

## Ethical Advertising for Lawyers: Is it time to update your ads?



David A. Bailey *Visiting Clinical Assistant Professor*

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**T**here are essentially five rules in Arkansas that govern advertising by lawyers. Rules 7.1 through 7.5 of the Arkansas Rules of Professional Conduct:

Rule 7.1 Communications concerning a lawyer's services

Rule 7.2 Advertising

Rule 7.3 Direct contact with prospective clients

Rule 7.4 Communication of fields of practice and specialization

Rule 7.5 Firm names and letterheads

The scope of this essay will be limited to an examination of Rules 7.1 and 7.2. I will discuss these two rules as they existed before the 1999 amendments and as they exist today. I will then discuss some examples of lawyer advertising in light of these rules in their current forms. Finally, I will make a plea for Arkansas lawyers to examine their advertisements in light of these rules in order to foster compliance.

### **Rules 7.1 and 7.2: Then and Now**

In October 1999, the Arkansas Supreme Court made several changes to Rule 7.1 and Rule 7.2 of the Arkansas Rules of Professional Conduct. Prior to the 1999 amendments, Rule 7.1 read:

#### **Communications Concerning a Lawyer's Services**

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:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve

results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.<sup>1</sup>

The 1999 amendment added a subsection (d) banning testimonials and endorsements. Rule 7.1 in its current form reads:

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(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial or endorsement.<sup>2</sup>

The 1999 amendments significantly changed Rule 7.2. Prior to the 1999 amendments, Rule 7.2 read:

#### Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) 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 or communications permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its contents.<sup>3</sup>

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1. Ark. Rule of Professional Conduct 7.1 (prior to 1999 amendment).  
2. Ark. Rule of Professional Conduct 7.1 (as amended in 1999).  
3. Ark. Rule of Professional Conduct 7.2 (prior to 1999 amendment).

## ETHICAL ADVERTISING FOR LAWYERS

The 1999 amendments made several additions to Rule 7.2. The current Rule 7.2 reads:

### Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) 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 or communications permitted by this rule and may pay the usual charges for not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law.

(e) Advertisements may include photographs, voices or images of the lawyers who are members of the firm who will actually perform the services. If advertisements utilize actors or other individuals, those persons shall be clearly and conspicuously identified by name and relationship to the advertising lawyer or law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain. Clients or former clients shall not be used in any manner whatsoever in advertisements. Dramatization in any advertisement is prohibited.<sup>4</sup>

For purposes of quick comparison, I have underlined the new additions made by the 1999 amendment. The single biggest change to Rule 7.2 was the addition of subsection (e). As I will discuss in this essay, Rule 7.2 (e) is all too often being violated by Arkansas lawyers.

### Examples of Rule 7.1 Violations

In this section, I will cite some specific examples of lawyer advertising and examine them in light of Rule 7.1. The first example I will examine concerns lawyers using nicknames in their advertisements. Some lawyers like to add terms like "The Hammer" or "The Barracuda" as part of their name in their ads. A quick search in the yellow pages or on [www.youtube.com](http://www.youtube.com) will reveal several examples of this type of advertising. The lawyers who place these ads would likely argue that it is harmless puffery. However, the concern under Rule 7.1(b) is whether these ads are

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4. Ark. Rule of Professional Conduct 7.2 (as amended in 1999, underlining added).

“likely to create an unjustified expectation about the results the lawyer can achieve.”<sup>5</sup> If the ads are likely to create such an expectation, they are considered “false or misleading” under the rule and are, therefore, unethical.<sup>6</sup>

When using names like “The Hammer,” these lawyers often talk about how they like to “hammer” insurance companies. This is, arguably, where harmless puffery becomes a Rule 7.1 violation. The spirit of Rule 7.1 in preventing false or misleading communications about the lawyer’s services is to protect the public. A lawyer who practices personal injury law would understand that such ads do not necessarily mean that every case is a winner. However, the average Joe could easily interpret these ads as meaning that every case is a winner or at least settles for top dollar. Therefore, these ads should be viewed from the perspective of the average non-lawyer citizen. When viewed from the client’s perspective, this type of advertising violates Rule 7.1(b) because it is likely to create an unjustified expectation of results.

