SUPREME COURT OF MISSOURI

en banc

September 19, 2005
Effective January 1, 2006

In re:

Repeal of subdivision 4-7.1, entitled "Communication Concerning a Lawyer's Services," and the comment, code comparison and supplemental Missouri comment thereto; subdivision 4-7.2, entitled "Advertising," and the comment and supplemental Missouri comment thereto; and subdivision 4-7.3, entitled "Direct Contact with Prospective Clients," and the comment, code comparison, and supplemental Missouri comment thereto, of Rule 4, entitled "Rules of Professional Conduct," and in lieu thereof adoption of a new subdivision 4-7.1, entitled "Communication Concerning a Lawyer's Services," and a new comment, code comparison and supplemental Missouri comment thereto; a new subdivision 4-7.2, entitled "Advertising," and a new comment and supplemental Missouri comment thereto; and a new subdivision 4-7.3, entitled "Direct Contact with Prospective Clients," and a new comment, code comparison, and supplemental Missouri comment thereto.

ORDER

1. It is ordered that effective January 1, 2006, subdivision 4-7.1 and the comment, code comparison and supplemental Missouri comment thereto; subdivision 4-7 and the comment and supplemental Missouri comment thereto; and subdivision 4-7.3 and the comment, code comparison, and supplemental Missouri comment thereto of Rule 4 be and the same are hereby repealed and a new subdivision 4-7.1 and a new comment, code comparison and supplemental Missouri comment thereto; a new subdivision 4-7 and a new comment and supplemental Missouri comment thereto; and a new subdivision 4-7.3 and a new comment, code comparison, and supplemental Missouri comment thereto adopted in lieu thereof to read as follows:

4-7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

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:

(a) omits a fact as a result of which the statement considered as a whole is materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

(j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or

(k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

CODE COMPARISON

DR 2-101 provides that "a lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." DR 2-101(B) provides that a lawyer "may publish or broadcast . . . the following information . . . in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information . . . complies with DR 2-101(A), and is presented in a dignified manner. . . ." DR 2-101(B) then specifies 25 categories of information that may be disseminated. DR 2-101(C) provides that "any

person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to (the agency having jurisdiction under state law). . . . The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

SUPPLEMENTAL MISSOURI COMMENT

This Rule 4-7.1 is not intended to alter the definition of "competence" as defined in Rule 4-1.1.

Rule 4-7.1 prohibits false or misleading communications. False and misleading statements have never enjoyed the limited first amendment protection afforded to other forms of commercial speech by *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

Rule 4-7.1(c) allows a verifiable statement regarding the number of cases tried or handled in a particular area without the disclaimer language of Rule 4-7.1(c).

Rule 4-7.1(h) addresses the practice of using testimonials and endorsements by entertainers, sports figures or other well-known persons. This rule requires the disclosure of the fact that a payment was made to obtain the testimony or endorsement, thereby giving the public an opportunity to evaluate the credibility of the statement.

Rule 4-7.1(i) deals with simulations primarily utilized in the electronic media. Rule 4-7.1(i) permits simulations of a lawyer, client, victim, scene or event if the advertising indicates that it is a simulation that is being portrayed. The simulation must contain a disclosure that it is a simulation in order to counteract any suggestion that the representation is a portrayal of actual fact. Rule 4-7.1(i) also permits a communication to contain a picture or other representation of the lawyer or lawyers providing the legal services that are the subject of the advertisement.

4-7.2 ADVERTISING

(a) Subject to the requirements of Rule 4-7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. The record shall include the name of at least one lawyer responsible for its content unless the advertisement or written communication itself contains the name of at least one lawyer responsible for its content.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:

(1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;

(2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and

(3) a lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-10.1 or other not- for-profit legal services organization.

(d) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer. Similarly, in any communications such as television, radio or other electronic programs purporting to give the public legal advice or legal information, for which programs the broadcaster receives any remuneration or other consideration, directly or indirectly, from the lawyer who appears on those programs, the lawyer shall conspicuously disclose to the public the fact that the broadcaster has

been paid or receives consideration from the lawyer appearing on the program.

(e) A lawyer or law firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week, or

(2) the advertisement states:

(A) the days and times during which a lawyer will be present at that office, or

(B) that meetings with lawyers will be by appointment only.

(f) 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."

(g) The disclosures required by Rules 4-7.2(e) and (f) need not be made if the information communicated is limited to the following:

(1) the name of the law firm and the names of lawyers in the firm;

(2) one or more fields of law in which the lawyer or law firm practices;

(3) the date and place of admission to the bar of state and federal courts; and

(4) the address, including e-mail and web site address, telephone number, and office hours.

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Paying Others to Recommend a Lawyer. A lawyer is allowed to pay for advertising permitted by this Rule 7.2, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid

agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Rule 7.2(c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Rule 7.2(c) also does not prohibit paying a person for making a testimonial or endorsement in compliance with Rule 7.1(h).

SUPPLEMENTAL MISSOURI COMMENT

Advertising concerning a lawyer's services should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of appropriate counsel. Information communicated in advertising should be disseminated in an objective and understandable fashion and should be relevant to a prospective client's ability to choose a lawyer. A lawyer should strive to communicate such information without undue emphasis upon advertising stratagems, which serve to hinder rather than to facilitate intelligent selection of counsel. Tasteful advertising is a matter of subjective interpretation. However, in all communications concerning a lawyer's services, a lawyer should avoid advertising that serves to denigrate the dignity of the profession or trust in courts, of which every lawyer functions as an officer.

