

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT OF RULES)
7.1 and 7.2 and COMMENTS THERETO OF THE) ORDER APPROVING
SOUTH DAKOTA RULES OF PROFESSIONAL) AMENDMENT
CONDUCT (APPENDIX TO SDCL 16-18))
)

There having been presented to the Court and filed with the Clerk of the Court a letter from the Secretary-Treasurer of the State Bar of South Dakota certifying that the membership of the State Bar approved amendment of the above-designated rules and comments thereto of the South Dakota Rules of Professional Conduct at its annual meeting in June 1994, now, therefore, it is

ORDERED that amendment of Rules 7.1 and 7.2 and Comments thereto of the South Dakota Rules of Professional Conduct be and the same is hereby approved, said amended rules being hereto attached and incorporated herein.

IT IS FURTHER ORDERED that this order shall become effective January 1, 1995.

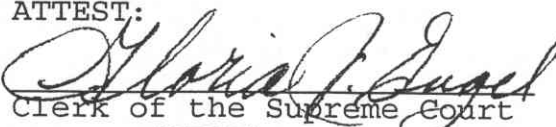
DATED at Pierre, South Dakota, this 7th day of October, 1994.

BY THE COURT:

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 07 1994

ATTEST:


Clerk of the Supreme Court
(SEAL)


Chief Justice


Clerk

PARTICIPATING: Chief Justice Robert A. Miller and Justices George W. Wuest, Richard W. Sabers, Robert A. Amundson and John K. Konenkamp.

RULE 7.1. Communications Concerning A Lawyer's Services.

(a) **Definitions.** For the purpose of this Rule 7.1, the following terms shall have the following meanings:

- (1) "communication" means any message or offer made by or on behalf of a lawyer concerning the availability of the lawyer for professional employment which is directed to any former, present, or prospective client, including, but not limited to, the following:
 - (1) any use of firm name, trade name, fictitious name, or other professional designation of such lawyer;
 - (ii) any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such lawyer;
 - (iii) any advertisement, regardless of medium, of such lawyer, directed to the general public or any significant portion thereof; or
 - (iv) any unsolicited correspondence from a lawyer directed to any person or entity; and
- (2) "lawyer" means an individual lawyer and any association of lawyers for the practice of law, including a partnership, a professional corporation, limited liability company or any other association.

(b) **Purpose of Communications.** All communications shall be predominantly informational. As used in this Rule 7.1, "predominantly informational" means that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and that the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

(c) **False or Misleading Communications.** A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading;
- (2) contains a prediction, warranty or guarantee regarding the future success of representation by the lawyer or is likely to create an unjustified expectation about results the lawyer can achieve;
- (3) contains an opinion, representation, implication or self-laudatory statement regarding the quality of the lawyer's legal services which is not susceptible of reasonable verification by the public;
- (4) contains information based on the lawyer's past success without a disclaimer that past success cannot be an assurance of future success because each case must be decided on its own merits;
- (5) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;
- (6) states or implies that the lawyer actually represents clients in a particular area of practice when the lawyer refers a significant number of such clients to other lawyers for representation with respect to all or a significant aspect of the particular practice area;
- (7) states or implies that the lawyer is experienced in a particular area of practice unless significant experience in such practice area can be factually substantiated;
- (8) states or implies that the lawyer is in a position to improperly influence any court or other public body or office;

- (9) states or implies the existence of a relationship between the lawyer and a government agency or instrumentality;
- (10) states or implies that a lawyer has a relationship to any other lawyer unless such relationship in fact exists and is close, personal, continuous and regular;
- (11) fails to contain the name and address by city or town of the lawyer whose services are described in the communication;
- (12) contains a testimonial about or endorsement of the lawyer, unless the lawyer can factually substantiate the claims made in the testimonial or endorsement and unless such communication also contains an express disclaimer substantively similar to the following: "This testimonial or endorsement does not constitute a guaranty, warranty, or prediction regarding the outcome of your legal matter";
- (13) contains a testimonial or endorsement about the lawyer for which the lawyer has directly or indirectly given or exchanged anything of value to or with the person making the testimonial or giving the endorsement, unless the communication conspicuously discloses that the lawyer has given or exchanged something of value to or with the person making the testimonial or giving the endorsement;
- (14) contains a testimonial or endorsement which is not made by an actual client of the lawyer, unless that fact is conspicuously disclosed in the communication;
- (15) contains any impersonation, dramatization, or simulation which is not predominantly informational and without conspicuously disclosing in the communication the fact that it is an impersonation, dramatization, or simulation;

- (16) fails to contain disclaimers or disclosures required by this Rule 7.1 or the other Rules of Professional Conduct;
- (17) contains any other material statement or claim that cannot be factually substantiated.

(d) **Lawyers Responsible for Communication.** Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes a communication in violation of this rule may be subject to discipline for the failure of the communication to comply with the requirements of this rule.

COMMENT:

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

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.
- (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.

(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.

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.