



The Missouri Bar
Attn: Special Committee On Lawyer Advertising
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Jefferson City, MO 65101-3158
Telephone: 573-635-4128
Via Fax: 573-635-2811

Re: Missouri Bar Member Comments on Proposed Changes to Rules of Professional Conduct Related to Lawyer Advertising

Dear Committee Members,

Thank you for the opportunity to give my comments on the proposed changes to the rules on lawyer advertising. I apologize for the lateness of my comments and I hope that you will have time to review them.

The proposed rules stifle competition among lawyers, serve only to protect entrenched, politically connected lawyers, and prevent consumers from receiving valuable information. The proposed rules violate the Constitution with overbroad restrictions on free speech in a failed attempt to regulate good taste in advertising.

Consumer protection. Restricting lawyer advertising hurts consumers by limiting their ability to learn of the legal services available and stifling lawyer competition. Corporations and insurance companies want to restrict the information lawyers can give consumers—especially with regard to their fees (*see* the prohibitions on advertising “cut rate” or “discount” fees). Preventing consumers from learning that one lawyer is willing to work for less than another lawyer hurts consumers. The Special Committee should find that these proposed rules stifle competition among lawyers and prevent consumers from receiving valuable information.

The highest duty of the profession is to provide legal services to those who need them and don't have them. Advertising allows the uneducated poor to learn of legal services available to them. Restrictions on truthful, nondeceptive advertising are prohibited under the First Amendment so that consumers can obtain the information they need to choose a lawyer.

In overturning a previous Missouri Supreme Court advertising rule, the U.S. Supreme Court stated, “States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be

presented in a way that is not deceptive.”¹ The U.S. Supreme Court also holds that commercial speech restrictions “may be no broader than reasonably necessary to prevent deception.”² These proposed regulations are much broader than necessary to prevent deception.

Further, the Federal Trade Commission (FTC) has warned states restricting lawyer advertising that they are hurting consumers.³ The FTC states empirical evidence overwhelmingly demonstrates that consumers benefit in the form of lower prices and higher quality from increased marketplace information. “The FTC believes that while false and deceptive advertising by lawyers should be prohibited, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value is likely to inhibit competition and frustrate informed consumer choice.”⁴ The FTC states, “consumers are better off if concerns about potentially misleading advertising are addressed through the adoption of advertising restrictions that are narrowly tailored to prevent deceptive claims.”⁵

Far from protecting consumers, the proposed rules actually protect politically connected law firms from competition by other lawyers.

Free speech. The Supreme Court has repeatedly held that truthful, non-deceptive lawyer advertising is protected from state restriction by the First Amendment. The Special Committee should find that the First Amendment prohibits these proposals from further restricting lawyer advertisement.

As states restrict lawyer advertising more and more in a misdirected attempt to improve lawyers’ reputations, the issue of lawyer free speech finds its way into the news more often. A New York federal court recently held that New York’s lawyer advertising restrictions violate the First Amendment.⁶ Public Citizen, a consumer rights organization, stated, “The main beneficiaries of this decision are New York

¹ *In re R.M.J.*, 455 U.S. 191, 203 (1982).

² *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).

³ *Brief of the Federal Trade Commission as Amicus Curiae Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey*, New Jersey Supreme Court, Docket No. 60,003, fn. 16.

⁴ *FTC’s letter to Richard Lemmler*, Ethics Counsel, Louisiana State Bar Association, March 14, 2007.

⁵ *FTC’s letter to The Committee on Attorney Advertising*, Supreme Court of New Jersey, March 1, 2007.

⁶ *Alexander v. Cahill*, Case No. 5:07-CV-117 (N.D.N.Y. July 20, 2007).

consumers. Truthful advertising promotes healthy competition between lawyers and allows the public to learn about their rights and available legal services.”⁷

The most frequent types of commercial free speech cases before the Supreme Court involve state attempts to restrict advertising by lawyers and other professionals. State supreme courts have attempted to prohibit lawyers from advertising and to restrict the content of the ads that are published. The Supreme Court has repeatedly made it clear that such advertisements are protected by the First Amendment as long as they are truthful and not deceptive.

The proposed rules attempt to prohibit a lawyer from advertising because one recipient may be offended. Whether the solicitation offends is too subjective a standard to defeat the Constitution, which protects lawyer advertising. Many constitutional rights, when exercised, offend others. That is the purpose of constitutional protection. To deny a lawyer’s prospective clients the information they need, and the lawyer his constitutional right to advertise, requires much more than one person being offended.

Lawyers that support advertising restrictions do so based on a faulty premise. The premise is that advertisements by a few lawyers degrade the reputations of other lawyers. On the contrary, elitist notions that lawyers are somehow smarter than those they call “lay people” degrade the reputations of all lawyers. All lawyers earn their income from non-lawyer clients.

Those who proposed these rules undoubtedly believe that they are helping lawyer’s reputations by restricting lawyer advertising. They believe that lawyer advertising disparages lawyers and is in bad taste. But Richard Cebula, who conducted an empirical study on lawyer advertising, points out that lawyers had a bad public image even before the Supreme Court lifted the national ban on advertising in 1977. As Cebula pointed out, most politicians are lawyers. Most people deal with lawyers when they have a problem such as a divorce. Finally, for every litigant that wins a case, another one must lose. Cebula states that advertising, if anything, actually improves the image of lawyers.⁸

⁷ Jody Sokolowski, *Court: Lawyer ad rules violate free speech*, BUFFALO BUSINESS FIRST, July 24, 2007.

⁸ Elizabeth Stawicki, *Lawyer advertising still controversial after 30 years*, MINNESOTA PUBLIC RADIO.

Richard Cebula, a national expert on economic analysis, conducted an empirical study on how lawyer advertising affects the image of lawyers. He found many factors were at play: Politicians don’t have a good image and many are lawyers;

Furthermore, the government is not a good judge of taste. Nevada Supreme Court Justice James Hardesty states, “Taste is something we cannot govern without infringing on First Amendment rights.”⁹ The Special Committee’s job is to make sure that consumers are protected from false and misleading ads. The Special Committee’s job is not to prevent consumers from receiving information that helps them—like the fact that a lawyer will work for less money—in the name of good taste.

I urge the committee to reject these proposed rule changes.

Sincerely,

Roy Bertram True

people typically aren’t happy when they see lawyers like during divorces; and for every case that wins, someone has to lose.

“What I think we’re dealing with here is that we have a declining image of lawyers, but that has historical basis and a number of identifiable sources. But it certainly isn’t lawyer advertising. If anything, lawyer advertising, the evidence shows—that if we allow for all of these other factors—lawyer advertising actually improves the overall image of lawyers,” said Cebula.

⁹ Associated Press, *Nevada court OKs lawyer advertising rules*, Daily Report, April 27, 2007.