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December 1, 2008

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

Dear Committee Members:

It is amazing how much time and energy has been consumed assembling, disassembling and reassembling Missouri's Rule 4-7. The other eight Rules of Professional Conduct seem to work pretty well fresh out of the box. Past tampering has certainly voided any ABA warranty on this model, so we might as well go for it again. During the past three years, more bar thought has been expended on this rule than on all other Rules of Professional Conduct put together. The last revision of Rule 7 became effective only in July 2007. Little time has elapsed within which to judge how it works in practice.

I do no advertising which is subject to the proposal. I represent lawyers and other professionals who sometimes request advertising advice. I am an active member of the Professionalism and Ethics Committee of the Bar Association of Metropolitan St. Louis and a member of the Professionalism Committee of The Missouri Bar. These comments are solely mine, though.

My unfavorable critique of the proposals does not reflect upon my deep respect toward each Committee member for the work he or she has invested in this project.

On the whole, I believe the changes add little to existing rules and invite battles over issues of minimal importance. Some proposed modifications are unfair. For example, Rule 7.3 encourages every recipient of a mailer to complain about all aspects of the lawyer's practice, not just the mailer.

Some of my comments suggest that if a proposed change is adopted, then its structure or phrasing should be improved.

Preamble to Rule 7

Proposed preamble: The purpose of lawyer advertising is to provide prospective clients with accurate advice and to help facilitate intelligent selection of an attorney. The following rules have been drafted with a recognition that the practice of law requires the complex balance of sometimes competing interests in representing clients zealously, within the bounds of ethical constraint, promoting the public welfare of the courts and our judicial system, and earning a reasonable livelihood for ourselves and our families. The intent of the following rules is to benefit the public and to allow lawyers to engage in constitutionally

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protected commercial speech. All members of the Bar should, however, note that the privilege of being a profession carries with it the responsibility of conducting ourselves as professionals. Members of the Bar are encouraged to consider that, although a particular advertisement may satisfy constitutional requirements, the advertisement may nonetheless convey to the public a negative impression of our profession, and that such an advertisement should be avoided in the interest of our profession and in the public's faith in our legal system.

It is unclear if the preamble is intended to be incorporated into the body of the rules or if it is merely a statement by the Committee. It should not be included. The Rules of Professional Conduct already contain a general preamble to which this adds nothing. Should this preamble be deemed necessary, it should be folded into the general preamble. In fact, paragraph 21 of the general preamble assumes the existence of only one preamble.

The proposal invites the rules to be interpreted in light of the "public welfare of the courts" (a poorly constructed phrase in itself) and the need to make a "livelihood." The consequences of such concepts as interpretive tools are unpredictable. Courts are able to fend for their own welfare, and each Rule of Professional Conduct in some way infringes on a lawyer's ability to earn a livelihood.

Rule 7.1 (d)

Proposed rule (with new material underlined): *A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law. A communication is misleading if it: . . . (d) contains any reference in any advertisement to past successes or results obtained unless the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery or was primarily responsible for the settlement or verdict.*

Currently, Rule 7.1 relates to all communications made by a lawyer, whether an advertisement or not. Thus, it is not appropriate to append a statement directed exclusively to advertising to this rule. If adopted, the changes should be moved to Rule 7.2, which deals with advertising.

The proposal prohibits a lawyer from mentioning her record of success unless she was "lead counsel." The concept of "lead counsel" is impractical to apply. On a multi-lawyer team, the efforts of each may have been crucial to the outcome. Is the lead counsel the one who conducted direct examination on the client's principal or the one who cross-examined the opposing party's key witness? One lawyer wins at trial, another on appeal; who is "lead counsel?" One could logically take the position that both are lead counsel or neither one of them is.

The rule may have unintended consequences which impair the client's interest. On a multi-lawyer team, each attorney may contend for designation as "lead counsel."

The proposed modification prohibits accurate, truthful and publicly useful communication. "My theory was the instrument by which the defendant prevailed" can be an absolutely unimpeachable

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statement whether the lawyer was lead counsel or not. If truthful, such a statement should weigh heavily in the public's selection of that attorney.

The proposed section adds nothing to the existing rule. Is the failure to state that a lawyer was not "lead counsel" the omission of a fact under current (a), or does it create unjustified expectations under current (b)? If not, then why is a new rule necessary? If so, then why is a new rule needed?

Rule 7.1 (l)

Proposed rule (with new material underlined): *A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law. A communication is misleading if it: . . . (l) contains any testimonial about or endorsement of the lawyer by a celebrity unless the celebrity is a client or former client.*

The loophole in preventing endorsements from non-client celebrities is patent—make the celebrity a client. All a lawyer needs to do is represent the celebrity on one unimportant traffic ticket to legitimize his endorsement as the world's greatest murder defense lawyer.

Applying this rule entails a useless contest over who is and who is not a celebrity. Is a Broadway actor a celebrity beyond Manhattan? Is Lawrence Tribe a celebrity at all or, if he is, does his celebrity status extend beyond the legal community?

