

The New, Improved Advertising Rule

By Karolin Solorzano Walker

The rules on attorney advertising went into effect on January 1, 2006 pursuant to an en banc order by the Supreme Court of Missouri. There are some lawyers who are of the opinion that attorneys should never advertise, and the genesis of the changes to the advertising rules may have come from a sentiment that advertising was out of control, that further regulation was needed, and that further regulation of advertising was possible. I have heard the opinion that the increase in attorney advertising lends itself to a lack of loyalty, and that has led to a number of disciplinary complaints.

The United States Supreme Court articulated its view of attorney advertising in a 1977 case, *Bates v. State Bar of Arizona*, which says that states are free to regulate the time, place and manner of attorney advertising. This case protects attorney advertising, citing the Fourth Amendment and Fifteenth Amendment. It notes that consumers should not be denied the relevant information needed to make an informed decision. The Court said that advertising is a traditional mechanism in a free market economy by which a supplier informs a potential purchaser of availability and terms of exchange. The Court goes on to say that it is

possible advertising will serve to reduce the cost of legal services for the consumer and will aid new attorneys entering the market to get business – a position well articulated by those practitioners during The Missouri Bar’s Solo and Small Firm Conference

The rest of the national picture concerning attorney advertising includes the often cited case of *Florida Bar v. Went For It, Inc.*, 515 U.S. 618. This is a 1995 case about direct mail advertising targeted to accident victims within 30 days of an accident. The majority opinion of the decision upholds a Florida standard limiting attorneys’ right to advertise and says that advertising is commercial speech with limited First Amendment and Fourteenth Amendment protections.

What is important about the decision is that the Court split on a 5-4 vote. Justices Kennedy, Stevens, Souter and Ginsburg dissented, saying that attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth amendments. They note that the Court undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents at the expense of those victims most in need of legal assistance. They argue that the Court’s solicitude for the privacy of victims and its

concerns for the profession are misplaced and self-defeating.

The case highlights the fact that advertising is a hotly-debated issue, often on a state-by-state basis. After beginning to think about advertising, I noticed it when traveling and was struck by state to state differences. For example, in Florida many of the television advertisements are for legal services, and there are attorney advertisements on the sides of buses, on the backs of benches, the seats of shopping carts, and in phone books.

In the new advertising rule, the greatest numbers of changes are focused on direct solicitation. A case cited in the rules is *Ohralik v. Ohio*, 439 U.S. 883. The facts of the case involve an attorney who made several visits to the hospital beds of accident victims who were in traction, stopped on the way to a home visit to take photographs of an accident scene, and took a tape recorder concealed under his raincoat to tape his conversation with a potential client in her home the day after she was released from the hospital. The attorney in this case could have been the poster child for the term “aggressive marketing.” In the ruling in this case, the Court upheld the right of potential clients to be free from solicitation and the right of the state bar association to regulate the speech of attorneys.

That's the background, and I am sure you are wondering about some of the changes in the rules. Rule 4-7.1, entitled "Communications Concerning a Lawyer's Services," under the heading of "Information About Legal Services," governs advertising results obtained by lawyers in previous cases, such as damage award amounts. Perhaps to

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combat unjustified expectations on the part of clients, the rule says that you can proclaim results obtained on behalf of clients but not "without stating that past results afford no guarantee of future results and that every case is different and should be judged on its own merits."

The new portion of Rule 4-7.1(f) says that an attorney cannot advertise for a specific type of case concerning a matter in which the lawyer has neither experience nor competence. So, if you would like to buy your own EKG machine, go into the class action business and sue American Home Products for those people who took phen/fen and sustained heart damage, and you have no experience in these cases, you might have a problem under this rule.

Another part of Rule 4-7.1(g) says

that you cannot advertise in an area of practice in which a lawyer routinely refers matters to other lawyers without conspicuous identification of that fact.

Paragraph (h) of Rule 4-7.1 says that an advertisement can not contain any simulated portrayal of a lawyer, client, victim, scene, or event without *conspicuously* identifying that it is a simulation.

Thus, to get Julia Roberts to play me in my commercial while sitting with my client, who is being loaded into an ambulance after an accident, may not be permissible under the new rule – unless, of course, I tell you that it really is Julia Roberts.

There are new rules about advertising a satellite office in Rule 4-7.1(j), which says that if you have an office that is staffed part time or by appointment only, the advertisement must *conspicuously* identify that fact. The Supreme Court did not ban advertising in offices that are staffed part time. To do so might restrict the availability of legal services in poor or sparsely populated areas. Rather, this change is to prevent members of the public from being misled into employing a lawyer in a distant city who advertises that there is a nearby office, and the client later

learns that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by non-lawyers.

I know what you are thinking: "What does the rule mean when it says 'conspicuously?'" That is an answer I cannot provide, except to say the requirements of typeface that have been used before could be a guide to practitioners. I advise attorneys to call or write the Legal Ethics Counsel with their advertisement to see if they comply with the rules before they use that advertisement. The Legal Ethics Counsel does not perform a general review of advertising, but will answer specific questions about the application of the rules to the proposed advertisement.

These are the changes to Rule 4-7.1, and they are the tip of the iceberg! To learn the rest of the changes, look for the next issue of *Precedent*, where I will discuss the changes to Rule 4-7.2 and Rule 4-7.3.



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