed rules 4-7.3(b)(3); and 4-7.3(b)(10).

Based on our experiences, direct mail written solicitations broaden access to legal services by making consumers aware of their rights and the availability of representation, informing them when they may have a legal claim, enhancing their access to the legal system, and offering legal choices of which consumers may not otherwise be aware.

Truthful legal advertising is a service to the public because it makes it easier for consumers to find appropriate legal representation, and it encourages fair marketplace competition among lawyers. The proposed changes regarding written solicitations to prospective clients create unnecessary restrictions and impose additional costs that hurt smaller firms who cannot afford to advertise on television or radio.

A. Rule 4-7.3(b)(3)

The proposed rule change would require attorneys to add to a written solicitation the sentence, "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." This sentence is in addition to the lengthy disclosure already required by Rule 4-7.3(b)(3) and the words "ADVERTISEMENT" on both the envelope and letter of the communication.

The Missouri Bar
Attn: Special Committee on Lawyer Advertising
August 29, 2008
Page -2-

This rule change is unnecessary since current rules already require an attorney to communicate truthful information. Rule 4-7.1 prohibits false and misleading communication, and Rule 4-7.3(c) places broad, far-reaching restrictions on direct mail written solicitations. Significantly, currently a lawyer must retain a copy of any written solicitation for at least two years pursuant to Rule 4-7.3(b)(2). Because a true and accurate copy of the written solicitation must be retained, the content of the solicitation cannot be disputed and may be readily produced. The current rules provide sufficient protection to the legal profession and consumers. In short, the disclosure does not serve a purpose left unaddressed by the current rules.

The new disclosure will only discourage attorneys from using truthful, non-misleading legal advertising in the form of direct mail written solicitations with prospective clients because the disclosure inherently encourages recipients to find fault with the communication. The disclosure instructs a recipient to contact the office of the Chief Disciplinary Counsel regarding any complaints about the letter, including complaints which do not violate the Rules of Professional Conduct. The disclosure puts attorneys using written solicitations at risk for frivolous complaints, as well as for complaints regarding conduct permitted under the Rules of Professional Conduct. While frivolous complaints may be ultimately disposed of or dismissed, attorneys still face unnecessary legal fees and must make disclosure of the complaints to their legal malpractice insurers, increasing their rates unnecessarily.

In addition, there is no similar disclosure or restriction on television advertising. The proposed rule places a burden on small firms who cannot afford television advertising that does not exist for larger firms who advertise on television.

B. Rule 4-7.3(b)(10)

The proposed change to Rule 4-7.3(b)(10) would require an attorney using direct mail written solicitations to file a copy of each and every solicitation with the Office of the Chief Disciplinary Counsel with a signed affidavit regarding the solicitation. This proposed change imposes new and unjustified restrictions on attorney advertising.

Requiring an attorney to prepare an affidavit and file a copy of the solicitation with the Office of the Chief Disciplinary Counsel would take a significant amount of time and money, making direct mail solicitations unpractical for small firms. The burdens imposed by this proposed regulation would be overwhelming and unworkable, and it would generate untold amounts of useless paperwork both for the attorney and the Office of the Chief Disciplinary Counsel.

As with proposed Rule 4-7.3(b)(3), this additional burden and restriction does not serve a purpose further than the current rules. Because a lawyer must retain a copy of any written solicitation for at least two years pursuant to Rule 4-7.3(b)(2), a true and accurate copy of the written

The Missouri Bar
Attn: Special Committee on Lawyer Advertising
August 29, 2008
Page -3-

solicitation is available for inspection should the Office of the Chief Disciplinary Counsel want to review it. The current rules provide sufficient protection to the legal profession and consumers.

Conclusion

The proposed changes regarding direct mail written solicitations to prospective clients, as suggested in proposed rules 4-7.3(b)(3); and 4-7.3(b)(10), will chill lawyers from engaging in advertising by direct mail. This will prevent consumers from receiving truthful, non-misleading information about legal services and their legal rights. Placing additional burdens on advertising which is not false or misleading diminishes the legal profession and may violate the free speech rights of Missouri attorneys under the First Amendment. Attorneys who advertise for clients, particularly those who represent their clients on a contingency bases, have no incentive to trick consumers into pursuing legal claims that have no reasonable probability of success.

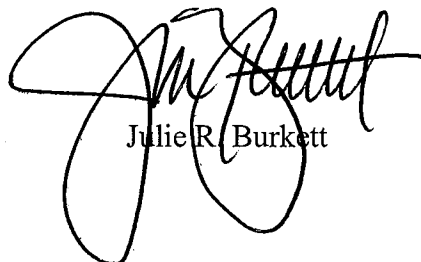
In addition, the current rules and restrictions on attorney advertising meet the legitimate interests in protecting consumers. See, e.g., Rule 4-7.1. The proposed changes to Rules 4-7.3(b)(3) and 4-7.3(b)(10) add more burden and restrictions without benefitting consumers. Indeed, the proposed changes appear to do less to prevent fraud than to stifle one of the most effective forms of lawyer advertising for small firms and impede competition for legal services.

In brief, we urge the Committee to withdraw and reject the proposed changes to Rules 4-7.3(b)(3); and 4-7.3(b)(10). Thank you for consideration of our comments and your service to the Missouri Bar.

Yours truly,



Brad L. Blake



Julie R. Burkett