For the reasons mentioned in my comment to Rule 7.1, if adopted, this proposal should be made part of Rule 7.2 because Rule 7.2 deals only with advertising.

Rule 7.1 (n)

Proposed rule (with new material underlined): *A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law. A communication is misleading if it: . . . (n) vilifies any other potential party or adversary.*

This proposed rule prohibiting vilifying comments about opponents is disjointed from the lead-in language of Rule 7.1 which relates solely to a lawyer's communication about his own services. Read without the intervening material, this section will say, "A communication about the lawyer or the lawyer's services is misleading if it vilifies any other potential party or adversary." That is a non sequitur; a lawyer can't mislead about himself by saying something about his opponent, true or not. The services offered by the lawyer have nothing to do with the opponent's character.

The proposed rule has some predictable unintended consequences. As it applies to all communications, not just advertising, it prohibits the lawyer from agreeing with a client behind closed doors that the opponent is the devil incarnate or some lesser manifestation of evil. Moreover, it prohibits a lawyer from vilifying even the most vile opponent during closing argument.

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"Vilification" is a problematic concept. A truthful statement that an adversary holds a Nazi Party card or supports Bin Laden amounts to demonization in the eyes of most. But some marginal groups exalt members of such organizations. In most cases, it should be safe to make truthful statements without ethical reproach no matter how they are regarded by the listener. The law of defamation can take care of any overreaching.

Supplemental comment to Rule 7.1

Proposed supplemental comment: Characterization of rates or fees chargeable by the lawyer or law firm such as 'cut-rate,' 'lowest,' 'giveaway,' 'below cost,' 'discount,' and 'special' is misleading. A communication is false or misleading if it states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Given the architecture of the Rules, it is improper to include the proposed comment as such. Paragraph 21 of the existing preamble gives comments weight only as illustrations of the meaning and purpose of the rules. Clearly, the proposed comments are intended as commandments in and of themselves rather than as illustrations. Thus, they should be elevated to the body of the rule if they are adopted. However, both concerns in the proposed comment are adequately addressed in the existing body of the rule.

Rule 7.2 (c)

Proposed rule: A copy of any television, radio or other transitory audio or video advertising subject to the disclosure requirements of Rule 4-7.2 (g) shall be deposited within seven days of its first publication with the Office of Chief Disciplinary Counsel who shall maintain such advertising for a period of one year, and shall make such advertising available for inspection by the public on such reasonable terms as the Office of Chief Disciplinary Counsel may prescribe. Nothing in this Rule shall be construed to require the Office of Chief Disciplinary Counsel to inspect, approve, catalog or otherwise act upon such advertising.

It is a massive duplication of effort to require deposit of audio and visual advertising with OCDC and a one-year retention period. The existing rule requires retention by the lawyer for two years. If the lawyer fails to abide by the current rule, he can be charged. The ability of OCDC to charge multiple violations for essentially one act of the same nature does nothing to further ethical behavior.

It can be argued that the requirement of filing with the OCDC is intended as nothing more than a burden on truthful speech. The proposal specifically relieves OCDC of any duty to index the materials. So a big mass of undifferentiated paper can build up to the point where it becomes inaccessible as a practical matter. Under these circumstances, a "reasonable term" for OCDC to "prescribe" for public access is to invite the requester to rummage around its office. Thus, public access through OCDC could become a sham. If it is a sham, then the requirement of filing with OCDC is hard to justify.

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It would, however, make sense to think about allowing a concerned member of the public to request a copy of the advertisement from the OCDC which will, in turn, obtain it from the lawyer who placed the ad.

If the rule is adopted, provision ought to be made to file audio and visual advertisements electronically. The rule should allow the possibility of OCDC's being renamed without requiring a rule change. Something like "the Office of Chief Disciplinary Counsel or such other body as the Supreme Court may designate from time to time" would be appropriate language.

Rule 7.2(g)

Proposed rule: Any advertisement or communication made pursuant to this Rule 4-7.2, other than written solicitations governed by the disclosure rules of Rule 4-7.3(b), shall contain the following conspicuous disclosure: "The choice of a lawyer is an important decision and should not be based solely upon advertisements." This disclosure shall be made separately and in a single complete sentence containing only the foregoing words. Conspicuous disclosure means: (i) With regard to printed matter, in font on high-contrast background at least one-third the size of the largest font displaying a telephone number made in a type size and manner that is reasonably legible to persons reading the advertisement; (ii) With regard to radio or other audio presentation, spoken orally in a cadence not faster than the slowest statement of a telephone number or, in the absence of a telephone number, audibly in a clear and understandable manner; (iii) With regard to television, both spoken orally in a cadence not faster than the slowest statement of a telephone number or, in the absence of a telephone number, audibly in a clear and understandable manner and in font on high-contrast background at least one-third the size of the largest font displaying a telephone number, displayed for at least as long as the longest display of a telephone number or, if none, in a type size and manner that is reasonably legible to persons watching the advertisement displayed for a sufficient amount of time that a reasonable person can read and comprehend the disclosure.

The text of the proposal relating to conspicuous disclosure on a/v materials is redundantly written. It would be clearer to say, "... shall contain the following conspicuous disclosure containing only the following words: ..."

