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Legal Ethics and Developing New Clients

By Michael Downey

If you are a lawyer in private practice, you should possess some understanding of how the Missouri Rules of Professional Conduct regulate lawyer marketing and client solicitation activities – even if you have no intention of advertising. After all, the Missouri Rules of Professional Conduct, Missouri Supreme Court Rule 4, contains one of most stringent sets of regulations in the country governing lawyers' client development activities. Virtually all communications, even in private conversations, that lawyers make to promote their practice or solicit clients are regulated regarding content and often method of delivery. Failure to comply with these regulations may result in attention from Missouri's Office of Chief Disciplinary Counsel and possibly serious discipline.

This article seeks to provide a basic understanding of the Missouri Rules of Professional Conduct and their regulation of lawyers' business- and client-development activities. In its opening sections, this article explains the origins of the framework now established in Missouri Supreme Court Rules 4-7.1 through 4-7.5. It will then discuss specific requirements that Missouri's Rules of Professional Conduct impose on lawyer business and client development communications, before closing with thirteen practical suggestions for ethical business development.

I. U.S. Supreme Court Precedent Shape the Framework for Regulation of Lawyer Business Development

The Rules of Professional Conduct that regulate lawyer business development activities in Missouri are, like the ethics rules in every United States jurisdiction except California, modeled on the American Bar Association ("ABA") Model Rules of Professional Conduct. The framework for the Model Rules governing lawyer advertising and business development communications, in turn, is based on a series of United States Supreme Court decisions that began with *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

- For decades prior to *Bates*, states like Arizona prohibited lawyers from engaging in virtually any type of advertising or overt business development activities. In *Bates*, however, the U.S. Supreme *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), where the Court permitted a state to ban direct, in-person solicitation of prospective clients, specifically in a personal injury action;

- *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), where the Court held a state could not discipline an attorney for soliciting legal business through printed advertising containing truthful, nondeceptive information and advice regarding the legal rights of potential clients who might have specific claims to pursue;

- *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), where, reviewing a solicitation letter sent to people facing foreclosure, the Court rejected a complete ban on solicitation letters targeted to potential clients known to face particular legal problems; and

- *Peel v. Attorney Registration & Discipline Committee of Illinois*, 496 U.S. 91 (1990), which allowed a lawyer to state truthfully that he was certified as a civil trial specialist by the National Board of Trial Advocacy.

Court declared unconstitutional Arizona Code of Professional Responsibility Disciplinary Rule ("DR") 2-101(B), which in part prohibited lawyers from "public[ing]" themselves including "through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity."

When declaring Arizona DR 2-101(B) unconstitutional, the *Bates* Court held that lawyer advertising was constitutionally protected commercial speech. The Court also rejected arguments that DR 2-101(B) should be upheld as necessary to protect the dignity of the legal profession and proper administration of justice and that lawyer advertising was inherently misleading. But the Supreme Court did limit its holding in four respects: (1) that false, deceptive, and misleading advertisements were not constitutionally protected, but were instead subject to restraint; (2) that truthful lawyer advertising could be subjected to restrictions as long as they were reasonable as to "time, place, and manner of advertising"; (3) that the Court was not deciding the limitations that could be imposed on statements concerning the "quality of legal services"; and (4) that the Court also was not deciding what limitations could be imposed on in-person solicitations by attorneys or their "runners."

These holding, conclusions, and limitations in the *Bates* decision became the focus of later decisions that examined the constitutional protections for and appropriate regulation of lawyers' client solicitation activities. Four of these later decisions are significant for purposes of this article:

These four Supreme Court decisions help provide the framework for the regulation of lawyer business development: (1) regulation of *in-person solicitations*, which relying upon *Ohralik* are largely banned by ABA Model Rule 7.3(a) and Missouri Rule 4-7.3(a); (2) truthful general advertisements, which consistent with *Bates* are allowed by regulated under Model Rules 7.1 and 7.2 and the much more detailed and onerous Missouri Rules 4-7.1 and 4-7.2; (3) *targeted, mailed solicitations*, which consistent with *Shapero* are subjected to more stringent regulations than general advertising in Model Rule 7.3 and Missouri Rule 4-7.3, but not a virtual ban as the same rules establish for real-time solicitations; and (4) regulation of lawyer specialization and certification claims, about which *Peel* guides the content of Model Rule 7.4 and Missouri Rule 4-7.4.

