

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-R-99018 SCT

IN RE: RULES OF PROFESSIONAL CONDUCT

ORDER

This matter has come before the Court on The Mississippi Bar's Petition for Adoption of Proposed Rules 7.6(a) and (b), Mississippi Rules of Professional Conduct, filed January 21, 1998 and The Mississippi Bar's Amended Petition for (a) Adoption of Proposed Rule 7.6(a) and (b), Mississippi Rules of Professional Conduct and (b) Adoption of Rule 7, Mississippi Rules of Professional Conduct, in Accordance with Final Judgment in *Schwartz v. Welch*, filed January 15, 1999. Specifically, the Bar seeks the amendment of Rule 7.6 to allow limited communication by attorneys of areas of the practice of law in which they have been certified or designated for specialization, and to reconcile the text of Rule 7 with the final judgment rendered in *Schwartz v. Welch*, 890 F. Supp. 565 (S.D. Miss. 1996), in which portions of the rule were declared unconstitutional. Having considered the petitions, the Court finds that the amendments proposed will promote the fair and efficient administration of justice in the state and that the relief sought should be granted.

IT IS THEREFORE ORDERED that Rule 7 of the Mississippi Rules of Professional Conduct be and the same are hereby amended to read as set forth in Exhibit "A" hereto, such amendment to be effective upon entry of this order.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order on the minutes of the Court and forward a true certified copy of this Order to West Publishing Company for publication in the *Southern Reporter, Mississippi Cases* and the *Mississippi Rules of Court*.

SO ORDERED, this the day of February, 1999.

EDWIN LLOYD PITTMAN, PRESIDING JUSTICE,
FOR THE COURT

MCRAE, J. WOULD DENY THE PETITION

EXHIBIT "A" TO ORDER AMENDING RULES 7.1 THROUGH 7.7 OF THE MISSISSIPPI RULES
OF PROFESSIONAL CONDUCT

As amended, the Rule 7 (Rules 7.1 through 7.7 inclusive) Mississippi Rules of Professional Conduct, and the Comments thereto shall read as follows.

INFORMATION ABOUT LEGAL SERVICES

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 the 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;
- (b) Is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Mississippi Rules of Professional Conduct or other law;

Comment

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

The prohibition in paragraph (b) 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.

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. The term "public communication" includes, but is not limited, to communication by means of television, radio, motion picture, 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) A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.
- (d) 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.
- (e) 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 paragraphs (b) of this Rule.
 - (7) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.
- (f) Nothing in this Rule prohibits 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.
- (g) The lawyer shall retain a copy or recording for five (5) 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, upon General Counsel's request.

(h) 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.

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.

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.

Neither this Rule or 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 (g) does not prohibit paying regular compensation to an assistant, such as secretary or advertising consultant, to prepare communications permitted by this Rule.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A Lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family, close personal, or prior professional relationship when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) Prospective client has made known to the lawyer the desire not to be solicited by the lawyer or

(2) The solicitation involves coercion, duress or harassment.

(c) A rewritten or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, with whom the lawyer has no family, close personal, or prior professional relationship, shall include the words, "solicitation material" on the outside envelope or at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

There is a potential for abuse inherent in direct in-person or live telephone 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 may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully 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.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone 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 are 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 or live telephone conversations between a lawyer to a prospective client can be disputed and are not 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 with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by consideration other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(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(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule 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 which 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 which 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(c) that certain communications be marked "Solicitation Material" 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.

Paragraph (d) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members

generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

Code Comparison

DR 2-104(A) provided with certain exceptions that "[a] lawyer who has given in-person unsolicited advice to a layperson 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 provided 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) provided other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

RULE 7.4 LEGAL SERVICE INFORMATION

(a) Each lawyer or law firm that advertises his, her or its availability to provide legal services shall have available in written form for delivery to any potential client:

- (1) A factual statement detailing the background, training and experience of each lawyer or law firm.
- (2) If the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, the written information shall set forth the factual details of the lawyer's experience, expertise, background, and training in such matters.

Further, any advertisement or written communication shall advise any potential client of the availability of the above information by prominently displaying in all such advertisements and communications the following notice: **FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.**

(b) Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

- (1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in paragraph (a) of this Rule.
- (2) The lawyer or law firm may furnish such additional factual information regarding the law firm deemed valuable to assist the client.

