

**REPORT TO THE SUPREME COURT OF LOUISIANA
FROM THE COMMITTEE TO STUDY ATTORNEY ADVERTISING**

FEBRUARY, 2007

Through promulgation of 2006 Senate Concurrent Resolution No. 113, the Legislature asked the Supreme Court of Louisiana to establish a committee “to study attorney advertising and the need and feasibility of creating a standing committee to evaluate such advertising, provide written advisory opinions thereon, develop a handbook on advertising, and recommend amendments to the Rules of Professional Conduct.” A copy of 2006 SCR 113 is attached. (Attachment 1). The Resolution calls upon the Committee that is formed by the Court to “report its findings, and any recommendations, to the Louisiana Supreme Court on or before March 1, 2007.”

Following passage of the aforementioned Concurrent Resolution, the Court created the Committee to Study Attorney Advertising. The Committee consists of the following members:

Justice Catherine D. Kimball, Chair
Senator Rob Marionneaux
Representative Donald Cazayoux, Jr.
Christopher H. Riviere
Elizabeth Erny Foote
Sam N. Gregorio
Darrel J. Papillion
Charles B. Plattsmier
Joseph L. Shea, Jr.
Richard C. Stanley

The first meeting of the Committee occurred on September 15, 2006. At that meeting, the Committee was informed that a Louisiana State Bar Association Subcommittee on Lawyer Advertising had been working for some time on amendments to the Rules of Professional Conduct pertaining to lawyer advertising. The LSBA Subcommittee’s proposal was patterned after the Florida advertising rules. The Florida advertising rules are considered to be among the most comprehensive and proactive ethics rules in the nation insofar as lawyer advertising is concerned. For example, Florida has in place a comprehensive procedure for having attorneys submit advertisements for review by a committee charged with

evaluating whether the advertisements conform with the Florida ethics rules on advertising.¹

The Supreme Court Committee to Study Attorney Advertising reviewed the draft proposal prepared by the LSBA's Lawyer Advertising Subcommittee and decided that the LSBA advertising study should be allowed to run its course, with the Supreme Court Committee providing advice, input and recommendations. Thereafter, the LSBA Lawyer Advertising Subcommittee submitted its comprehensive proposal to the LSBA Rules of Professional Conduct Committee (hereinafter referred to as the "ROPC Committee") for review.²

A comprehensive draft proposal was then finalized by the ROPC Committee and reviewed by the Supreme Court Committee. The consensus view of both the ROPC Committee and the Supreme Court Committee was that the advertising proposal should be discussed in public hearings and placed on the LSBA website for comments. The Supreme Court Committee reviewed the advertising proposal and approved it for dissemination and additional study. At that time, everyone involved in studying the advertising proposal anticipated that the proposal would be placed before the House of Delegates for a vote at the January, 2007 meeting.

The LSBA convened four public hearings concerning the advertising proposal. The public hearings were held in New Orleans, Baton Rouge, Lafayette, and Shreveport. The advertising proposal was placed on the LSBA website and comments were invited.

The draft proposal included a number of significant changes to the Rules of Professional Conduct concerning attorney advertising. Among the proposed changes were the following:

¹As noted, 2006 SCR 113 calls upon the Committee to study the "need and feasibility of creating a standing committee to evaluate such advertising [and] provide written advisory opinions thereon . . ."

²Among other duties, the ROPC Committee reviews proposed changes to the Rules of Professional Conduct prior to submission to the LSBA House of Delegates. The LSBA ROPC Committee is chaired by Rick Stanley. Mr. Stanley is also a member of the Supreme Court Committee to Study Attorney Advertising.

- The addition of required and permitted components of lawyer advertisements;
- Amendments to the present rules concerning the types of advertising or written communications that are violative of the rules;
- Rule changes clarifying the circumstances in which lawyers may communicate that they are “certified” or an “expert” in a particular field of law;
- A new rule concerning advertisements in the electronic media, including television or radio;
- A new rule addressing computer-accessed communications, including e-mails;
- A new rule which would require attorneys to file copies of their advertisements with the ROPC Committee. The ROPC Committee would evaluate the advertisements for compliance with the advertising rules. Attorneys would be charged a fee for the evaluation. The fee would be set by the Court.
 - Included in the new rule addressing the review and evaluation of advertisements would be a requirement that the ROPC Committee “develop a handbook on lawyer advertising” for the benefit of LSBA members.³
- A new “safe harbor” rule would exempt certain advertisements from the aforementioned review and evaluation process.
- A new rule that describes the types of information that can be provided by a lawyer or law firm following a request by a potential client.