As will be discussed later in this article, Missouri's regulations are generally more stringent than those adopted by ABA Model Rules 7.1 through 7.4. In my personal opinion, several of the more aggressive Missouri regulations likely would not survive constitutional challenge. But such issues are beyond the scope of this article, which aims to provide practical guidance regarding

what the Missouri Rules governing lawyer business development require instead of trying to argue what the Rules should regulate.

II. Basic Structure of Rules Regulating Lawyer Business Development

While the U.S. Supreme Court decided *Bates* and its progeny, the ABA modified its model ethics rules to reflect the guidance on what restrictions were constitutionally permissible. Today there are five Model Rules focused on regulating lawyer advertising. Those five rules are:

- Model Rule 7.1, which prohibits a lawyer from making false and misleading statements in any communication – including both private communications and advertising – about the lawyer or the lawyer's services;

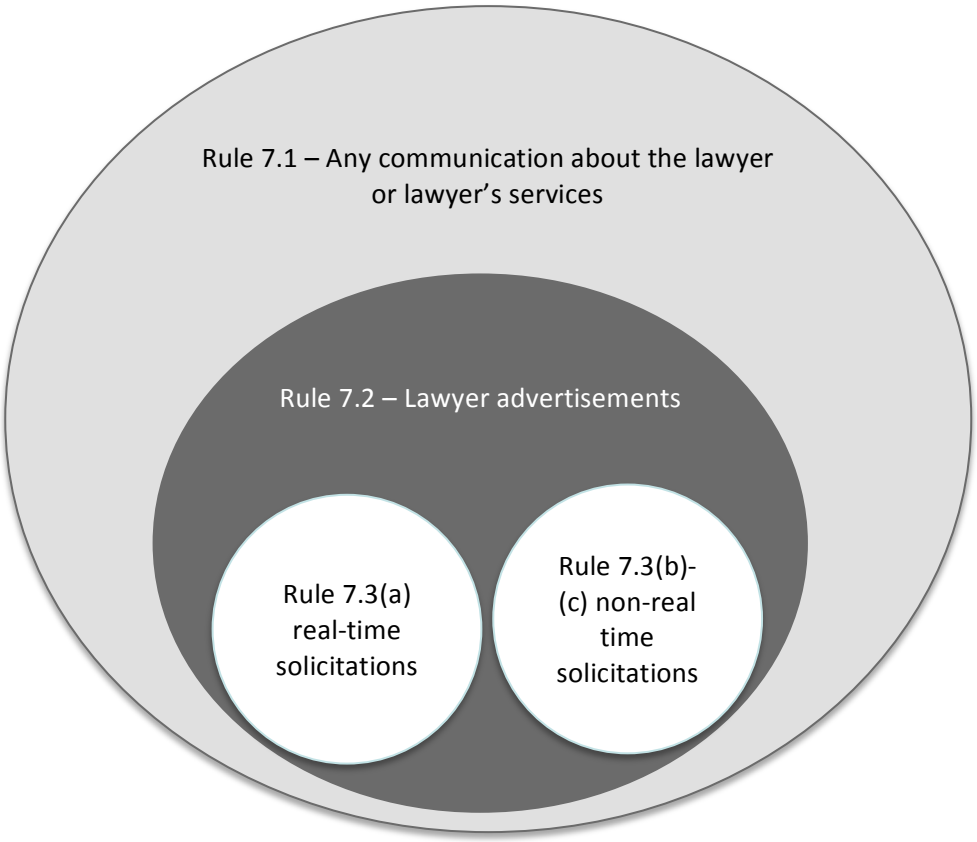
- Model Rule 7.2, which expressly provides that lawyers may advertise, subject to ABA Model Rules 7.1 and 7.3; establishes a requirement that an advertisement must identify at least one responsible for the advertisement; and prohibits the payment of referral fees to non-lawyers for referring work to a lawyer (except in limited circumstances);

- Model Rule 7.3, which regulates solicitations, or the seeking of legal work from persons known to have a specific legal need, by (a) generally banning in-person or "real time" solicitations of persons who are not also lawyers or known by the lawyer soliciting the legal work; but (b) generally permitting mailed and other non-real-time solicitations, as long as they are clearly delineated "advertisements";

- Model Rule 7.4, which restricts how and when a lawyer may claim to be specialists or certified in a specific legal practice; and

- Model Rule 7.5, which regulates what name (and URL) a law firm may use, including allowing the use of trade names and prohibiting certain naming conventions that might be misleading.

