

The Missouri Bar
Attn: Special Committee on Lawyer Advertising
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Dear Members of the Special Committee on Lawyer Advertising:

I have had the opportunity to carefully review the Proposed Amendments to Rule 4-7. These changes are strikingly similar to the proposed changes of 2005 which were not adopted. I am of the opinion that the proposed new rules raise serious constitutional concerns as well as issues pertaining to the attorney/client privilege and work product doctrine. The proposed rules also foster an anti-competitive business climate. I must say that I am surprised at the short comment period on the proposed new revisions given the severity of their impact on Missouri attorneys.

The rules implemented in 2005/2006 were more than sufficient to protect the interest of the public. What has changed since then? Has there been a dramatic increase in complaints? If so, were the complaints by members of the public or by lawyers? I would suspect the latter.

PROPOSED RULE 4-7.3(b)(10)

There is no logical explanation why proposed section (10) is included in Rule 4-7.3(b). This section requires the attorney to file a sworn affidavit attesting to: (1) the truthfulness of all facts contained in the communication; (2) how the identity and specific legal need of the intended recipients were discovered; and (3) how the identity and specific need of the intended recipients were verified by the soliciting lawyer. This raises serious problems concerning the attorney/client privilege and work product doctrine. Even the Rules which are currently in place that deal with duties of confidentiality to the client specifically relate to not only current clients, but to "prospective clients" as well. The scenarios in which an attorney becomes aware of a client's need for the attorney's services are limitless. In some instances, information gained by the attorney will be considered confidential information and thus will be subject to the attorney/client privilege. Was it gained in pending litigation? Was it gained from a confidential informant? Was it gained from the spouse of the client? Was it gained in the attorney's investigation of other matters? These are only a few scenarios in which this proposed Rule would jeopardize the attorney/client privilege and possibly the client's case. The proposed rule not only requires the attorney to divulge this confidential information, but also requires the information be divulged by way of a sworn affidavit with very detailed, specific information. Indeed, this confidential information could be disastrous to the client if revealed to adversaries both in the civil and criminal contexts. Once this information leaves the attorney's possession, it will be discoverable information. This is

true regardless of whether the client ever retains the attorney. Adversaries will use information in the attorney's sworn affidavit against the client even if the client retains different counsel. Moreover, how does revealing this potentially confidential/privileged information serve to protect the client or the public? I believe the answer is that it does nothing to protect the client or the public. How does this proposed section (10) advance "the substantial government interest in preventing deception and confusion?" The answer is that it does nothing to further these interests.

Not only does proposed section (10) raise attorney/client privilege issues, it also raises issues pertaining to the attorney work product doctrine. Again, there is no limit to the number of scenarios in which the attorney learns of the client's need for the attorney's services. In some instances, it may well come as a result of existing litigation. In other instances it may come as a result of the attorney's investigation in preparation for related litigation. Years of jurisprudence have created the attorney work product doctrine to protect an attorney's information and strategies which, in turn, serve the client's interest. This doctrine is applicable in both the civil and criminal contexts. This proposed rule will very likely diminish the work product doctrine and may indeed be disastrous to the current or prospective client's case. The question must be asked again — How does this protect the client's or the public's interest?

PROPOSED RULE 4-7.3(b)(9)

The proposed section (9) also raises serious constitutional and anti-competitive concerns. The proposed amendment to section (9) now requires an attorney to prove a negative in order to ethically offer services to prospective clients — the lawyer must prove the client had not retained an attorney at the time the solicitation was sent. There is no logical explanation of how this rule protects the client. This proposed change appears to be a thinly veiled attempt to consolidate legal services into the hands of a few rather than allowing a prospective client to have choices. Having choices in legal representation only serves to improve representation and competitive compensation for legal services. As the U.S. Supreme Court has held: "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable."

Bates v. State Bar of Arizona, 433 U.S. 350, 376-377 (U.S. Ariz. 1977).

This proposed section (9), on the other hand, serves only to further anti-competitive conduct and does absolutely nothing to protect or inform the client. What is the reason this amendment was proposed? Was it because of complaints from the public? Or more realistically, was it because of complaints by a few lawyers who do not want the public to have choices in legal representation? I believe the latter. As the U.S. Supreme Court has held:

"[I]t is well settled that attorney advertisements such as the Letter Notice are protected by the First Amendment, so long as they are "not false or deceptive and [do] not concern unlawful activities." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) (reversing lower court's finding that attorney's mass-mailed advertising letter was prohibited by ban on targeted, direct-mail

solicitation, because the lower court made no finding that the letter was false or misleading, or that the ban otherwise advanced the substantial government interest in preventing deception and confusion)."

The rules already provide for disclaimers in case the recipient of the solicitation has already retained a lawyer. Absent some sort of deception in the solicitation, this proposed section (9) is clearly a constitutional violation. Nothing in proposed section (9) advances "the substantial government interest in preventing deception and confusion" nor does it do anything to protect the client. Rather, the proposed section (9) is clearly a constitutional violation and not only condones, but actually fosters anti-competitive conduct which will ultimately harm the public.

I strongly believe the proposed rules are overreaching, constitute a myriad of constitutional violations, and foster anti-competitive conduct — all of which will ultimately create harm to the public and will foster litigation on multiple issues pertaining to constitutional concerns, attorney/client privilege, and work product doctrine. None of the proposed changes are designed to prevent deception or confusion. Rather, it appears the proposals are solely attorney driven and not as a result of any actual problems or concerns raised by the public. The proposed amendments should be rejected in their entirety.