

**OFFICE OF THE  
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*SUPREME COURT OF MISSOURI*

November 17, 2008

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

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

Dear Tom:

On behalf of the Office of Chief Disciplinary Counsel (OCDC), I thank you for the opportunity to provide comments to the proposed changes to the Rules of Professional Conduct (RPC) as they relate to lawyer advertising. I know that the Special Committee on Lawyer Advertising (Committee) has worked tirelessly to examine the existing advertising rules, to review their enforcement by the OCDC, and to suggest revisions thereto. I am pleased that the OCDC has been able to assist in the process by educating the Committee regarding the manner in which the OCDC enforces the rules and by providing historical data regarding advertising complaints.

In analyzing and commenting upon the Committee's proposed rule changes, the OCDC has considered several factors, including, but not limited to, (i) whether each proposed change furthers the disciplinary system's mission of protecting the public and improving the integrity of the Bar, (ii) whether each proposed rule change presents enforcement issues for the OCDC and (iii) other factors that may be relevant to an evaluation of each proposed rule change. The following comments are provided as guidance for the Special Committee, the Board of Governors and the Supreme Court as you continue to consider changes to the advertising rules. To the extent that particular rule changes are not addressed below, the OCDC has no comment to the proposed change. I am available at your convenience to discuss these comments.

Preamble

We note that no other section of the RPC has its own preamble. We also note that the Preamble to the RPC generally describes a lawyer's responsibilities and specifically addresses, *inter alia*, issues of honesty, diligence, competence, confidentiality and *pro bono* service. To the extent that a preamble to the advertising rules is deemed necessary and appropriate, we suggest that it be incorporated as a separate paragraph into the Preamble to the RPC.

Rule 4-7.1(d)

We believe that this proposed change raises enforcement issues as applied to the phrases "lead counsel in the matter giving rise to the recovery" and "primarily responsible for the settlement or verdict". Specifically, in a case where multiple lawyers from different firms represented a client, it may be difficult for the OCDC to determine whether or not any one of the lawyers or law firms was "lead counsel" or "primarily responsible" for the recovery, settlement or verdict.

Rule 4-7.1(i)

This subsection appears to conflict with subsection (j), 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 change creates enforcement issues in interpreting who is a "celebrity."

Rule 4-7.1 (Supplemental Missouri Comment)

We question the constitutionality and enforceability of the "[c]haracterization of rates..." language in 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.

Rule 7.2(c)

We are opposed to this rule change and question the reasoning behind the requirement that attorneys deposit a copy of any advertisement with the OCDC, particularly in light of the fact that the OCDC is not required to "inspect, approve, catalog or otherwise act upon such advertising." The OCDC has not studied the data and does not know how many

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advertisements would be deposited with our office under this provision; however, it is reasonable to assume that there would be significant labor and storage costs associated with the implementation of this rule.

In addition, we question the necessity of this rule change given the fact that existing Rule 4-7.2(b) requires attorneys to keep copies of advertisements for two (2) years. In those cases where the OCDC has found it necessary to request a copy of an advertisement from an attorney pursuant to Rule 4-7.2(b), we have not encountered any problems with the production of the requested advertisements.

#### Rule 7.2(g)

This rule amendment seeks to define the term "conspicuous" by associating it to the size of the largest font in an advertisement displaying a telephone number. Assuming the constitutional validity of the provision, an attorney might attempt to avoid the rule by not including a telephone number in the advertisement. We suggest consideration of associating the term "conspicuous" to the size of a telephone number, email address, website address or other listed contact information, whichever is larger.

#### 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." We have 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 enforceability and constitutionality of this provision may be subject to question.

#### 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.

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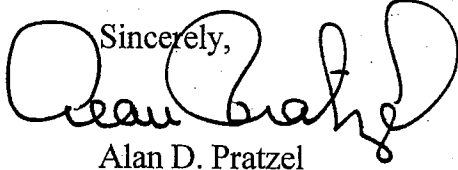
Rule 4-7.3(b)(10)

We are opposed to this rule change because it is imprecise in stating what, if any, requirements are imposed on the OCDC upon receipt of what one would reasonably expect to be thousands of solicitation letters accompanied by the required affidavits. To the extent that the OCDC is required to review, investigate and act upon solicitation letters that violate the rules, then the rule would impose a significant additional cost on the disciplinary system. On the other hand, to the extent that the OCDC is not required to review or act on such letters, we question the relevance of the rule.

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." We can envision advertisements that enter the state through the internet where the attorney has no intent to solicit clients or even knowledge that the ad has entered the state. We question the enforceability of such a provision in these instances.

Again, thank you for the opportunity to comment on 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,  
  
Alan D. Pratzel  
Chief Disciplinary Counsel

ADP

cc: Special Committee on Advertising  
Ms. Jennifer Gille Bacon  
Ms. Sara Rittman  
Mr. Keith Birkes