

OCDC SPOTLIGHT

Lawyer Advertising: These Are Not Your Father's Advertising Rules — Have You Recently Considered What You Can and Cannot Do?

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The Supreme Court of Missouri, by order dated September 19, 2005, effective January 1, 2006, made numerous changes to Supreme Court Rules 4-7.1, 4-7.2 and 4-7.3. These three rules and Rules 4-7.4 and 4-7.5 address lawyer advertising. The purpose of this article is not to address all of the changes adopted by the Supreme Court but is intended to provide a general overview of the rules and issues that should be considered if you plan to advertise your services. You should read the above referenced rules before you initiate any advertising of your services or the services of your firm.

WHAT AN ADVERTISEMENT CANNOT BE

Rule 4-7.1 prohibits 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. The rule provides eight specific ways a written communication is misleading.

Two examples:

Are written communications heralding the results obtained by a client misleading? Rule 4-7.1(c) now makes it clear that advertising can state the results obtained for clients, such as the amount of a damage award, but the advertisement must state that past results are no guarantee of future results and that "every case is different and must be judged on its own merits."

Can an advertising lawyer identify an area of practice of law when he routinely refers such cases out to other lawyers? No, unless the lawyer conspicuously discloses that fact as required by Rule 4-7.1(g).

For other examples of what communications are misleading, the lawyer planning to advertise should review Rule 4-7.1(a).

WHAT MUST BE INCLUDED IN ADVERTISEMENTS

The rules provide for the general advertising of lawyer services (Rule 4-7.2) and targeted advertising for the purpose of obtaining employment by individuals known to need legal services of the kind provided by a lawyer in a particular matter (Rule 4-7.3).

Rule 4-7.2 requires that you must include this conspicuous disclosure: "The choice of a lawyer is an important decision

and should not be based solely upon advertisements."

There are exceptions to the rule if the advertisement is limited to:

- 1) the name of the law firm and names of the firm's lawyers
- 2) the fields of law the lawyer or law firm practices
- 3) the date and place of admission to the bar of state and federal courts
- 4) the address, telephone number and office hours.

Rule 4-7.3 allows written solicitations to prospective clients (not an existing or former client, lawyer, friend or relative), but subject to several requirements:

- Sending a solicitation by mail? On the face of the envelope the word "ADVERTISEMENT" must be plainly marked.

- All written solicitations must be plainly marked "ADVERTISEMENT" at the top of the first page at least as large as the largest type used in the solicitation. The Comments to Rule 4-7.3 provide that "Advertisement" does not need to appear on communications sent in response to requests from potential clients.

- All written solicitations must include this language: "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."

- Written solicitations resulting from a specific occurrence (e.g. dissolution, traffic ticket, criminal case, etc.) which involve or affect the intended recipient or family member must disclose how the lawyer obtained the information. Rule 4-7.3(b)(6).

- If the lawyer whose name or signature appears on the solicitation knows another lawyer will handle the matter or the matter will be referred to another lawyer (or law firm), the solicitation must so advise the potential clients. Rule 4-7.3(b)(8).

WHAT MAY NOT BE INCLUDED IN SOLICITATIONS

A lawyer or law firm cannot advertise an office other than the principal office unless:

- 1) that office is staffed by a lawyer at least three days a week, or
- 2) the advertisement provides the days and times a lawyer will be present at the office or that lawyers will be available by appointment only. Rule 4-7.2(e).

Written solicitations mailed to prospective clients cannot be made to look like legal pleadings or other legal documents. Rule 4-7.3(b)(5).

Written solicitations for employment by a specific prospective client for a specific matter cannot reveal on the envelope or the outside of the mailer the nature of the client's legal problem. Rule 4-7.3(b)(7).

OTHER CONSIDERATIONS

A lawyer cannot send a written solicitation to a prospective client if it concerns an action for personal injury, wrongful death or relates to an accident or disaster involving the individual or a relative of the individual solicited if the accident or disaster occurred less than thirty days prior to solicitation. This restriction also applies if the lawyer knows or should reasonably know that the physical, emotional, or mental state of the individual is such the individual is unlikely to exercise reasonable judgment in hiring a lawyer. Rule 4-7.3(c)(4).

A lawyer cannot initiate in person, telephone or real time electronic solicitation of prospective clients known to need the legal services of a lawyer. This restriction does not apply to

existing or former clients, a lawyer, close friend or relative.

Advertisements no longer require, but may contain, the name of at least one lawyer responsible for their content. Rule 7.2(b) does still require that an advertisement or written communication must be kept for at least two years after its last dissemination with a record of when and where it was used. This record must list the name of at least one lawyer responsible for the advertisement's content unless the advertisement provides the name(s) of the lawyer(s).

Written solicitations mailed to prospective clients can only be sent by regular mail. No registered or certified mail is authorized. Rule 4-7.3(b)(4).

With very limited exceptions, a lawyer can only state or imply he is a specialist if the communication contains a disclaimer that neither the Missouri Supreme Court nor The Missouri Bar reviews or approves certifying organizations or specialist designations. Rule 7.4.

CONCLUSION

The Rules of Professional Conduct have attempted to clarify what an advertisement can include and, perhaps more importantly, what an advertisement cannot include. The Supplemental Missouri Comment to Rule 4-7.2 urges lawyers in all communications concerning a lawyer's services to avoid advertising that serves to denigrate the dignity of the profession. Complying with the requirements of the rules can benefit clients, prospective clients and the legal profession.

Got a Great Idea?

Why not share the wealth by turning it into an article for the *Journal of The Missouri Bar*?

The *Journal of The Missouri Bar* is always looking for good articles – articles that enlighten your colleagues, keep them abreast of important changes in the law, and help them meet their professional obligations.

If you know of a legal topic or issue worthy of illumination, we invite you to consider preparing an article for the *Journal*. It's simple — just let us know the topic in which you're interested and we'll send you all the materials you need to get the creative process started.

The *Journal* currently has only a small backlog of articles, which means that your article, if approved for publication, will appear in print quickly. That's all the more incentive to spread the word on that "hot" legal topic!

To reserve a topic for publication, send a brief letter outlining the issue in question to: Gary Toohey, Editor, *Journal of The Missouri Bar*, P.O. Box 119, Jefferson City, MO 65102-0119. We'll get right back to you with further information.

Let's Get Busy!