These three primary Model Rules that govern business development communications – Model Rules 7.1 through 7.3 – are designed to provide interlocking regulations, so that communications with potential clients become subject to more regulation as the communication becomes more targeted and invasive. Model Rules 7.1 through 7.3 may be diagrammed as follows:



As this diagram illustrates, a targeted solicitation letter would normally need to comply with Model Rules 7.1 and 7.2 as well as Rule 7.3(b), while a private communication that was not an advertisement or targeted solicitation would need to comply only with Model Rule 7.1.

Missouri Rule 4-7.1 through 4-7.5 largely follow the Model Rules' overlapping framework illustrated in the Venn diagram above, with two odd exceptions. First, under Missouri Rule 4-7.2(f), the disclaimer requirement contained in that subsection is *not* required for targeted solicitation letters regulated by Missouri Rule 4-7.3(b). Second, provisions near the end of Missouri Rules 4-7.1 through 4-7.3 direct that communications from or related to certain Legal Services or other *pro bono* legal providers or activities are generally exempted from most requirements imposed by Missouri Rules 4-7.1 through 4-7.3.

III. Regulations governing all communications about a lawyer or lawyer's services – Rule 4-7.1

Turning now to specific Missouri Rules, Rule 4-7.1 governs all communications about a lawyer or the lawyer's services, and prohibits such communications from being false or misleading. Rule 4-7.1 is fully set forth on the Supreme Court's website at http://on.mo.gov/1xKDESu.

Missouri Rule 4-7.1 is 370 words long and has 11 sections designated by letters. It is 320 words longer and much more detailed than the 49-word Model Rule 7.1, which contains only the three

opening sentences and section (a) of Missouri Rule 4-7.1. The remaining 10 subsections and final unnumbered paragraph of Missouri Rule 4-7.1 are not present in Model Rule 7.1.

Missouri Rule 4-7.1 is also perhaps the most important rule for lawyers in private practice to understand, because any communication that promotes the lawyer as a lawyer – including, for example, private conversations, social media profiles that identify the lawyer as a lawyer, and law firm advertising materials – must comply with the Rules' detailed proscriptions and requirements.

That said, Rule 4-7.1 is quite easy to summarize: it prohibits lawyers from saying anything false or misleading about themselves or their legal services, or omitting information to cause a communication to be materially misleading. The remaining ten provisions simply elaborate on this prohibition by specifying content deemed misleading.

The elaboration in Rule 4-7.1 can be separated into three categories. First, there are four specific prohibitions against certain content, regardless of the medium. Those content prohibitions are:

> (1) A prohibition against communications that are false, misleading, or omit facts such that the resulting communication is a material misrepresentation. The Comment to Rule 4-7.1 makes clear this prohibition includes statements about discounts and other pricing adjustments;
>
> (2) A prohibition against statements that create unjustified expectations about results;
>
> (3) A prohibition against statements that suggest the lawyer may use illegal\ or unethical conduct to benefit a client; and
>
> (4) A prohibition against statements that compare the lawyer to other lawyers in a manner that cannot be factually verified.

Second, there are six limitations in Missouri Rule 4-7.1 that do not actually prohibit speech but instead require additional disclosures or disclaimers when and if certain types of statements are made. Those six limitations are:

> (1) A requirement that lawyers discussing past results warn that past results afford no guarantee as to future results and that each case is different and must be judged on its own merits;
>
> (2) A requirement that a lawyer to disclose if the lawyer is indicating an area of practice but routinely refers matters in that practice to other lawyers;
>
> (3) A requirement to disclose when a person making a testimonial or endorsement has been paid to make the testimonial or endorsement;
>
> (4) A requirement to disclose when content in a communication – such as the lawyer, client, or scene – is simulated;

(5) A requirement when an office address is promoted but the office is only staffed part-time; and

(6) A requirement to disclose that a client may be liable for costs if a communication indicates legal services are available on a contingent or no-recovery-no-fee basis.

Finally, there one limitation in Missouri Rule 4-7.1 is really a limitation only on lawyer advertisements. It should therefore be located in Missouri Rule 4-7.2, discussed *infra*, but it remains located improperly in Rule 4-7.1. It is the Rule 4-7.1(f) prohibition against advertising for matters where the lawyer has neither experience nor competency.

The proscriptions and requirements in Missouri Rule 4-7.1 are intended to be quite comprehensive. Also, they can be quite confusing. There is no clear rationale, for example, why under Rule 4-7.1(f) do we let lawyers seek retention on engagement where the lawyers are *incompetent*, simply because they have *some experience* in the relevant type of matter. And how much and by whom must an office be staffed so that it would no longer be deemed "part-time" under Rule 4-7.1(j).