Rules 4-7.2(d) and (e) have been added to jointly address the problem of advertising that experience has shown misleads the public concerning the location where services will be provided or the lawyer who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

Rule 4-7.2(e) also prohibits advertising the availability of a satellite office that is not staffed by a lawyer at least on a part-time basis. The rule does not require, however, that a lawyer or firm identify the particular office as its principal one. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel.

Rule 4-7.2(e) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise, low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown

that lawyers not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, Rule 4-7.2(d) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Rule 4-7.2(d) also requires disclosure if a broadcaster receives remuneration from a lawyer appearing on any television, radio or other electronic program purporting to give the public legal advice.

In the case of television, the disclosure required by Rule 4-7.2(f) may be made orally or in writing. In the case of radio, the disclosure must be made orally. The disclosure required by Rule 4-7.2(f) may, at the option of the advertiser, include the following language: "This disclosure is required by rule of the Supreme Court of Missouri" This disclosure is only required for advertisements in Missouri.

4-7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

This Rule 4-7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) In-person solicitation. A lawyer may not initiate the in-person, telephone or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend or relative.

(b) Written Solicitation. A lawyer may initiate written solicitations to an existing or former client, lawyer, friend or relative without complying with the requirements of this Rule 4-7.3(b). Written solicitations to others are subject to the following requirements:

(1) any written solicitation by mail shall be plainly marked "ADVERTISEMENT" on the face of the envelope and all written solicitations shall be plainly marked "ADVERTISEMENT" at the top of the first page in type at least as large as the largest written type used in the written solicitation;

(2) the lawyer shall retain a copy of each such written solicitation for two years. If written identical solicitations are sent to two or more prospective clients, the lawyer may comply with this requirement by retaining a single copy together with a list of the names and addresses of persons to whom the written solicitation was sent;

(3) each 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;"

(4) written solicitations mailed to prospective clients shall be sent only by regular United States mail, not registered mail or other forms of restricted or certified delivery;

(5) written solicitations mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents;

(6) any written solicitation prompted by a specific occurrence involving or affecting the intended recipient of the solicitation or family member shall disclose how the lawyer obtained the information prompting the solicitation;

(7) a written solicitation seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the client's legal problem;

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) 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.

(c) 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:

(1) it has been made known to the lawyer that the person does not want to receive such solicitations from the lawyer;

(2) the written solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(3) the written solicitation contains a false, fraudulent, misleading, or deceptive statement or claim or makes claims as to the comparative quality of legal services, unless the comparison can be factually substantiated, or asserts opinions about the liability of the defendant or offers assurances of client satisfaction;

(4) the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation or if the lawyer

knows or reasonably should know that the physical, emotional, or mental state of the person solicited makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

(5) the written solicitation vilifies, denounces or disparages any other potential party.

COMMENT

There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who already may feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The

contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those situations. Also, Rule 7.3(a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1), is prohibited.

This Rule 7.3 is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(b)(1) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors.

General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule 7.3.

CODE COMPARISON

DR 2-104(A) provides with certain exceptions that "a lawyer who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice. . . ." The exceptions include DR 2-104(A)(1), which provides that "a lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provides other exceptions relating, respectively, to employment resulting from public educational programs, recommendations by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

SUPPLEMENTAL MISSOURI COMMENT

Rule 4-7.3(a) is similar to but less restrictive than Iowa Disciplinary Rule DR 2-101 (4). The United States Supreme Court in the case *of*

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), held that a state could categorically ban all in-person solicitation.

Rules 4-7.3(b)(1) and (2) are from Rule 7.3 of the Rhode Island rules of the court. Rules 4-7.3(b)(9) and (c)(1) and (2) are from Rhode Island Rule 7.3(b)(2)(a), (b) and (c).

Rule 4-7.3(c)(3) is taken in part from suggestions found in *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466 (1988), which condemned written solicitation that unduly emphasized trivial and uninformative facts or that stated that "the liability of the defendants is clear" or that made claims about the quality of legal services.

Rule 4-7.3(c)(4) is taken from South Carolina Appellate Court Rule 7.3(b)(3) and is similar to Florida's 30-day ban on direct mailing of solicitations in personal injury and wrongful death clients. The Florida 30-day moratorium was upheld in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court held that the Florida rule did not violate the lawyer's first amendment rights because it served a legitimate state interest in protecting the privacy and sensibilities of accident victims and helped preserve the integrity of the bar and the public's perception of the administration of justice.

Rules 4-7.3(b)(3) to (8) are taken from South Carolina Appellate Court Rule 7.3(c)(2) and (3), except South Carolina Rule 7.3(c)(3)(i) was eliminated.

The requirements of Rule 4-7.3(b) apply to written solicitations disseminated in Missouri.

2. It is ordered that notice of this order be published in the Journal of The Missouri Bar.

3. It is ordered that this order be published in the South Western Reporter.

Day - to - Day

MICHAEL A. WOLFF
Chief Justice