LAWYER ADVERTISING

The More Things Change ...

By
Martin A. Cole, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility

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Lawyer advertising remains one of the most enduring topics in the area of lawyer ethics/professional responsibility. Despite the large number of articles written about advertising, the well does not seem to go dry. New rules and a continued willingness by the United States Supreme Court to review cases in this area allow for regular updates. This is as true in Minnesota as elsewhere.

In August 1993, following a petition from the Minnesota State Bar Association, the Supreme Court amended Rule 7.2 of the Minnesota Rules of Professional Conduct, dealing with lawyer advertising. The Court made two substantive changes, adding new Rule 7.2(e), which requires advertisements and written communications indicating that the charging of a fee is contingent on the outcome to disclose that the client will be liable for expenses regardless of the outcome if that is what the lawyers intends to do, and adding new Rule 7.2(f), which requires the word "ADVERTISEMENT" to appear clearly and conspicuously at the beginning of a targeted written solicitation letter when the recipient has been selected because of some condition or occurrence known to the lawyer.Ftn1 The discussion about the perceived abuses of lawyer advertising, the adverse effect advertising has on the image of the profession, the need for rule changes and the constitutional limits of regulating advertising was somewhat heated and ran, not surprisingly, along "party" lines (heavy advertisers versus non-advertisers).

After nearly two years' experience operating under the revised rules, the Director's Office can safely say that the changes have had little impact on the lawyer disciplinary system. Statistically, only a minor increase in the number of complaints dealing with lawyer advertising has occurred. In 1994, the first full year under the current rules, 45 complaints were received which dealt with some aspect of advertising and solicitation. This represented approximately 3 percent of the complaints received for the year. By comparison, in 1991-93 the number of complaints about advertising and solicitation were as follows: 1991 - 33 (2.4%); 1992 -24 (1.7%); 1993 - 39 (2.8%).Ftn2 Concerns that increased regulation of lawyer advertising would strain the resources of the disciplinary system have not been substantiated.

The Director's Office has received no complaints about new Rule 7.2(e). Even a quick perusal of the current Minneapolis Yellow Pages reveals many advertisements that still contain various versions of the familiar "no fee if no recovery" language, yet contain no statement about the client being held liable for expenses regardless of the outcome. This must mean that the majority of personal injury lawyers in Minnesota have opted to forego seeking to collect for expenses if a case is lost, or else consumers are just not aware of the rule's requirements.

The requirement of Rule 7.2(f) that the word "ADVERTISEMENT" appears clearly and conspicuously at the beginning of certain solicitation letters has generated several complaints and resulted in at least three admonitions being issued. As in previous years, the majority of such complaints come from other lawyers, not from the public. The Director and the Board are attempting to enforce this particular rule fairly literally. A short grace period was allowed immediately following the adoption of the rule, but a claim of

ignorance of the rule, coupled with a promise to send correct letters in future no longer will be accepted. The rule is clear on its face and is being enforced as written. For example, the Director has held that "at the beginning" does not mean anywhere on the first page of a two-page letter. Nor is it sufficient to have "encl: ad" at the bottom of the letter if the lawyer sends a solicitation letter with a copy of her Yellow Pages advertisement enclosed. Nor does the rule require proof that someone actually was misled to their detriment before discipline can be imposed. Appeals from private discipline issued on such facts are winding their way through the system on the basic issue of whether substantial compliance with the rule is enough. The last word on this subject may never be written.

AN ADVERTISING PRIMER

Lawyer advertising remains a frequent source of telephone advisory opinion calls to the Director's Office. As a reminder, Minnesota attorneys may call the Director's Office seeking prospective guidance on a wide variety of ethics issues. In general, the Director's Office declines to issue opinions about lawyer advertising. The Director's Office will not screen or give approval to any proposed advertising copy. As to some recurring questions, however, answers have evolved which can be shared. For example, Rule 7.2(f) applies only when the lawyer knows that the recipient may be in need of specific legal services because of some condition or occurrence. This requirement is easy to apply to solicitation letters following a drunk driving arrest, reported traffic accident or death notice. But what about a letter sent by a lawyer to prospective business clients - does Rule 7.2(f) apply? A letter offering general corporate legal services, which any business might always need, does not trigger Rule 7.2(f). If the legislature recently changes a tax law or workers' compensation law which affects businesses, however, then offering to help prospective business clients apply the new law would require the word "ADVERTISEMENT" clearly and conspicuously at the beginning of the solicitation letter.

Several other advertising rules, though not amended in 1993, still draw frequent advisory opinion requests or complaints. Each year, many new lawyers just starting out call with the same questions about advertising. For those individuals and as a primer of some do's and don'ts of lawyer advertising, here's a quick reminder about the basics of the Rules of Professional Conduct:

Rule 7.1 - The basic standard for judging the content of an attorney's advertisements or solicitation letters remains whether the communication is false or misleading, creates an unjustified expectation about the results the lawyer can achieve, or compares a lawyer's services with other lawyers without factual basis. Minnesota lawyers have been admonished under this section, for example, for inflating their jury trial experience or for attempting to charge prospective clients despite a "free initial consultation" claim in their ad.

Rule 7.2(d) - The name of at least one Minnesota licensed attorney responsible for the content of an advertisement must be included somewhere on the communication. Since most lawyer-advertisers presumably want the prospective client to know the attorney's name, this seems an easy rule with which to comply. But how does the rule apply to trade names or legal clinics? The Director's Office has opined that a firm name (such as "Smith & Jones" or "Smith and Jones, P.A.") is sufficient to satisfy this rule requirement if Smith or Jones is a current Minnesota licensed attorney. If someone at the firm other than Smith or Jones is in fact to be responsible for the ad's content, then that attorney's names must be included. Otherwise, Smith or Jones will be held accountable for any violation. If Smith and Jones are dead or retired, so that the firm name is in effect now a trade name, then a current member of the Minnesota bar must be identified.

Rule 7.3 - Lawyers may not solicit employment by in-person or telephone contact unless the person contacted has some prior family or professional relationship with the lawyer. Direct mail solicitation is permitted (subject to new Rule 7.2(f) discussed above), but the lawyer cannot follow up a letter with a phone call or in-person contact unless the prospective client contacts the lawyer first.

Rule 7.4 - A lawyer cannot hold herself out as a "specialist," or imply that she is, unless she is currently certified by an approved organization. Use of various forms of the magic "S"-word have resulted in private discipline. What other words imply specialization is not always predictable without looking at their context.Ftn3 As an alternative, note that Rule 7.4(a) allows a lawyer to communicate truthfully that she does or does not practice in a particular area of law or limits her practice to certain types of cases.

Rule 7.5(d) - Lawyers who share office space, overhead and expenses without being formally organized as a partnership or professional corporation may not share a letterhead that says "Law Offices of Smith, Jones & Johnson." The use of such a name would imply a partnership when no such organization in fact exists and would violate the rule. Office shares should have separate letterhead for each lawyer.

1]The Court also made minor changes to Rule 7.2(a) and to the title of Rule 7.3. Two other recommended changes were rejected: To require the word "ADVERTISEMENT" on the envelopes as well as the solicitation letters to which Rule 7.2(f) applies, and to require the disclosure that an advertising soliciting lawyer may refer a case to another lawyer if that was the lawyer's intent.

2 The total number of complaints received in the four-year period are as follows: 1991 - 1,380; 1992 - 1,399; 1993 - 1,405; and 1994 - 1,456.

3 The MSBA recently passed a proposal which would eliminate the part of this rule that prohibits an attorney from "implying" specialization. This will be presented to the Supreme Court for consideration.