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SUPREME COURT OF MISSOURI

July 13, 2009

Mr. Thomas M. Burke, President
The Missouri Bar
326 Monroe Street
P.O. Box 119
Jefferson City, MO 65102

**In re: Supplemental Comments to Proposed Amendments to Rules of Professional
Conduct Related to Lawyer Advertising**

Dear Tom:

By letter dated November 17, 2008, the Office of Chief Disciplinary Counsel ("OCDC") provided comments to the proposed amendments to the Rules of Professional Conduct (RPC) as they relate to lawyer advertising and related rules. The proposed amendments were the product of a lengthy analysis of the advertising rules conducted by the Special Committee on Lawyer Advertising ("Committee").

The OCDC has been provided with a copy of the Report of the Special Committee on Lawyer Advertising (the "Report") as well as the revised draft of the proposed amendments to the advertising rules dated July 6, 2009 (the "July 6, 2009 draft"). The July 6, 2009 draft incorporates several significant revisions from prior drafts. We also understand that the Board of Governors of The Missouri Bar is scheduled to consider the Committee's Report and July 6, 2009 draft at its meeting later this month. In order to assist the Board of Governors in its analysis and evaluation of the Committee's proposed amendments, the OCDC is providing these supplemental comments to the Committee's Report and the July 6, 2009 draft of the proposed amendments. To the extent that particular rule changes are not addressed herein, the OCDC has no comment to the proposed change. I am available at your convenience to discuss these comments.

Report of the Special Committee on Lawyer Advertising

The OCDC concurs that additional education of the bar relating to Rule 4-7 (and all Rules of Professional Conduct) would be valuable to the profession and to the public. The OCDC also agrees that the public might be well served by a “public outreach campaign” intended to educate the public about lawyer selection.

The Committee’s Report also addresses “enforcement issues.” The OCDC is committed to enforcing all provisions of Rule 4, including the advertising rules contained in Rules 4-7.1 through 4-7.5. The OCDC, however, does not support providing greater weight or dedicated funding to enforcement of the advertising rules. The Supreme Court has consistently stated that the key purposes of attorney discipline are protection of the public and maintenance of the integrity of the legal profession. In our view, those purposes are not best served by giving greater weight and priority to enforcement of the advertising rules than to enforcement of rules explicitly related to the duties owed by lawyers to their clients and to the courts. Those duties include diligence, communication, safekeeping property, honesty.

Preamble

Per our previous comments, the Preamble relating to lawyer advertising has been rewritten in the July 6, 2009 draft and incorporated into the existing Preamble to the Rules of Professional Conduct.

Rule 4-7.1(h)

This section prohibits celebrity testimonials or endorsements unless the celebrity is a client or former client of the lawyer. This subsection appears to conflict with subsection (j) to Rule 4-7.1, which permits paid testimonials or endorsements (even by non-clients or former clients) provided that the advertisement identifies the fact that payment has been made. In addition, we believe that this proposed amendment creates enforcement issues in interpreting who is a “celebrity.”

Rule 4-7.1 (Supplemental Missouri Comment)

We question the enforceability of the “[c]haracterization of rates...” language in the July 6, 2009 draft in those cases where an attorney does, in fact, offer legal services at a cut-rate, below cost or at a discount. In addition, courts have generally been receptive to advertisements that help clients make informed choices as to which attorney to retain and we believe that accurate information regarding rates would constitute such helpful information.

We support the other revisions to the Supplemental Missouri Comment to Rule 4-7.1 made by the Committee in the July 6, 2009 draft.

Rule 4-7.2(d)

The July 6, 2009 draft includes language prohibiting a lawyer from compensating the news media “in anticipation of or in return for professional publicity” unless there is conspicuous disclosure of the payment and the word “advertisement” appears conspicuously in the news item. We are uncertain as to the nature and substance of the conduct that the Committee is seeking to address by this new provision. In addition, we believe that such paid professional publicity is currently addressed by Rule 4-7.1(h). As a result, we oppose this proposed amendment of Rule 4-7.2(d).

Rule 4-7.2(f)

The July 6, 2009 draft seeks to provide objective definitions to the term “conspicuous” as utilized in the RPC. Assuming the constitutional validity of the definitions, the OCDC supports the Committee’s effort to provide tangible, objective guidelines to lawyers who advertise. While we are uncertain as to the challenges that will be confronted by the OCDC in enforcing these definitions, we support the effort and assure the Board of Governors and the Committee, in the event that they are adopted by the Court, that we will suggest that the Court adopt any necessary and appropriate modifications in the definitions after an suitable period of enforcement.

Rule 4-7.2(j)

The July 6, 2009 draft excludes the Legal Services Corporation as well as other pro bono service organizations from the provisions of Rule 4-7.2 and Rule 4-7.3. The Legal Services Corporation and these other pro bono service organizations, however, are not excluded from the requirements of Rule 4-7.1. The OCDC has reviewed the comments to the proposed advertising rule amendments provided to The Missouri Bar by Legal Services of Missouri on November 18, November 25 and December 19, 2008. The OCDC believes that further explanation is necessary in order to understand the distinctions made by the Committee in the application of the various sections of the advertising rules to these pro bono service organizations.

Rule 4-7.2 (Supplemental Missouri Comment)

Paragraph 7 of the Supplemental Missouri Comment states: "The provisions of Rule 4-7.2 shall apply to any lawyer who advertises for clients in this state. See Rule 4-8.5." The OCDC has concerns about extending the jurisdiction of our rules to attorneys simply because their advertisements enter Missouri through national airwaves, publications or the internet. Specifically, the propriety and enforceability of this provision may be subject to question in those cases where an attorney's advertisement inadvertently enters the state through no action or intent of the attorney.

Rule 4-7.3(b)(3)

We are opposed to this rule change because it invites the recipient of an authorized and ethically-compliant solicitation letter to contact the OCDC if the recipient has "any complaint about this letter." Thus, a person who disapproves of merely having received such a letter may file a complaint with our office, only to be told that the OCDC will not open an investigative file because the solicitation letter was in compliance with the rule requirements. Such a response is likely to harm the credibility of the attorney discipline system in the eyes of the public.

In addition, the proposed amendment fails to specify that the complaint to the OCDC must be made in writing. Our office does not accept verbal complaints.

Rule 4-8.5(a)

The amendment to this rule seeks to extend the enforceability of the advertising rules to any lawyer "who advertises for clients in this state, solicits residents of this state or solicits for employment in this state." As stated above, the OCDC can envision advertisements that enter the state through electronic or other means where the attorney has no intent to solicit clients or even knowledge that the ad has entered the state. We question the propriety and enforceability of such a provision in these instances.

Rule 4-8.5 (Comment, Paragraph 5)

The referenced comment seeks to establish a conclusive presumption that the "predominant effect" of a lawyer's conduct for the choice of law provision of Rule 4-8.5(b) is Missouri whenever the lawyer solicits employment by advertising in a medium located in Missouri. We oppose this amendment because it is too broad and may not be factually accurate in some cases.

Mr. Thomas M. Burke

July 13, 2009

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Thank you for the opportunity to provide these supplemental comments to the July 6, 2009 draft of the proposed changes to the advertising rules. I am available to meet with you or the Special Committee on Advertising regarding the OCDC's comments to the proposed rule changes.

Sincerely,

/s/ Alan D. Pratzel

Alan D. Pratzel
Chief Disciplinary Counsel

ADP

cc: Ms. Jennifer Gille Bacon (via email and regular mail)
Mr. Mark Levison (via email and regular mail)
Ms. Sara Rittman (via email and regular mail)
Mr. Keith Birkes (via email and regular mail)