

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE AMENDMENT  
OF RULE 7.2 OF THE RULES OF  
PROFESSIONAL CONDUCT (APPENDIX  
TO SDCL 16-18)

RULE 98-36

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A hearing having been held on October 23, 1998, at Sioux Falls, South Dakota, relating to the amendment of Rule 7.2 of the Rules of Professional Conduct (Appendix to SDCL 16-18), and the Court having considered the amendment, the correspondence and oral presentations relating thereto, if any, and being fully advised in the premises, now, therefore, it is

ORDERED that said rule (Appendix to SDCL 16-18) be and it is hereby amended to read in its entirety as follows:

**Rule 7.2. Advertising.**

(a) **Definition.** "Lawyer" is defined in Rule 7.1(a)(2).

(b) **Permitted Advertising.** Subject to the requirements of Rules 7.1 and 7.3, 7.4 and 7.5, a lawyer may advertise legal services through public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television and other electronic media, and recorded messages the public may access by dialing a telephone number, or through other written or recorded communication. This rule shall not apply to any advertisement which is broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is reasonably expected by the lawyer not to be received or disseminated in the state of South Dakota.

(c) **Record of Advertising.** A copy or recording of an advertisement shall be kept by the advertising lawyer for two years after its last dissemination along with a record of when and where it was used.

(d) **Prohibited Payments.** Except as provided in subparagraph (c)(13) of Rule 7.1, a 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 advertisements permitted by this Rule 7.2 and may pay the

usual charges of a not-for-profit lawyer referral service or other not-for-profit legal service organization.

(e) **Prohibited Cost Sharing.** No lawyer shall, directly or indirectly, pay all or part of the cost of an advertisement by another lawyer with whom the nonadvertising lawyer is not associated in a partnership, professional corporation or limited liability company for the practice of law, unless the advertisement conspicuously discloses the name and address of the nonadvertising lawyer, and conspicuously discloses whether the advertising lawyer contemplates referring all or any part of the representation of a client obtained through the advertisement to the nonadvertising lawyer.

(f) **Permissible Content.** The following information in advertisements and written communications shall be presumed not to violate the provisions of this Rule 7.2:

- (1) Subject to the requirements of Rule 7.5, the name of the lawyer, a listing of lawyers associated with the lawyer for the practice of law, office addresses and telephone numbers, office and telephone service hours, and a designation such as "lawyer," "attorney," "law firm," "partnership" or "professional corporation," or "limited liability company."
- (2) Date of admission to the South Dakota bar and any other bar association and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.
- (3) Technical and professional licenses granted by the State of South Dakota or other recognized licensing authorities.
- (4) Foreign language ability.
- (5) Fields of law in which the lawyer is certified subject to the requirements of Rule 7.4.
- (6) Prepaid or group legal service plans in which the lawyer participates.
- (7) Acceptance of credit cards.
- (8) Information concerning fees and costs, or the availability of such information on request, subject to the requirements of this Rule 7.2 and the other Rules of Professional Conduct.
- (9) A listing of the name and geographic location of a lawyer as a sponsor of a public service announcement or charitable, civic or community program or event. Such listings shall not exceed the traditional description of sponsors of or contributors to the charitable, civic or community program or event or public service announcement, and such listing must comply with the provisions of this rule and the other Rules of Professional Conduct.

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- (10) Schools attended, with dates of graduation, degree and other scholastic distinctions.
- (11) Public or quasi-public offices.
- (12) Military service.
- (13) Legal authorships.
- (14) Legal teaching positions.
- (15) Memberships, offices and committee assignments in bar associations.
- (16) Memberships and offices in legal fraternities and legal societies.
- (17) Memberships in scientific, technical and professional associations and societies.
- (18) Names and addresses of bank references.
- (19) With their written consent, names of clients regularly represented.
- (20) Office and telephone answering service hours.
- (g) **Permissible Fee Information.**
  - (1) Advertisements permitted under this Rule 7.2 may contain information about fees for services as follows:
    - (i) the fee charged for an initial consultation;
    - (ii) availability upon request of a written schedule of fees or an estimate of fees to be charged for specific legal services;
    - (iii) that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery, provided that the advertisement conspicuously discloses whether percentages are computed before or after deduction of costs, and only if it specifically and conspicuously states that the client will bear the expenses incurred in the client's representation, regardless of outcome, except as permitted by Rule 1.8(e);
    - (iv) the range of fees for services, provided that the advertisement conspicuously discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client, that the quoted fee will be available only to clients whose legal representation is within the services described in the advertisement, and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;
    - (v) the hourly rate, provided that the advertisement conspicuously discloses that the total fee charge will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and that the

client is entitled without obligation to an estimate of the fee likely to be charged;