Generally I give three recommendations to lawyers about complying with Rule 4-7.1, or at least those provisions that do not require additional disclosures. First,, the lawyer should presume that, if a communication mentions the lawyer's profession, firm name, firm email address, or the like, the lawyer should probably expect the communication to be governed by Rule 4-7.1. After all, it is better to be safe than sorry.

Second, the lawyer should avoid any "puffing" about the lawyer's abilities, such as claiming the lawyer does great, exceptional, or wonderful work or provides great, exceptional, or wonderful client service. After all, puffing statements are likely to run afoul of the rather nebulous prohibition in Rule 4-7.1(e) against comparison statements that cannot be factually verified.

Third, the lawyer should make sure that any statement that the lawyer makes regarding the lawyer or the lawyer's services are in fact factually verifiable, and that the lawyer would be comfortable setting for the statement in an affidavit and being cross-examined by disciplinary counsel or a lawyer bringing a legal malpractice claim on that statement. If you cannot satisfy these requirements, you should not be making the statement in any setting, including in lawyer advertisements, on firm or personal social media pages, or even in conversations with people.

IV. Regulations governing lawyer advertisements – Rule 4-7.2

Should a lawyer elect to "advertise," the lawyer must abide by Missouri Rule 4-7.2 as well as Rule 4-7.1 with regard to those advertisements. Although it has fewer sections, Rule 4-7.2 is more than twice as long (almost 750 words) and considerably more complicated than Rule 4-7.1. The entirety of Rule 4-7.2 is set forth on the Missouri courts website at http://on.mo.gov/14bslKj.

Missouri Rule 4-7.2(a) through (c) that lawyers may advertise, must keep a copy of advertisements, and may pay advertising costs but not share fees, are drawn either entirely or largely from similar provisions in ABA Model Rule 7.2. The remaining provisions of Missouri Rule 4-7.2 can be boiled down into six requirements or prohibitions for lawyer advertisements.

Addressing the last of these six requirements first, Rule 4-7.2(f) requires that virtually every advertisement a lawyer in private practice issues must conspicuously contain the following disclaimer:

> "The choice of lawyer is an important decision and should not be based solely upon advertisements."

Rule 4-7.2 recognizes only three circumstances when a lawyer's advertisement is *not* required to contain the Rule 4-7.2(f) disclaimer. First, written solicitations governed by Rule 4-7.3(b) – and addressed in Section IV of this article – are exempted under Rule 4-7.2(f). Second, advertisements issued by not-for-profits funded by the Legal Services Corporation and certain *pro bono* legal service providers, or by lawyer or law firms promoting, supporting or publicizing similar Legal Services or *pro bono* activities, are exempt as explained more fully in Rule 4-7.2(i). Third, Rule 4-7.2(g) provides what I call a "tombstone" exception to the Rule 4-7.2(f) disclaimer requirement, as well as to the Rule 4-7.2(e) requirements regarding disclosure of part-time offices (discussed *infra* in this section). The "tombstone" exception provides that a lawyer is not required to include the Rule 4-7.2(f) disclaimer when the sole contents of an advertisement are:

> (1) the name of the law firm and the names of lawyers in the firm;
>
> (2) one or more fields of law in which the lawyer or law firm practices;
>
> (3) the date and place of admission to the bar of state and federal courts; and
>
> (4) the address, including e-mail and web site address, telephone number, and office hours.

Notably, this tombstone exception often allows lawyers to print their business card or other documents with similar information without including the Rule 4-7.2(f) disclaimer. Yet adding something as simple as a tag line would appear to remove a business development communication from the protections of the tombstone exception. That said, I have never seen an ethics prosecution brought on such a basis, and would have to hope that an exercise of disciplinary counsel's prosecutorial discretion – as well as First Amendment protections – should prevent a disciplinary investigation of such circumstances.

The second requirement imposed on lawyer advertisements by Rule 4-7.2 is that a lawyer must keep a copy of the advertisement and information about the advertisement's dissemination for two years after the advertisement's final dissemination. Under Missouri Rule 4-7.2(b), the record but not the advertisement itself must include the name of the lawyer responsible for the advertisement. The ABA Model Rules and rules of many other jurisdictions require that the advertisement itself contain the name of the responsible lawyer.

Missouri Rule 4-7.2(b) does not attempt to address a controversy that has arisen in some jurisdictions regarding how a similar retention requirement applies to digital content, such as law firm websites or blog posts. Lawyers probably should be okay as long as they keep a digital copy of such materials for two years after the content was last made available to the public.