The requirement to make the disclosure "separately" is vague. Separate from what?

The proposal does not anticipate technological change when it measures the characteristics of the disclosure against the lawyer's telephone number. A time might soon come when telephone numbers are not as useful as other information, such as web addresses. Thus, a big web address followed by a small phone number will call for only a small disclosure. It would be better to talk about something like "the most prominent contact information other than the lawyer's name."

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Rule 7.2 (j)

Proposed rule: *The provisions of Rules 4-7.2, and 4-7.3 shall not apply to services provided by a not-for-profit organization funded in whole or in part by the Legal Services Corporation established by 42USC Sec. 2996b or to pro bono services provided by a not-for-profit organization, a court annexed program, a bar association or an accredited law school.*

This exemption for non-profits raises some questions. First, I am not sure if non-profits engage in the contemplated advertising. But, if they do, I wonder why they should not be subject to the same rules as others. For example, under the proposed exemption, a law school professor in charge of a non-profit program could give money to a radio station in return for a favorable news story.

Supplemental comment to Rule 7.2

Proposed supplemental comment: *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 revision is subject to the same objection as that mentioned in regard to the supplemental comment to Rule 7.1, as an effort to rewrite the law through a comment designed to be merely interpretive.

Rule 7.3 (b)(3)

Proposed rule: *[E]ach written solicitation must include the following: "Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri: 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 has a punitive aspect. It requires lawyers using mailers to invite recipients to complain about both the advertising and the representation. Thus, an ethical lawyer must choose between advertising and having lots of complaints or foregoing advertising and having fewer. Essentially, if a lawyer wants to advertise her own services, she is forced to advertise those of OCDC and implicitly ask the recipient to "Please review this carefully so you can decide if you want to discipline me."

Why should the rule simply invite complaints at the expense of lawyers who advertise about their representation? It would seem equally appropriate for every client to be given the same invitation

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in conspicuous type (at least as large as the suite number) on the front door of every law office whether it advertises or not.

If adopted, some latitude ought to be written into the rule for name changes, address changes and telephone number changes of OCDC, as mentioned in the comment about Rule 7.2(c) above.

Rule 7.3 (b)(9)

Proposed rule: [A] lawyer shall not send a written solicitation regarding a specific matter unless the lawyer knows or reasonably believes that the person to whom the solicitation is directed is unrepresented by a lawyer in the matter.

Current rule: [A] lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

Under the current rule, a lawyer can send mailings to someone he has no reason to believe is represented. Under the proposal, he would have to have reason to believe that the recipient was not represented.

This invites an endless stream of complaints and an intricate discussion of what constitutes a reasonable investigation. It would be foolish to embark on that. To illustrate, my wife got a traffic ticket and received several mailers. Would lawyers who had failed to check her address and check my name (which is different than hers) be guilty of ethical misconduct since they had no basis to believe she was not represented by me? Is an investigation of the court docket required to determine who is represented and who isn't? Escalating my amused annoyance into an ethical problem is entirely unwarranted and silly.

Rule 7.3 (b)(10)

Proposed rule: [S]imultaneously with the mailing of the solicitation, the lawyer must file a copy of it with the Office of Chief Disciplinary Counsel along with a signed affidavit in which the lawyer attests 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.

As proposed, this rule requires an enormous pile of paperwork by lawyers sending mailers and an even larger mountain of work by OCDC. Strangely, unlike the proposal regarding Rule 7.2, this rule does not contain the language excusing OCDC from indexing the likely blizzard of affidavits.

The proposal adopts an assumption that anyone who sends out such a mailer is probably an offender who needs to explain herself fully and completely under oath. Such mailers may be annoying to most. It goes too far, however, to assume that lawyers who engage in legitimate advertising are of such low character that they deserve this type of burden.

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If this requirement is adopted, every lawyer who lands a client ought to be placed under similar suspicion and be required to file an affidavit.

Rule 7.3 (c)(6)

Proposed rule: *A lawyer shall not send, nor knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, the lawyer's partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm a written solicitation to any prospective client for the purpose of obtaining professional employment if: . . . (6) the written solicitation vilifies, denounces or disparages any other potential party or adversary.*

This proposal, which prohibits vilification in direct mailers, is subject to comments made about Rule 7.1(n) above.

Rule 8.5

Proposed rule (with new material underlined): *A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. The provisions of Rule 4-7 shall apply to any lawyer who advertises for clients in this state, solicits residents of this state or solicits for employment in this state.*

This revision is probably intended to subject out-of-state lawyers to the advertising proposals including sending their materials to OCDC, thus mandating that non-Missouri lawyers add a whole range to the Missouri mountain already at OCDC. The result might be a truly tectonic event.

It is unclear what the proposed sentence adds to the sentence before it. Without the new sentence, non-Missouri lawyers would be just as subject to the rules.

The phrase "solicits for employment" adds little to the rule unless it means "looks for a job."

Thank you for providing the opportunity to submit these comments.

Very truly yours,



MARK D. PASEWARK

MDP/nc