

Serial: 104819

IN THE SUPREME COURT OF MISSISSIPPI

FILED

MAY 29 2003

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

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

No. 89-R-99018-SCT

and

***IN RE: RULES OF DISCIPLINE FOR
THE MISSISSIPPI BAR***

No. 89-R-99010-SCT

ORDER

This matter is before the Court en banc. At the request of the Court, The Mississippi Bar has, through its Ad Hoc Committee on Lawyer Advertising conducted a thorough study of the Rules of Professional conduct relating to advertising by attorneys. Pursuant to that study, the Bar has filed with the Court proposals for amendment of certain rules, and, with that report, a dissent by Hon. James L. Robertson, a member of the Ad Hoc Committee, was filed. After the report and dissent were filed, the Court advertised the proposed amendments on its internet web site, and numerous responses, pro and con, have been received. Having closely studied these filings, the Court finds that certain amendments to those parts of the Rules of Professional Conduct should be adopted, and that the adoption of such rules will alleviate abuses which have been observed in the solicitation of clients by attorneys.

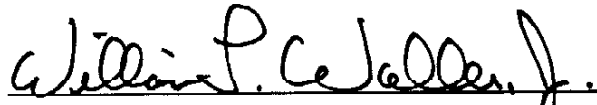
The Court further finds that the implementation of such amendments requires certain amendments to the Rules of Discipline.

IT IS THEREFORE ORDERED that Rules 7.1, 7.2, 7.5, and 8.5 of the Mississippi Rules of Professional Conduct are amended as set forth in Exhibit "A" to this order, effective September 1, 2003.

IT IS FURTHER ORDERED that Rule 8 of the Rules of Discipline for The Mississippi Bar is amended as set forth in Exhibit "B" hereto, effective September 1, 2003.

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 29th day of May, 2003.


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

McRAE, P.J. DISSENTS.

EASLEY, J. DISSENTS WITH SEPARATE STATEMENT JOINED BY McRAE, P.J.

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EASLEY, J., DISSENTS WITH SEPARATE WRITTEN STATEMENT

This is a violation of the first amendment of the U.S. Constitution protecting free speech. The Court's action will result in a challenge by way of a lawsuit in federal court needlessly costing the taxpayers money. The majority of the Court has chosen to ignore *Schwartz v. Welch*, 890 F. Supp. 565 (S.D. Miss. 1995).

McRAE, P.J., JOINS THIS STATEMENT.

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

~~(b)~~ (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 20, 1999; amended effective September 1, 2003.]

Comment

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. ~~Whenever~~ 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.]

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, 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 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.

(c) (d) A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.

(d) (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.

(e) (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 of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

~~(f)~~ (g) 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)~~ (h) 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)~~ (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.]

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.

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.

Neither this Rule or 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.]

RULE 7.5 EVALUATION OF ADVERTISEMENTS

(a) A copy or recording of any advertisement in the public media shall be delivered or mailed to the Office of the General Counsel of the Mississippi Bar (OGCMB) as set forth in paragraph (b) 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 ~~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~~ 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 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."

[Adopted effective June 22, 1994; amended February 5, 1999; amended effective September 1, 2003.]

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 gives 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.]

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.]

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.

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.]

Code Comparison

There is no counterpart to this Rule in the Code.

EXHIBIT "B" TO ORDER

RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR

RULE 8. COMPLAINT TRIBUNAL - POWERS AND DUTIES

(a) All formal complaints shall be filed with the Clerk of the court and the Court shall designate a Complaint Tribunal to hear and determine the matter. Hearings before Complaint Tribunals shall be as cases in chancery.

(b) At the conclusion of the hearing, upon majority vote, the tribunal shall render a written opinion incorporating a finding of fact and a judgment which may:

(i) Exonerate the accused attorney and dismiss the Formal Complaint; or

(ii) Publicly or privately reprimand the attorney; or

(iii) Suspend the attorney with or without probation for a fixed period of time and may specify conditions precedent to reinstatement; or

(iv) Disbar the attorney; or

(v) In addition to any disposition authorized under this paragraph, with the assent and accord of the attorney who is the subject of the complaint, notwithstanding the provisions of Rule 15 of these rules, refer the attorney to the Lawyers and Judges Assistance Committee for evaluation and, as recommended by such committee, treatment, monitoring and assistance.