Third, Rule 4-7.2 allows lawyers to pay reasonable advertising costs, but they generally may not give anything of value beyond such advertising costs for recommending the lawyer's services. When coupled with the prohibitions against sharing fees with non-lawyers contained in Rules 4-5.4(a), this prohibition in Missouri Rule 4-7.2(c) generally means – at least according to ethics guidance primarily from other jurisdictions – that a lawyer may pay based upon the "click" or likely even the "lead," but the lawyer cannot agree to pay a non-lawyer for referring clients to the lawyer by paying the non-lawyer a sum per client generated or a share of the legal fees.

The fourth requirement in Rule 4-7.2 is the Rule 4-7.2(d) ban against one lawyer paying for or directing another lawyer's advertisements, unless the relationship is properly disclosed in the advertisements.

Fifth, Rule 4-7.2(d) prohibits lawyer advertising that appears simply to be a story reported by the media or a public service announcement, when in fact the broadcaster is receiving payment. When such an arrangement exists, the lawyer must properly disclose it.

Sixth and finally, Rule 4-7.2(e) revisits the issue of part-time offices addressed – rather inconclusively -- in Rule 4-7.1(j). Rule 4-7.2(e) states that a lawyer shall not advertise the existence of an office unless a lawyer staffs the office three days a week or indicates the office is not staffed full time. Such indication may be provided by listing the days and times when the office is staffed or by indicating lawyers will be "by appointment only." In reality, lawyers almost always comply with this rule by simply indicating the location of their (full-time) office, or indicating a lawyer is available in an office "by appointment only."

V. Regulations largely banning in-person and real-time solicitations – Rule 4-7.3(a)

Having completed discussion of the ethics rules governing all communications about a lawyer or lawyer's services (Rule 4-7.1) and the rule governing lawyers' advertising (Missouri Rule 4-7.2), we next turn to Rule 4-7.3, available at http://on.mo.gov/1yxmgAC. Rule 4-7.3 actually regulates two distinct types of activities: (a) in-person, telephone, and real-time solicitations, which are largely banned under Rule 4-7.3(a); and (b) other, non-real-time solicitations that are permitted but significantly regulated under Rule 4-7.3(b) and (c).

As noted, Missouri Rule 4-7.3(a) bans virtually all in-person, telephone, and real-time solicitations, except when the person solicited is another lawyer or a client, former client, or close personal friend. Rule 4-7.3(a) states: "A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative."

The key limitation on the prohibition in Rule 4-7.3(b) and (c) against in-person and real-time solicitations is that it only prohibits "solicitations." The introductory sentence to Rule 4-7.3, which precedes the start of Rule 4-7.3(a), states, "This Rule 4-7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment." By defining the scope of Rule 4-7.3 to reach only communications to persons "known to need legal services of the kind provided by the lawyer in a particular matter," Rule 4-7.3 is not intended to prevent, for example, an employment lawyer from asking a business owner if the business owner

might retain the lawyer to handle any employment law matters or employment litigation generally. Rule 4-7.3(a) would, however, prevent that employment lawyer from asking the business owner in person or by telephone if the lawyer could defend a discrimination charge or lawsuit that the lawyer knew had been filed by a specific individual.

The Rule does not define "real time electronic" communications, but it is ordinarily understood to include any technology where the two participants are expected to communicate in a contemporaneous fashion, where it is more difficult for a recipient of a communication to ignore that communication. Instant messaging systems remain an area of some uncertainty, but ethics opinions such as Philadelphia Ethics Opinion 2010-6 (2010) appear to be following a general trend of holding that Rule 4-7.3(a) does not regulate communications that are typed, such as text messaging or typed instant chat functions.

The Rule also does not define who is a "close friend" or "relative." Further, although Model Rule 7.3(a) is quite similar to Missouri Rule 4-7.3(a), the Model Rule does not use these terms. The Model Rule instead delineates nonlawyers whom a lawyer may solicit as those persons who have a "family, close personal, or prior professional relationship with the lawyer." I am aware of no authority that compares the scope of exceptions in the Missouri and Model Rules, for example whether the term "family relationship" encompasses fewer or more people than a lawyer's "relatives," or whether a lawyer has a "close personal relationship" with persons who would not qualify as "close friends." That having been said, the Model Rule and Missouri Rule share the same main purpose of Rule 4-7.3(a), which the Comment to each states is to prevent lawyers from soliciting clients where the prospective client may feel overwhelmed, have exercise practicing reasoned judgment, or be in situation "fraught with the possibility of undue influence, intimidation, or overreaching."

