

Serial: **113838**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99018-SCT

***RE: MISSISSIPPI RULES OF
PROFESSIONAL CONDUCT***

ORDER

Effective September 1, 2003, the Court, by order issued May 29, 2003, adopted various changes to the Mississippi Rules of Professional Conduct and the Rules of Discipline for the Mississippi Bar addressing advertising by attorneys. At the request of the Mississippi Bar, the Court, by order effective August 8, 2003, suspended the operations of those amendments for further study and comment.

The Court has now completed such additional study and considered comments from the Bar and others, and has adopted further amendments to Rules 7.2 and 7.5 of the Mississippi Rules of Professional Conduct, effective October 1, 2004. No further changes have been made to Rules 7.1 and 8.5, and the Court finds that the prior amendments to those rules should be reinstated.

IT IS THEREFORE ORDERED that Rules 7.2 and 7.5 of the Mississippi Rules of Professional Conduct are amended. The prior amendments to Rules 7.1 and 8.5 thereof, originally to be effective September 1, 2003 and suspended by order of August 8, 2003, are

reinstated to full force. Such additional and reinstated amendments shall be effective October 1, 2004. Rules 7.1, 7.2, 7.5 and 8.5 shall read as set forth in Exhibit “A” hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Second Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 24th day of May, 2004.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING
JUSTICE, FOR THE COURT

DIAZ AND GRAVES, JJ., NOT PARTICIPATING.

EXHIBIT “A” TO ORDER

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if it:

(a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or

(b) Creates an unjustified, false or misleading expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law; or

(c) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(d) Compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

[Amended effective June 22, 1994; amended February 11, 1999; amended May 29, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

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 shall be truthful.

The prohibition in paragraph (b) of statements that create an unjustified expectation of results precludes advertisements about results obtained on behalf of a client, such as the amount of damage verdicts or settlements, that create an unjustified expectation of similar results without reference to the specific factual and legal circumstances.

The prohibition in paragraph (d) discussing comparisons that cannot be factually substantiated would preclude a lawyer from representing that he or she (or his or her law firm) is "the best," "one of the best" or "one of the most experienced" in a particular field of law.

[Comment amended effective June 22, 1994; amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

RULE 7.2 ADVERTISING

~~(a) All advertisements and written communications pursuant to these Rules shall include the name of at least one lawyer or the lawyer referral service responsible for their content.~~ An advertisement is an active quest for clients involving a public or non-public communication. The term "~~public communication~~" "advertisement" includes, but is not limited to, ~~to~~ communication by means of telephone, television, radio, motion picture, computer-accessed communication, newspaper, ~~periodical, book,~~ sign, ~~display,~~ directory, ~~professional card, letterhead,~~ listing or through written communication ~~not involving solicitation as defined in Rule 7.3.~~

(b) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a longer period; provided that for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

~~(c) Location of Practice.~~ All advertisements and written communications provided for under these rules shall disclose the geographic location by city ~~or town~~ and state of one or more offices of the lawyer or lawyers whose services are advertised or shall state that additional information about the lawyer or firm can be obtained by contacting the Mississippi Bar at a number designated by the Bar and included in the advertisement.

~~(d) All advertisements and written communications pursuant to these Rules shall include the name of at least one lawyer or the lawyer referral service responsible for their content.~~ A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.

(e) No lawyer shall directly or indirectly pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer

and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(f) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of this Rule and Rule 7.7, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm."

(2) Date of admission to The Mississippi Bar and any other Bars and a listing of federal courts and jurisdictions other than Mississippi where the lawyer is licensed to practice.

(3) Foreign language ability.

(4) Prepaid or group legal service plans in which the lawyer participates.

(5) Acceptance of credit cards.

(6) Fee for initial consultation and fee schedule, subject to the requirements of paragraph (b) of this Rule.

(7) A listing of the name and geographic location by city and state of one or more offices of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(g) Nothing in this Rule prohibits the inclusion of the name of a lawyer or law firm ~~from permitting the inclusion~~ in law lists and law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(h) A copy or recording of an advertisement or written or recorded communication shall be submitted to the Office of General Counsel of the Mississippi Bar (hereinafter referred to as "OGCMB") in accordance with the provisions of Rule 7.5. The OGCMB shall retain a copy of such advertisement or communication for three (3) years from the date of submission. The lawyer shall retain a copy or recording for five (5) three (3) years after its last dissemination along with a record of when and where it was used. ~~A copy or recording of an advertisement or written or recorded communication shall be submitted to the Office of General Counsel of the Mississippi Bar (hereinafter referred to as "OGCMB") in accordance with the provisions of Rule 7.5.~~

(i) The lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or a written or recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or to other legal service organization.