³During the course of its study, the Supreme Court Committee reviewed a draft handbook modeled after Florida’s advertising handbook. In the event this suggested amendment to the Louisiana rules is adopted, the finalization of a Louisiana Advertising Handbook presumably can be completed in expeditious fashion by the ROPC Committee.

Following the public hearings and the receipt of comments, the ROPC Committee again reviewed the proposal.⁴ Also, during this same period of time, both study committees were informed that Florida had amended its advertising rules. This development necessitated additional study of the new amendments to the Florida advertising rules.

As a result of this multi-level review, additional changes were made to the advertising proposal. While the aforementioned significant amendments to the current version of the Louisiana rules governing advertising were maintained, the scope of the original proposal was narrowed and/or clarified with regard to a number of individual subparts, in response to complaints that various aspects of the proposal were ambiguous, overbroad, overreaching, or perhaps unconstitutional.⁵

Because of the time needed to study the proposal following the comment period, Florida's new changes to its advertising rules, the complexity of the matters under consideration, and the numerous changes made to the original proposal, it was decided that the advertising proposal would not be presented to the LSBA House of Delegates for a final vote at the January meeting. Rather, the advertising proposal would be presented only as an information item.

The advertising proposal, in the form submitted to the LSBA House of Delegates in January, is attached. (Attachment 2). Changes to the original advertising proposal are noted through the use of ~~strike through~~ and *italics*.

The Supreme Court Committee then reviewed the revisions made by the ROPC Committee in response to the public hearings and comments. The Supreme Court Committee suggests the following two additional changes to the proposal.

⁴The Supreme Court Committee discussed at some length the possible need to have conducted a survey of the public's perceptions of attorney advertising. Principally because of the cost involved in conducting the survey; issues involving who should conduct and pay for the survey; the large amounts of empirical data already available in other states concerning citizens' perceptions of attorney advertisements; and the many comments received from the public hearings and website posting, the Committee has not recommended at this time that a survey be conducted.

⁵For example, the original proposal prohibited all testimonials. As a result of receiving well thought out comments that were critical of this prohibition, the prohibition was narrowed to prohibit ads that contain "a paid testimonial or endorsement, unless the fact of payment is disclosed."

- (1) Proposed Rule 7.1(c), which provides an exemption from the advertising prohibitions for non-profit organizations, should be amended to read as follows:

Publications, educational materials, websites and other communications by lawyers **for on behalf of** non-profit organizations that are not motivated by pecuniary gain are not advertisements **or unsolicited written communications** within the meaning of these Rules.⁶

- (2) The Supreme Court Committee also recommends the deletion of a prohibition on “descriptive statements” contained in proposed rule 7.2(c)(2).⁷

Recommendation

The Attorney Advertising proposal has been the subject of much work and study. The Supreme Court Committee is pleased with the efforts of all involved in the study and preparation of the advertising proposal, and recommends to the Court that the amended advertising proposal, with the changes the Committee has suggested, be allowed to proceed to another phase of study. Because the regulation of attorney advertising is a matter of great interest to bar members, because advertising regulations are often the subject of legal challenges,⁸ and because additional study and debate on this difficult subject may well be beneficial, the Supreme Court Committee to Study Attorney Advertising recommends that the advertising proposal, as amended, be placed before the LSBA House of Delegates for consideration at the June, 2007 meeting. The Committee also recommends that the two changes it suggested be incorporated in the final version of the proposal that is presented to the LSBA House of Delegates.

⁶The language in **boldface type** is the language suggested for inclusion by the Committee.

⁷In the opinion of the Committee members who voted to delete this prohibition, the prohibition is overbroad and probably prohibits more commercial speech than is permissible.

⁸The Committee was informed that advertising rules recently promulgated in New York have been challenged in federal court.

After consideration and action by the House of Delegates, the Court could consider the proposal pursuant to its constitutional and inherent authority to regulate the practice of law in Louisiana.