(c) A copy of all information furnished to clients by reason of this Rule shall be retained by the lawyer or law firm for a period of five years after the last regular use of the information.

(d) Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this Rule shall not:

- (1) Be directly or inherently false or misleading;
- (2) Be potentially false or misleading;
- (3) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
- (4) Be unsubstantiated in fact; or
- (5) Be unfair or deceptive.

(e) Upon reasonable request by The Mississippi Bar, a lawyer shall promptly provide proof that any statement or claim made in any advertisement or written communication, as well as the information furnished to a prospective client as authorized or required by these Rules, is in compliance with paragraph (d) above.

(f) A statement and any information furnished to a prospective client, as authorized by paragraph (a) of this Rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the history of prior conduct by the lawyer in similar matters may be considered.

Comment

Consumers and potential clients have a right to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The Rule provides that potential clients may request such information and be given an opportunity to review that information without being required to come to a lawyer's office to obtain it. Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison.

RULE 7.5 EVALUATION OF ADVERTISEMENTS

(a) 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 Office of General Counsel of the Mississippi Bar (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) A submission with OGCMB as permitted by 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 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; and

(4) A fee of twenty-five dollars per submission of advertisement or communication made payable to The Mississippi Bar. This fee shall be used only for 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 print and electronic media utilizing the same script.

(c) The OGCMB shall evaluate all advertisements and communications submitted with it pursuant to this Rule for compliance with the applicable requirements set forth in this Rule. The OGCMB shall render its advisory opinion within forty-five days of receipt of a filing 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.

(d) 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) When the OGCMB determines that an advertisement or communication is not in compliance with the applicable Rules, the OGCMB shall advise the lawyer 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."

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 gives lawyers the opportunity to submit their advertisements and other communications. 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.

RULE 7.6 COMMUNICATION OF CERTIFICATION OR DESIGNATION

(a) A lawyer may communicate the fact that he or she has been certified or designated in a field of law by a named organization or authority, but only if that certification or designation is granted by an organization or authority whose specialty certification or designation program is accredited by the American Bar Association. Notwithstanding the provisions of this Rule, a lawyer may communicate the fact that he is certified or designated in a particular field of law by a named, non-American Bar Association organization or authority, but must disclose such fact and further disclose that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

(b) Notwithstanding the provisions of Rule 7.6(a), a lawyer may state or imply as follows:

1. A lawyer who is admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; or
2. A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

Comment

Rule 7.6(a) permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in a field of law when the American Bar Association has accredited the organization's or authority's specialty program to grant such certification or designation. Certification or designation procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience and knowledge to ensure that the lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that the consumers can obtain access to useful certification or designation information, the name of the certifying or designating organization or other agency must be included in any communication regarding the certification or designation. See *Peel v. Attorney Registration & Disciplinary Com.*, 496 U.S. 91 110 S. Ct. 2281, 210 L. Ed. 2d 83 (1990).

However, even though this Rule permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in the field of law when the American Bar Association has accredited the organization's or authority's specialty program, a lawyer may communicate the fact that he is certified or designated in a field of law by a named, non-American Bar Association accredited organization or authority, provided such fact is disclosed and further disclosure is made that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

Recognition of specialization in patent matters is a matter of law and established policy of the Patent and Trademark Office, as reflected in Rule 7.6(b)(1).

Rule 7.6(b)(2) recognizes that the designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

RULE 7.7 FIRM NAMES AND LETTERHEADS

- (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1.
- (b) A lawyer shall not practice under a trade or fictitious name or a name that is misleading as to the identity of the lawyer or lawyers practicing under such name. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the legal community for those services.
- (c) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm except as permitted by Rule 1.17.
- (e) Lawyers may state or imply that they practice in a partnership or to other organization only when that is the fact except as permitted by Rule 1.17.

Comment

A firm may be designated by the names of all or some of its members, or by the names of deceased members where there has been a continuing succession in the firm's identity. The United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Paragraph (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Two examples of such terms are "academy" and "institute". Paragraph (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. Although not prohibited per se, the terms "legal clinic" and "legal services" would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the legal community for like services.

With regard to paragraph (c), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones", for that title suggests partnership in the practice of law.