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News Story

The return of the Ad wars

Proposed advertising rules called too restrictive by some, needed reform by others

By Heather Cole

A Missouri Bar committee's suggested tightening of attorney advertising rules has reignited a debate smoldering since the last changes to the rules took effect almost three years ago.

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Among other changes, the Missouri Bar Special Committee on Lawyer Advertising is proposing setting size and television ad requirements for an already mandated disclaimer, making the Office of Chief Disciplinary Counsel a repository for ads, direct mail and affidavits, and banning some celebrity endorsements and references to past successes.

The Bar association also is considering creating a committee to monitor compliance with the rules, but few details on the composition of such a committee have been outlined.

The proposed rule changes have drawn the ire of personal injury attorneys and the Missouri Broadcasters Association, who say the rules are being pushed forward without any research showing they're needed and could improperly discourage attorneys from advertising.

Changes to the rules could have a effect on Missouri attorneys - at least 158 firms or legal groups aired 87,000 television spots in the state's three largest markets in 2007, according to a report by TNS Media Intelligence's Competitive Media Reporting. The total value of the airtime in St. Louis, Kansas City and Springfield was nearly \$7.7 million.

The committee is taking comments on the proposal until Oct. 15, and may issue a second draft of proposed changes based on those comments, said Mark Levison, a Lathrop & Gage member who is chairman of the 17-person committee. The proposed changes would have to be approved by the Missouri Bar Board of Governors and then by the Supreme Court.

A bill supported by the Missouri Association of Trial Attorneys to restrict attorney advertising was introduced in the 2007 legislative session, so there is urgency for the bar to act on the issue to show lawyers "will take care of our own house lest somebody else do it," Levison said.

'Biggest' issue

The biggest issue with the proposed restrictions is the committee hasn't done any research and demonstrated that further restrictions are needed, said Ed Herman, an attorney and vice-president of business development for St. Louis plaintiffs' firm Brown & Crouppen. Brown & Crouppen, which aired more than 9,300 television spots in 2007, is one of the largest lawyer advertisers in Missouri.

Some of the suggested new rules seem to be intended to make compliance so onerous that they get rid of attorney advertising altogether, Herman said.

"They may not like it, but it is constitutionally protected, and it does provide a service," he said.

Levison, who does a column for the St. Louis Daily Record, a sister publication, acknowledged that research is a good idea. He said the committee is composed of a broad spectrum of attorneys, including some who advertise. It hears from a wide variety of people that advertising is a significant concern inside the profession.

The Office of Chief Disciplinary Counsel said in a memorandum prepared for the special committee that there had been 27 complaints about lawyer advertising in 2007, and 13 disciplines meted out. Information on whether attorneys or members of the public were making the complaints was not available.

Chief Disciplinary Counsel Alan Pratzel said in the memo that his office will sometimes dismiss a complaint in cases where an attorney corrects the advertising immediately and doesn't have a history of other disciplinary actions.

'Costly' TV time

The Missouri Broadcasters Association took issue with the requirement that the disclaimer "The choice of a lawyer is an important decision and should not be based solely upon advertisements," be spoken during the advertisement.

In a letter posted in the comments section on the bar's Web site, association president and chief executive Donald Hicks said the "improper" purpose of requiring the verbal disclaimer is to make the disclaimer so prominent, repetitive and costly that "lawyers will be discouraged from conducting broadcast advertising."

With the oral disclaimers, lawyers won't be able to have 10- or 15-second television spots, Herman said.

"They're a vital part of anybody's media buy," he said.

The verbal requirement was proposed during the last round of changes to the advertising rules, but removed after objections were raised, said Levison, who also was the chair of the special advertising committee that produced the 2006 rule changes. The proposed rule change was intended to ensure lawyers didn't place the disclaimer in such small print that it was virtually unnoticeable, which is exactly what happened with some advertisements, Levison said.

A proposed rule requiring that the disclaimer in print advertising be in a point size either a third the size of a telephone number included in the ad or "reasonable legible" if there isn't a telephone number also is intended to ensure lawyers make the disclaimer prominent, Levison said.

That proposed requirement, which tries to define "conspicuous disclosure" could have unintended consequences, Herman said. Potentially, an attorney with his phone number in a 42 point size could be in violation if the disclaimer is only in 13-point type, but another attorney would be in compliance with a 12 point size disclaimer because the ad didn't have a phone number.

"Why not use 'reasonably legible?' " Herman said.

Bona fide direct mail

The series of rules the committee crafted on direct mail, meanwhile, is so onerous that it would make it impossible for any attorney to do a direct mail campaign, Herman said. The changes would require an affidavit and a copy of a solicitation is required every time a piece of mail is sent to a single client, he said.

"They said to themselves, 'Hey, if we double the costs to the attorneys doing this, maybe they won't do it,' " Herman said.

If the same solicitation is sent to several clients, only one affidavit is required, Levison said. If each letter is tailored to a particular person, an affidavit for each one would need to be sent to the chief disciplinary counsel's office. The change was suggested because both Board of Governors members and special committee members had heard numerous complaints about direct mail, Levison said.

If someone doesn't want to testify to the truth of a direct mailing, it raises questions about the mailing, Levison said.

"You could turn it around and say, what's wrong with an affidavit?" Levison said.

The committee will work with the Office of Chief Disciplinary Counsel on the proposed rule changes, Levison said. Pratzel said his office is reviewing the proposed rule changes but hasn't commented yet.

Boston illegal

Drawing fewer comments is the proposed ban on celebrity endorsements, unless the celebrity is a client.

Under the proposed addition to the rules, advertisements featuring actor William Shatner that Brown & Crouppen used to run would be prohibited, but the divorce firm Cordell & Cordell's radio spots featuring sometime client Ozzie Smith would be allowed.

"The committee felt it may be inherently misleading to use a celebrity to endorse a law firm he or she never used," Levison said.

The proposed rules are drawing a number of comments, which are posted on the bar's Web site, from people on both sides of the issue. Most helpful, Levison said, are those comments that detail how a particular rule might create a problem.

However, some of those commenting wrote more generally about the topic of attorney advertising, passionately condemning or supporting the practice.

"This job of mine is not for the faint of heart," Levison said.

Among the proposed changes

- * Set minimum font sizes for a disclaimer in print and television ads
- * Mandate that the 17-word disclaimer be spoken during television advertisements, in addition to being displayed on the screen
- * Ban references to "cut-rate" fees
- * Require copies of direct mail solicitations be accompanied by affidavits attesting to their truthfulness be sent to the Office of Chief Disciplinary Counsel
- * Ban celebrity endorsers, unless the celebrity is a client

Largest legal services TV advertisers in 2007

Information from TNS Media Intelligence/Competitive Media Reporting summary report on network television advertising for 100 largest television markets.

St. Louis

Advertiser: CofmanTownsley **No. of spots:** 7,793

Advertiser: Brown & Crouppen **No. of spots:** 4,941

Advertiser: Kullmann, Klein & Dioneda **No. of spots:** 2,759

Total lawyer TV spots: 32,399

Springfield

Advertiser: Tolbert Beadle & Musgrave **No. of spots:** 5,039

Advertiser: Aaron Sachs Law Firm **No. of spots:** 4,879

Advertiser: Corbett Law Firm **No. of spots:** 2,348

Total lawyer TV spots: 28,943

Kansas City

Advertiser: Castle Law Offices **No. of spots:** 4,789

Advertiser: Brown & Crouppen **No. of spots:** 4,288

Advertiser: Injury Helpline **No. of spots:** 2,318

Total lawyer TV spots: 25,569

SOURCE: TNS Media Intelligence/Competitive Media Reporting

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