Finally, subpart (d) of Model Rule 7.3 permits lawyers, despite the ban on in-person and telephone solicitations contained in Model Rule 7.3(a), to participate in prepaid or group legal service plans (not owned by the lawyer) that use in-person or telephone contact to solicit potential members and subscribers. Missouri Rule 4-7.3 wholly omits such a provision. That said, I not aware of any particular hostility the Missouri Supreme Court or Missouri's Office of Chief Disciplinary Counsel may have against prepaid or group legal service plans.

VI. Direct Mail Solicitations – Rule 4-7.3(b) and (c)

In addition to its virtual prohibition against lawyers soliciting non-lawyer strangers, Missouri Rule 4-7.3 also contains restrictions on lawyers' direct mail solicitation of potential clients. Similar to the more stringent regulation of lawyer advertising in Missouri Rule 4-7.2 than in Model Rule 7.2, Missouri Rule 4-7.3(b) and (c) impose a much more rigorous and stringent set of restrictions on lawyers' non-real-time solicitation of potential clients. In fact, the restrictions in Missouri Rule 4-7.3(b) and (c) constitute 682 words, more than four times the 127-word length of the Model Rule's similar restrictions. Some may believe these regulations were intended simply to prevent lawyers from soliciting clients – an intent that likely violates lawyers' first amendment rights as analyzed in *Shapero v. Kentucky Bar Association,* 486 U.S. 466 (1988), discussed *supra* in Section I. Nevertheless, we continue with this discussion because it sets for the current state of Missouri law.

When all their requirements are synthesized, Rule 4-7.3(b) and (c) place the following thirteen requirements on non-real-time solicitations of potential clients, starting with the envelope and contents and progressing toward the through delivery to retention of information regarding what was sent:

(1) The word "ADVERTISEMENT" must be placed on the face of the envelope;

(2) The outside of the envelope shall not reveal the nature of the client's legal problem;

(3) The word "ADVERTISEMENT" must be placed on the first page of the solicitation "in type at least as large as the largest written type used in the written solicitation." Thus, if the law firm prints its header or even its firm name in 36-point Arial on the solicitation, and that is the largest font used, the word "ADVERTISEMENT" must appear in 36-point (or larger) Arial at the top of the solicitation;

(4) The solicitation may not resemble a legal pleading or other legal document;

(5) The solicitation shall, if applicable, disclose how the lawyer obtained the information about whatever incident prompted mailing of the solicitation;

(6) The solicitation must comply with certain requirements of Rule 4-7.1 restated in Rule 4-7.3, specifically the requirements to avoid misrepresentations and comparisons with other lawyer except the comparison can be factually verified, and to notify the recipient if the case is likely to be referred to another lawyer;

(7) A solicitation seeking employment on personal injury or wrongful death claims or other claims arising from an accident or disaster involving the person solicited or that person's relative may not be sent until at minimum 30 days after the accident or disaster. Additional delays may be necessary "if the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person solicited makes it unlikely that the person would exercise reasonable judgment in employing a lawyer";

(8) The solicitation must avoid vilifying, denouncing, or disparaging any other party in the mater;

(9) The solicitation must contain the following 87-word disclaimer:

> "Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri;"

(10) The method of delivery is restricted such that certified, registered, or similar "restricted delivery" mail service of a solicitation is prohibited. The relevant provision,

Rule 4-7.3(b)(4), is somewhat ambiguous as to whether only regular U.S. Mail may be used, or whether other mean of delivery (such as email or overnight couriers) may be used as long as delivery is not "restricted";

(11) A lawyer may not send a solicitation when the lawyer knows or should know the intended recipient is already represented by another;

(12) The lawyer may not send or allow someone associated to the lawyer to send a solicitation when the lawyer knows the recipient does not want to receive the solicitation, or that the solicitation involves "coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence";

(13) The lawyer must retain a copy of the solicitation as well as a recipient list for the solicitation for at least two years.

Obviously, these regulations impose significant burdens on written lawyer solicitations – a mandatory 87-word disclaimer, limits on method of delivery, . It is my personal belief, in fact, that several of these provisions would likely fail constitutional scrutiny.