Some ads use catchy jingles set to rap music beats that say things like, “If you’ve been injured in a wreck, and you really, really, really, need a check . . . .” These ads are likely effective due to the fact that the catchy jingles “really, really, really” get stuck in your head. However, they arguably “create an unjustified expectation about the results the lawyer can achieve.”<sup>7</sup> By their very own wording, these

ads tend to equate being in a wreck with receiving a check. Most personal injury lawyers would have to admit that there is often a big difference between being involved in a wreck and automatically getting a check. Consider the following: What if the wreck is the client’s fault? What if the party at fault has no insurance and is judgment proof? Once again, this type of advertising may not be false or misleading when viewed by other lawyers. However, Rule 7.1 should be viewed from the perspective of non-lawyers.

Despite Rule 7.1(d)’s prohibition on testimonials, some ads will have former clients (or actors portraying former clients) saying things like “Last year, my husband served me with divorce papers on Christmas Eve. That ruined my Christmas. So, I hired Lawyer Smith as my lawyer, and I ruined my husband’s new year.” In addition to violating Rule 7.1(d) because they contain testimonials, these ads also violate Rule 7.1(b) because they are likely to create unjustified expectations of results.

A common theme in both television and phone book ads is “results obtained.” Lawyers tout, “It’s the results that count.” Some lawyers boast their track records by citing examples of verdicts and settlements obtained. The purpose of this type of advertising can only be to induce in the average person the idea that “Maybe my case is worth that too!” Comment 1 to Rule 7.1 states:

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5. Ark. Rule of Professional Conduct 7.1(b).

6. *Id.*

7. *Id.*

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The prohibition in paragraph (b) of statements that may create “unjustified expectations” would ordinarily preclude advertisements about the 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.<sup>8</sup>

Some lawyers who cite specific examples of settlements and verdicts obtained have borrowed from the weight-loss product industry and put in the “fine print” a statement along the lines of “Results not typical. Individual results may vary.” Of course, when the “fine print” is flashed on the screen for less than two seconds and is in super small print, it does little to promote reasonable expectations by the potential clients.

### Examples of Rule 7.2 Violations

In this section, I will cite some specific examples of lawyer advertising and examine them in light of Rule 7.2. Rule 7.2(d) requires that the ad “include the name of at least one lawyer who is licensed in Arkansas and who

is responsible for its content . . . .”<sup>9</sup> The 1999 amendment added the requirement of an Arkansas license. This raises an interesting issue about out-of-state attorneys who advertise in Arkansas but do not have Arkansas licenses themselves. This is often the case with out-of-state lawyers advertising in Arkansas seeking plaintiffs in asbestos or products liability cases. Unless these lawyers associate with Arkansas licensed counsel and include the Arkansas lawyer’s information in the ad, should they be allowed to advertise on television in Arkansas? If these lawyers are in fact violating Rule 7.2(d), does the Arkansas Committee on Professional Conduct have jurisdiction over the out-of-state lawyers for sanctioning purposes?

As noted earlier, section (e) of Rule 7.2 was added by the 1999 amendment. It is probably the most commonly violated section of the Rule. Despite Rule 7.2(e)’s clear restrictions on the use of actors or other individuals in advertisements, too many Arkansas lawyers are still using actors and other individuals in their advertisements. Phone book and television ads depict people in handcuffs, doctors and emergency personnel working accidents, families with children, and other scenes. Rule 7.2(e) allows the use of actors or individuals other than the lawyers who will actually perform the services but only if those persons are “clearly and conspicuously identified by name and relationship to the advertising lawyer or

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8. Comment 1 to Ark. Rule of Professional Conduct 7.1.

9. Ark. Rule of Professional Conduct 7.2(d)(emphasis added).

law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain.”<sup>10</sup> I have yet to see an ad that utilizes actors or other individuals which fully complies with these requirements. Some lawyers include in the fine print phrases like, “Generic images available to the public. No relationship to the law firm.” However, these phrases do not identify the actors or other individuals by name as required by the rule. Often times the actors in these ads are portraying doctors, nurses, and accident reconstruction experts. Indeed, one ad actually references “our team of lawyers, medical professionals, investigators, and other experts” while showing actors who fit these descriptions. While the law firm may regularly employ a team of such experts, it likely does not do so for every case. Therefore, it also likely violates Rule 7.2(e) in that it could create an unreasonable expectation about the results the law firm can obtain.