(c) The Complaint Tribunal shall have the power to enjoin violations under the Mississippi Rules of Professional Conduct.

[Amended April 18, 2002; amended effective September 1, 2003.]

Procedure

(8.1) Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.

(8.2) All Formal Complaints shall be prosecuted in the name of the Bar by Complaint Counsel unless the President or First Vice-President of the Bar shall appoint another attorney or attorneys to assist or proceed in the place of Complaint Counsel.

(8.3) The Formal Complaint shall be served in accordance with the applicable Mississippi Rules of Civil Procedure.

(8.4) Unless an enlargement of time be granted by the presiding judge of the Complaint Tribunal, the attorney's answer shall be filed within twenty (20) days after a copy of the Formal Complaint is served.

(8.5) Trials shall be held in the attorney's county of residence for those attorneys residing in the State of Mississippi; provided, upon written waiver by the attorney or upon motion made by either party and order by the Tribunal, trial may be held elsewhere. Trials shall be held before the Mississippi Supreme Court or a Tribunal sitting in Hinds County for those attorneys residing outside the State of Mississippi. The presiding judge shall hear and determine all pre-trial motions and all non-dispositive motions and enter all appropriate orders. The tribunal may hold such pre-trial conferences as deemed appropriate. Trial upon the merits shall be held before the full tribunal and shall be held as expeditiously as possible consistent with due process.

(8.6) **Imposition of Discipline.** No discipline shall be imposed except upon clear and convincing evidence. After final hearing on the merits, the opinion of the Tribunal may provide the following:

(i) Exonerate the accused attorney and dismiss the Formal Complaint.

(ii) Publicly or privately reprimand the attorney. If the Tribunal is of the opinion that a private reprimand will adequately afford the disciplinary sanctions required by the particular circumstances, the Tribunal may order the attorney to appear before the Board of Commissioners of the Bar at the board meeting convening first after the reprimand becomes final or may have it forwarded to the attorney by the Clerk of the Court or by certified mail, return receipt requested, restricted delivery to addressee only. If the Tribunal is of the opinion that a Public Reprimand will adequately afford the disciplinary sanctions required by the particular circumstances, the Tribunal may order the attorney to appear before the Circuit Court of the attorney's county of residence on the first day of a term convening next after the date the reprimand becomes final or on some other similar day when a maximum number of the Bar and the public are present. When a reprimand becomes public, a copy shall be given to the person filing the complaint, the Executive Director of the Bar and to the judges of the circuit and chancery districts of the attorney's county of residence. A Final Public Reprimand shall be read by the senior judge or his the senior judge's designee at the time herein indicated and placed upon the minutes of the Court.

(iii) Suspend the attorney with or without probation for a fixed period of time, and may specify conditions precedent to reinstatement. When such orders of suspension become public, they shall be placed upon the minutes of the chancery and circuit courts of the attorney's county of residence, and shall immediately become matters of public record.

(iv) Disbar the attorney. Such orders, when entered, shall be treated as provided in subparagraph (iii), above.

(v) In addition to (ii), (iii), or (iv), notwithstanding the provisions of Rule 15 of these rules, with the assent and accord of the attorney who is the subject of the complaint, refer the attorney to the Lawyers and Judges Assistance Committee for evaluation and, as recommended by such committee, treatment, monitoring and assistance. The Tribunal may delay action under (ii), (iii) or (iv) of this Rule provided that an attorney who is referred to the Lawyers and Judges Assistance Committee by the Tribunal complies with the terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee. If an attorney violates the terms and conditions imposed by the Lawyers and Judges Assistance Committee upon such attorney, notwithstanding the provisions of Rule (3.2)(g)(3) of these rules, the Lawyers and Judges Assistance Committee, in accordance with Rule (3.2)(g)(5) of these rules shall report such failure to comply with all terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee, and upon receipt of such report, the Tribunal may take such action under paragraph (b) which the Tribunal delayed but originally could have taken.

[Amended November 16, 1995; amended April 18, 2002; amended effective September 1, 2003.]