These restrictions do not, however, apply to written solicitations directed to lawyers, existing or former clients, friends or relatives – all of whom may be solicited in writing without regard for Rule 4-7.3(b) and (c). Further, as discussed in the prior section, these restrictions only apply to "solicitations," which are communications by a lawyer "for the purpose of obtaining professional employment" only to persons "known to need legal services of the kind provided by the lawyer in a particular matter." Communications to persons regarding other matters – such as a request for lunch, or to attend a continuing legal education program, or even to consider retaining the lawyer on whatever future legal work the potential client may have.

Considering the detail and complexity of Missouri Rule 4-7.3(b) and (c), a lawyer considering sending a targeted, written solicitation may benefit from having the proposed solicitation reviewed by the Missouri Ethics Counsel or a lawyer who focuses his or her practice on legal ethics matters.

VII. Claims of Specialization – Rule 4-7.4

As our prior discussions show, Missouri Rules 4-7.1 through 4-7.3 regulate client development activities based upon how targeted the communication is and how the communication is delivered. The remaining two Rules instead focus totally upon the content of the communications.

The first of these two Rules, Missouri Supreme Court Rule 4-7.4, imposes a disclaimer requirement when a lawyer makes a claim of specialization. Specifically, under Rule 4-7.4 lawyers stating or implying that they are specialists must include in the communication a disclaimer that "neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations." The full Rule 4-7.4 is available at http://on.mo.gov/1xrG09w.

In requiring the disclaimer, Rule 4-7.4 differs substantially from the Model Rule. Model Rule 7.4 permits a claim of specialization only if the lawyer has been certified by an approved organization and clearly identifies that certifying organization. Missouri Rule 4-7.4, meanwhile, permits any lawyer (even one who lacks the requisite certification) to claim that a specialization, as long as the disclaimer is required.

Despite their differences, both Missouri Rule 4-7.4 and Model Rule 7.4 are quite easy to circumvent. Both rules expressly allow lawyers to "communicate the fact the lawyer does or does not practice in particular fields of law." This means that, although most legal ethics authorities advise lawyers to avoid "specialist" and synonyms or proxies such as "expert" or "special expertise," a lawyer may, for example, state that the lawyer "only practices" some field of law, such as bankruptcy, family law, litigation, or the like. Further, the authorization for lawyers to state they do limit their practice render the two practice focuses referenced in Missouri Rule 4-7.4, patent and admiralty law, largely superfluous. After all, when Missouri Rule 4-7.4 permits a lawyer like me who practices legal ethics to call myself a "legal ethics lawyer," it is unclear how lawyer who practice admiralty law gain some special benefit from being expressly authorized by Rule 4-7.4(b) to call themselves "admiralty lawyers."

VIII. Law firm names and URLs – Rule 4-7.5

The final ethics rule normally grouped among those that "govern lawyer advertising," or more correctly lawyer business and client development communications, is Missouri Rule 4-7.5. Available at http://on.mo.gov/1wj5L8Q, Rule 4-7.5 largely tries to ensure that law firm names comply with Rule 4-7.1 in that a firm name is not false or misleading. Rule 4-7.5(a) therefore permits law firms to employ trade names, but in no instance may a firm name be misleading. Thus, a firm may not use the names of individuals who have never been associated with a firm in the firm name, nor may a firm use a trade name that implies (falsely) that the firm is a government office or legal clinic. Also, Rule 4-7.5 expressly prohibits a law firm from using a lawyer's name when that lawyer has entered public service and is no longer actively and regularly practicing with the firm, and it prohibits the use of names suggesting a law partnership or other organized entity when the lawyers identified are not actually partners or so organized.

In addition to law firm names, Missouri Rule 4-7.5 regulates "professional designations." Numerous ethics opinions from other jurisdictions interpret this to include the Internet address (also called a "uniform resource locators" or "URL") that a law firm may use. Thus, law firms must be careful that their URL does not violate Rule 4-7.5, including its incorporation of Rule 4-7.1. Most frequently, firms violate these two rules by adopting a URL that compares the law firm to other firms in a manner that cannot be factually verified, for example by proclaiming themselves the "BestStLouisLawyers.com" (which example I use because no firm presently uses that URL).

IX. Other Rules Regulating Lawyer Business Development

Having discussed the five rules that directly regulate communications about a lawyer or the lawyer's services, I want to take a moment and mention five other sets of rules that may impact how lawyers communicate about their practices and develop (or seek to develop) business. First, like several other states, Missouri has adopted a version of Model Rule 7.6, which regulates

when lawyers may accept appointments from judges to whom the lawyers have donated. This Rule 4-7.6 is located in the same "chapter" of the Rules of Professional Conduct, but its focus seems so dissimilar from the Rules I discuss here that I believe it deserves only a brief mention.