[Amended effective June 22, 1994; amended August 20, 1998; amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

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. The public's need to know about legal services can be fulfilled in part through advertising which provides the public with useful, factual information about legal rights and needs and the availability and terms of legal services from a particular lawyer or law firm. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Nevertheless, certain types of advertising by lawyers create the risk of practices that are misleading or overreaching and can create unwarranted expectations by laymen untrained in the law. Such advertising can also adversely affect the public's confidence and trust in our judicial system. The language in Rule 7.2(a) is reflective of that set forth in the ABA's Model Rules of Professional Conduct.

One developing area of communications to which the rules relating to communications about lawyers' services are intended to apply is computer-accessed communications. For purposes of this rule, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

This Rule is included in order to balance the public's need for useful information, the state's need to ensure a system by which justice will be administered fairly and properly, and the state's need to regulate and monitor the advertising practices of lawyers, with a lawyer's right to advertise the availability of the lawyer's services to the public. This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other factual information that might invite the attention of those seeking legal assistance. Rule 7.2(c) requires advertisements to contain a geographic office location because experience in other jurisdictions has shown, in the absence of such a rule, members of the public have been misled into employing an

inaccessible lawyer in a distant city or another state. See Rule 7.04(j), Tex. Disciplinary R. Prof. Conduct.

Neither this Rule nor Rule 7.4 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

This Rule applies to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. The Rule does not apply to communications between lawyers, including brochures used for recruitment purposes.

Paying Others to Recommend a Lawyer. A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay or provide other tangible benefits to another person for procuring professional work. However, 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 lawyer referral programs and pay the usual fees charged by such programs. Paragraph (i) does not prohibit paying regular compensation to an assistant, such as secretary or advertising consultant, to prepare communications permitted by this Rule.

[Comment amended effective June 22, 1994; amended February 11, 1999; amended May 20, 1999; amended September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

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RULE 7.5 ~~EVALUATION~~ SUBMISSION OF ADVERTISEMENTS

(a) Mandatory Submission. A copy or recording of any advertisement to be published in the public media shall be submitted delivered or mailed to the Office of the General Counsel of the Mississippi Bar (OGCMB) as set forth in paragraph (b) (c) below prior to its first dissemination. ~~Telephone directory non-display listings including only a lawyer's name, telephone number, address, and area of practice are excluded from this requirement. A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication by submitting the material and fee specified in paragraph (b) to the OGCMB at least forty-five days prior to such dissemination. If the OGCMB finds that the advertisement or communication complies with these rules, the lawyer's voluntary submission shall be deemed to satisfy the submission requirement set forth in paragraph (b) of this Rule.~~

(b) Exemptions. The following are exempt from this submission requirement:

(1) Any advertisement that contains no illustrations and no information other than that set forth in Rules 7.2 and 7.4;

(2) Any telephone directory advertisement;

(3) Notices or announcements that do not solicit clients, but rather state new or changed associations or membership of firms, changed location of offices, the opening of new offices, and similar changes relating to a lawyer or law firm;

(4) Professional business cards or letterhead;

(5) On premises office signage;

(6) Notices and paid listings in law directories addressed primarily to other members of the legal profession;

(7) Advertisements in professional, trade, academic, resource or specialty publications circulated to specific subscribing audiences rather than the general public at large that announce the availability of a lawyer or law firm to practice a particular type of law in many jurisdictions and that are not for the purpose of soliciting clients to commence or join in specific litigation to be performed in Mississippi;

(8) Internet Web pages viewed via a Web browser, in a search initiated by a person without solicitation.

(9) Informative or scholarly writings in professional, trade or academic publications;

(10) A communication mailed only to existing clients, former clients or other lawyers;

(11) Any written communications requested by a prospective client;

(12) Any notices or publications required by law; and

(13) Such other exemptions as may be authorized by the OGCMB.

(b)-(c) Items to be submitted. A submission ~~with~~ to the OGCMB pursuant to paragraph (a) shall consist of:

(1) A copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, audiotapes, print media, photographs or other accurate replicas of outdoor advertising);

(2) A transcript, if the advertisement or communication is on videotape or audiotape;

(3) A statement ~~listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement~~

~~or communication in each medium in which it will appear, and the anticipated time period during which the advertisement or communication will be used of when and where the advertisement has been, is, or will be used; and~~

(4) A fee of twenty-five dollars ~~(\$25)~~ per submission of advertisement or communication timely filed as provided in paragraph (a), or a fee of one hundred and fifty dollars (\$150) for submissions not timely filed, made payable to The Mississippi Bar. This fee shall be used only for administration and enforcement of these Rules. ~~the purposes of evaluation and review of advertisements under these Rules and for the related purposes of enforcing these rules.~~ A "submission of advertisement" is defined as each advertisement unless the same advertisement is to be ~~used for~~ republished in print and or electronic media utilizing the same script. An advertisement does not need to be resubmitted upon each dissemination so long as no changes to form or content are made following the previous submission.