Some lawyers like to include pictures or videos of their staff in their advertisements. Because legal staff do not qualify as “the lawyers . . . who will actually perform the services,”<sup>11</sup> these people fall into the “actors or other individuals” category. Therefore, they must be “clearly and conspicuously identified by name and relationship to the advertising lawyer. . . .”<sup>12</sup> A general statement describing them as your staff will not suffice under the rule.

Lawyers should exercise great caution when using “fine print” disclaimers in an attempt to comply with the rule. Rule 7.2(e) requires that the actors or other individuals be “clearly and conspicuously identified.”<sup>13</sup> Small print flashed briefly on a television screen would not likely be considered clear and conspicuous.

Rule 7.2(e) states, “Dramatization in any advertisement is prohibited.”<sup>14</sup> Despite this prohibition, many lawyers are still using dramatization in their advertisements. Take a look at your local yellow pages. You will probably find several attorney ads that contain pictures of car wrecks, people in handcuffs, people with empty pockets, ambulances, and the like. While these phone book ads contain pictures instead of video, it is a reasonable conclusion that such pictures constitute “dramatization” and should not be used in attorney advertisements.

Some television ads contain dramatizations of car crashes, couples fighting, babies in hospitals, and attorneys fighting against mean-spirited insurance adjusters. These ads clearly contain dramatizations which are prohibited by Rule 7.2(e). Interestingly, some of these television ads even contain the word “Dramatization” printed at the bottom of the screen. These attorneys would be hard pressed to justify their commercials in light of the rule.

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10. Ark. Rule of Professional Conduct 7.2(e).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

## ETHICAL ADVERTISING FOR LAWYERS

Rule 7.2(e) also states that “Clients or former clients shall not be used in any manner whatsoever in advertisements.”<sup>15</sup> Despite this strongly worded prohibition, some attorneys still have ads (often on their web sites) using clients or former clients, normally in a testimonial manner. This violates Rule 7.1(d) as well as Rule 7.2(e).

There is a conflict, however, between the plain language of Rule 7.2(e) and the comment that follows it. Comment 2 to Rule 7.2 states:

This Rule permits public dissemination of information concerning a lawyer’s name or firm name, address and telephone numbers; 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; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.<sup>16</sup>

There is an explanation for this conflict. The comment comes from the American Bar Association and, therefore, applies to Rule 7.2 of the Model Rules of Professional Conduct which reads:

### Information About Legal Services Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written,

recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.<sup>17</sup>

As you can see, Arkansas’s Rule 7.2 differs from the Model Rule in several respects. For this reason, a prudent Arkansas attorney

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15. *Id* (emphasis added).

16. Comment 2 to Ark. Rule of Professional Conduct 7.2 (emphasis added).

17. Model Rule of Professional Conduct 7.2.

should not rely on the part of the comment that is in conflict with the plain language of the rule itself. Therefore, Arkansas attorneys should not use clients or former clients at all in their advertisements.

### **A Call to Action**

Fortunately, most Arkansas lawyers are doing a fine job in their advertising. However, too many lawyers are not in compliance with these rules. Two possible reasons for this are apparent: either the offending lawyers do not know of the changes in the rules or they simply do not care. Giving my fellow Arkansas lawyers the benefit of the doubt, I believe that most of the violators are simply unaware of the changes in the rules brought by the 1999 amendments. Most of us who began practice prior to 1999 still have etched in our minds what the rules were when we graduated from law school and began practice. The 1999 amendments to Rules 7.1 and 7.2 were rather significant. Rule 7.2(e), in particular, was a major change in that it prohibits many types of pictures and images which constitute

dramatization. Prior to 1999, many of these ads would have been permissible. Now, they are not.

We lawyers love to quote the phrase “Ignorance of the law is no excuse.” While many of the lawyers who are violating Rules 7.1 and 7.2 are doing so out of ignorance, these words might painfully echo if the violators are sanctioned by the Committee on Professional Conduct. My purpose in writing this essay is to primarily educate those lawyers who haven’t read Rules 7.1 and 7.2 since the 1999 amendments in hope that they will examine their ads. I am not opposed to attorney advertising. I firmly believe that we no longer live in a world in which word of mouth advertising, standing alone, is sufficient. However, we all need to examine our advertisements in light of these rules and strictly adhere to them. Fundamental fairness in the marketplace dictates that all lawyers adhere to the same standards in advertising. Otherwise, lawyers who violate these rules might be financially rewarded for their catchy, yet unethical, advertisements. In short: Let’s clean it up!