Second, several rules make lawyers responsible for the actions of nonlawyers who work at or are associated with the lawyer's firm, such as marketing staff. Rule 4-5.3 generally imposes an ethical obligation on lawyers to supervise the activities of nonlawyers working at or with the law firm, and to take steps to ensure those nonlawyers' activities comply with the applicable ethics rules. Lawyers can also be held responsible for the actions of nonlawyers under Rule 4-5.3 and 4-8.4(a), which states that a lawyer shall not violate the Rules of Professional Conduct including through the actions of another.

Third, as mentioned earlier, Rule 4-5.4(a) generally prohibits lawyers from sharing fees with nonlawyers. Again, this rule is outside the scope of this article, but the prohibition against fee-sharing may impose some severe limitations on how law firms may pay non-lawyer business developers.

Fourth, lawyers need to be mindful of their candor obligations. We have already discussed Missouri Rule 4-7.1 and how it seeks to prevent any false or misleading lawyer advertising. The Rule 4-7.1 candor obligation, however, is one of four rules that prohibit false or misleading statements by lawyers. The Rule 4-3.3 duty of candor to tribunals is unlikely to be implicated by business development communications, but the Rule 4-4.1 duty of candor to third persons and the Rule 4-8.4(c) prohibition against conduct involving dishonesty, fraud, deceit or misrepresentation could be implicated should a lawyer make false statements when seeking to develop clients. Yet neither Rule 4-4.1 nor Rule 4-8.4(c) have the detail set forth in Rule 4-7.1 or otherwise supplement the discussion of that Rule much in the client-development context.

Fifth and finally, lawyers seeking to develop business need to be mindful of limitations on practice in jurisdictions in which they are not licensed. The Missouri Rules contain several provisions (for example, Rule 4-5.5 comment [19] and Rule 4-7.3's Supplemental Missouri Comment) that warn lawyers advertising or soliciting potential clients that they should expect to be regulated by the Missouri Rules of Professional Conduct. Likewise, Missouri lawyers should anticipate that, if they hold themselves out as lawyers, advertise, or solicit clients in other states, they may be deemed to be practicing law in those other states. Further, their business development communications in other states they may fall subject to the other states' regulations of lawyer advertising and client-development communications. Further, several states that border Missouri, including Kansas, Kentucky, and Iowa, have ethics rules that impose differing restrictions on lawyer client-development communications, and are known to prosecute lawyers for violating those rules.

X. Helpful Guidance for the Marketing Lawyer.

We have reached the end of the materials I intended to cover in this article. I realize, however, that the Rules are quite complicated and thus the contents of this chapter can be quite dense. Therefore, I thought I would end with a quick list of thirteen helpful hints for lawyer as they embark on business development activities, with the reassuring message that, as long as they

avoid these problem areas, they will probably also avoid ethics problems for their business development efforts:

1. Make sure that everything you say in any sort of marketing materials, including your resume and social media sites, is the absolute truth, something you would not mind being questioned about by disciplinary counsel.

2. Make sure anything you say about others, or that you ask anyone to say about you, is also the absolute truth.

3. Presume everyone will someday read everything you write. So, if you don't want someone to read it, don't say it in writing (including email).

4. Only write about clients if they authorize it. Even better, send them what you have written before you publish it and make sure they think it is okay.

5. Include necessary disclaimers, including the Rule 4-7.2(f) choice of lawyer disclaimer, unless exempt.

6. Avoid claiming you are an expert or specialist, unless you are willing to include the special disclaimer required by Missouri.

7. Never try to trick, pressure, or harass anyone into hiring you.

8. If you advertise a fee arrangement, make sure that people who retain you because of the advertisement pay only the advertised fees.

9. Pay reasonable advertising costs, but never share your fees – except with other lawyers as Rule 4-1.5 permits – or pay anyone for sending you clients.

10. You can say thank you to referral sources, and even send them a periodic gift, but never pay non-lawyers to refer you work – even with reciprocal referrals.

11. Avoid real-time (in-person or telephone) solicitations of non-lawyers who are not close friends or current or former clients.

12. Avoid answering legal questions about specific facts, unless you have decided to be the questioner's lawyer.

13. Keep copies of all advertising communications for at least three years, and be prepared to produce them if disciplinary counsel ever requests them.

Hopefully these materials have been helpful. Please let me know if you have questions or comments.

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