(vi) fixed fees for specific legal services, provided that the advertisement conspicuously discloses that the quoted fee will be available only to a client seeking the specific services described.

(2) A lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee or rate for at least ninety (90) days unless the advertisement conspicuously specifies a shorter period; provided, 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.

(h) **Electronic Media.** Advertisements by electronic media, such as television and radio, may contain the same information as permitted in advertisements by print media, subject to the following requirements:

(1) if a lawyer advertises by electronic media and a person appears in the advertisement purporting to be a lawyer, such person shall in fact be the advertising lawyer or a lawyer employed full-time by the advertising lawyer; and

(2) if a lawyer advertises a particular legal service by electronic media, and a person appears in the advertisement purporting to be or implying that the person is the lawyer who will render the legal service, the person appearing in the advertisement shall be the lawyer who will actually perform the legal service advertised unless the advertisement conspicuously discloses that the person appearing in the advertisement is not the person who will perform the legal service advertised.

(3) Advertisements disseminated by electronic media shall be prerecorded and the prerecorded communication shall be reviewed and approved by the lawyer before it is broadcast.

(i) **Law Directories.** Nothing in this Rule 7.2 prohibits a lawyer from permitting the inclusion in reputable directories intended primarily for the use of the legal profession or institutional consumers of legal services and contains such information as has traditionally been included in such publications.

(j) **Acceptance of Employment.** A lawyer shall not accept employment when he knows or should know that the person who seeks his services does so as a result of conduct prohibited under this Rule 7.2.

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(k) **Lawyers Responsible for Advertising.** Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes an advertising in violation of this rule may be subject to discipline for the failure of the advertisement to comply with the requirements of this rule.

(l) **Mandatory Disclosure.** Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least \$100,000, using the specific language required in Rule 1.4(c)(1) or (2).

**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. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

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; a lawyer's foreign language ability.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low or moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

*Record of Advertising*

Paragraph (c) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

*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 another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, 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 not-for-profit lawyer referral programs and pay the usual fees charged by such programs.

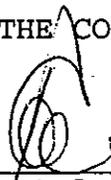
For purposes of the disclosure requirement of Rule 7.2(1), all advertising shall contain the specific disclosure language found at Rule 1.4(c)(1) or (2). The alphabetical listing of the name, address and phone number of the lawyer's office in a telephone directory, whether white pages or yellow pages, is not advertising for purposes of the disclosure rule. The mere use of bold face type in the alphabetical section of the phone book, white pages or yellow pages, does not constitute advertising for purposes of the disclosure. All yellow page block ads, regardless of content, constitute advertising and requires disclosure of the absence of professional liability insurance. There was no attempt to mandate a minimum decibel level for radio and television advertisements, nor size of type in newspaper, yellow page or billboard advertisements. However, the lawyer purchasing such advertisements is responsible for the content of the advertisement and must make reasonable efforts to insure that the disclosure is adequately communicated in the media selected.

IT IS FURTHER ORDERED that this rule shall become effective January 1, 1999. Advertising purchased after the effective date and contracts for advertising for dissemination after the effective date must be in compliance with Rule 98-36.

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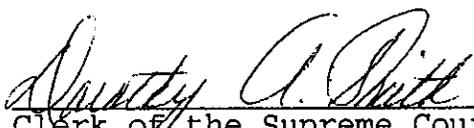
DATED at Pierre, South Dakota, this 25th day of  
November, 1998.

BY THE COURT:



Robert A. Miller, Chief Justice

ATTEST:

  
Clerk of the Supreme Court  
(SEAL)

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

NOV 25 1998

  
Clerk