(c) (d) Optional Advisory Opinion. A lawyer may request an advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication by submitting the advertisement or communication and fee specified in paragraph (1) below to the OGCMB at least forty-five days prior to such dissemination. The OGCMB shall, upon receipt of such request, evaluate all advertisements and communications submitted with to it pursuant to this Rule for compliance with the applicable requirements set forth in this Rule. If an evaluation is requested, the The OGCMB shall render its advisory opinion within forty-five days of receipt of a ~~filing request~~ request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period, and so advise the filing lawyer within the forty-five day time period. In the latter event, the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.

(1) Items to be submitted to obtain Advisory Opinion. A submission to OGCMB to obtain an advisory opinion pursuant to paragraph (d) shall consist of the same items as (c)(1)(2)(3) above, and an additional fee of fifty dollars (\$50) per submission of advertisement or communication made payable to The Mississippi Bar.

This fee shall be used only for the purposes of evaluation and/or review of advertisements and preparing the Advisory Opinion. A “submission of advertisement” is defined as each advertisement unless the same advertisement is to be republished in print or electronic media utilizing the same script.

(2) Use of finding. A finding by the OGCMB of either compliance or noncompliance shall not be binding in disciplinary proceedings, but may be offered as evidence.

(3) Change of circumstances. If a change of circumstances occurring subsequent to the OGCMB’s evaluation of an advertisement or communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly resubmit the advertisement or a modified advertisement with the OGCMB along with an explanation of the change in circumstances and a fee of twenty dollars (\$20) per “submission of advertisement or communication.”

~~(d)~~ (e) Substantiation. If requested to do so by the OGCMB, the requesting lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or communication.

~~(e)~~ (f) Non-compliance. When the OGCMB determines that an advertisement or communication is not in compliance with the applicable Rules, the OGCMB shall advise the lawyer by certified mail that dissemination or continued dissemination of the advertisement or communication may result in professional discipline.

~~(f) A finding by the OGCMB of either compliance or noncompliance shall not be binding in grievance proceedings, but may be offered as evidence.~~

~~(g) If a change of circumstances occurring subsequent to the OGCMB's evaluation of an advertisement or communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of a change in circumstances, the lawyer shall promptly refile the advertisement or a modified advertisement with the OGCMB along with an explanation of the change in circumstances and a fee of twenty dollars per "submission of advertisement or communication."~~

(g) Policies and procedures. The Mississippi Bar shall formulate the necessary policies and procedures to implement and enforce the provisions of this Rule and submit same to the Supreme Court for approval pursuant to Rule 3 of the Mississippi Rules of Discipline.

[Adopted effective June 22, 1994; amended February 5, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

Comment

This Rule has a dual purpose: to enhance the Court's and the bar's ability to monitor advertising practices for the protection of the public and to assist members of the Bar to conform their advertisements to the requirements of these Rules. This Rule requires lawyers to submit their advertisements and other communications and gives them the opportunity to obtain an advisory opinion. In such event, the OGCMB will advise the filing lawyer in writing whether the advertisement appears to comply with the Rules. The OGCMB's opinion will be advisory only, but may be considered as evidence of a good faith effort to comply with these Rules. A lawyer who wishes to be able to rely on the OGCMB's opinion as demonstrating the lawyer's good faith effort to comply with these Rules has the responsibility of supplying the OGCMB with all information material for a determination of whether an advertisement or communication is false or misleading.

[Comment amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

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RULE 8.5 JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer advertises, provides or offers to provide any legal services to be performed in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

[Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. It is settled law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to

the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. Nothing in this rule shall be construed to allow an unlicensed individual to engage in the practice of law in Mississippi contrary to any other rule or statute. See also Mississippi Rules of Discipline 1(1.1) and 16. The language in Rule 8.5 is reflective of that set forth in the ABA's Model Rules of Professional Conduct. The scope of Rule 8.5 is not intended to extend to advertisements such as those reference in Rule 7.5(b)(7), unless they are for the purpose of soliciting clients to commence or join in litigation to be performed in Mississippi.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

[Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]