

IN THE SUPREME COURT OF TENNESSEE

IN RE:)
)
)
 PETITION FOR THE ADOPTION OF) No. _____
 REVISIONS TO TENN. SUP. CT. R. 8,)
 RPCs 7.1, 7.2, 7.3, 7.4, 7.5, and 7.6)
)
)

**PETITION OF THE TENNESSEE BAR ASSOCIATION
FOR THE ADOPTION OF REVISIONS TO TENN. SUP. CT. R. 8,
RPCs 7.1, 7.2, 7.3, 7.4, 7.5, and 7.6**

The Tennessee Bar Association (“TBA”) files this petition to ask the Court to adopt revisions to the portions of the Tennessee Rules of Professional Conduct focused on advertising of services by attorneys. The proposed revisions being advocated for by the TBA are attached as Exhibit A. Attached as Exhibit B is a redline that shows the changes compared to the existing versions of those rules. As the Court will see, the proposed changes involve significant changes to the rules and have, at their heart, the twin goals of (1) winnowing down restrictions imposed on lawyer advertising to the core requirement that lawyers not make false or misleading statements about themselves or their services, and (2) removing restrictions on communications by lawyers where the types of communications now barred are not likely to cause consumer harm. In so doing, the TBA petition seeks to actually alleviate existing consumer harm by increasing the public’s access to communications about the availability of legal services.

BACKGROUND OF EVENTS LEADING TO THIS PETITION

The work of the TBA’s Standing Committee on Ethics and Professional Responsibility on these topics began in earnest toward the end of 2018, prompted by the adoption earlier that year by the ABA of revisions to its Model Rules of Professional Conduct. The ABA amendments were,

in turn, spurred on by the work of the Association of Professional Responsibility Lawyers (“APRL”) which issued multiple white papers in 2015 and 2016 proposing revisions to streamline the rules regarding attorney advertising. (A copy of the APRL 2015 Report of the Regulation of Lawyer Advertising Committee, and a copy of the APRL Regulation of Lawyer Advertising Committee Supplemental Report of April 26, 2016 are attached as Exhibits C and D respectively.) Because the APRL proposal was rapidly adopted in full by Virginia in 2017, and because of the close relationship between APRL and members of the TBA committee (Lucian T. Pera, a former Chair of the TBA committee is a former President of APRL, and Brian S. Faughnan, the current Chair of the TBA committee is the current President-Elect of APRL), the TBA committee began its work by studying *both* the APRL proposal *and* the amendments ultimately adopted by the ABA.

As the Court will see in the remainder of this petition and the attached exhibits, what resulted was a proposal that is a blend of the original APRL proposal and the Model Rule revisions ultimately adopted by the ABA. Importantly though, the committee gave great weight to certain existing, Tennessee approaches to lawyer advertising issues previously established by this Court and did not undertake to revisit or re-litigate a number of issues despite the fact that many on the committee would be in favor of re-examination of the policies behind such provisions. As a result, the Court will notice that the proposed revisions leave untouched a number of requirements that do not appear in the ABA Model Rules. These include: (1) Tennessee’s existing restrictions on certain solicitations within thirty days of certain events, (2) the existing requirement for lawyers to retain copies of advertising communications for two years, (3) existing limitations on references by lawyers to specialization, and (4) much of the substance and structure of Tennessee’s stand

alone rule on intermediary organization, RPC 7.6.¹ As has been its custom for years, the committee recommendations, ultimately adopted by the TBA and now proposed to this Court, also included determinations to retain aspects of Tennessee’s existing rules whenever the committee believed that the current Tennessee approach was better than other ideas implemented elsewhere.

SUMMARY AND HIGHLIGHTS OF PROPOSAL

As indicated at the outset, the TBA’s proposed amendments and revisions are set out in full in a clean version at Exhibit A to this petition, and a redline showing the specific changes that would be made from the current version of this rules under the proposal at Exhibit B to this petition. For the benefit of the Court, as well as the public, we highlight here a number of the most significant changes.

Reduction of number of rules while retaining “false and misleading” prohibition.

Consistent with APRL’s original proposals that prompted nationwide re-evaluation, and with the ultimate revisions adopted to the ABA Model Rules, the TBA proposes deletion of several existing rules from the “7 series” altogether and moving pertinent, helpful paragraphs from the Comments of those rules into the Comments of remaining rules, primarily added as new paragraphs to the Comment to RPC 7.1.

Specifically, the TBA proposal would delete RPC 7.2, RPC 7.4, and RPC 7.5 as black-letter rules. The existing Tennessee guidance contained in the Comments to those rules focused on the need to make sure that letterhead, firm names, and references to specialization or areas of practice are not false or misleading are retained, but re-located to the Comment to RPC 7.1.

¹ The TBA’s proposed amendments do include one change to the scope of RPC 7.6. That change involves deleting the “catch all” portion of the definition of an intermediary organization so as to reduce the existing level of uncertainty in, and outside of, the profession as to whether an entity is treated as being such an organization.

As to the numbering of the remaining rules, the TBA proposes, in the interest of transparency, to leave Tennessee’s rule addressing solicitations numbered as RPC 7.3 and to leave Tennessee’s rule on intermediary organizations numbered as RPC 7.6. The TBA believes doing so would allow lawyers to more easily locate and reference Tennessee’s rules consistently with the ABA Model Rules and compare other jurisdictions’ rules when appropriate.

Revisions to restrictions on communications with consumers known to have legal needs.

The TBA’s proposal in a revised RPC 7.3 would shrink the scope of what are prohibited solicitations by lawyers in a couple of ways. First, a new exception allowing for contact with sophisticated users of legal services has been added and an exception to expressly acknowledge what may be required in pursuing and prosecuting a class action has been added. (Exhibit A, Proposed RPC 7.3(b)(2) and (3)). Second, the TBA proposes to delete the prohibition on solicitation through “real-time electronic contact” so that only true “in-person” or “live telephone” solicitations are subjected to the outright prohibition.

The TBA’s proposal, however, maintains fully the prohibitions against any solicitations that would otherwise be permissible if they involve “coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence.” (Exhibit A, Proposed RPC 7.3(d)(2)). As with streamlining aspects of the advertising rules to hone in on what should really be regulated and prohibited – false and misleading communications – the efforts to reduce restrictions on solicitation (and thereby increase the public’s access to information about the availability of legal services) are part of an effort to help focus the restrictions on the kind of improper pressuring, harassing, or fraudulent tactics that should be regulated and prohibited.

The TBA's proposal also maintains the existing Tennessee requirement that all solicitations permitted within RPC 7.3 be required to have the "Advertising Material" disclaimer requirement. (Exhibit A, Proposed RPC 7.3(c)).

Lessening of restrictions on compensating others for referring clients.

Although the TBA proposal largely keeps in place Tennessee's current restrictions on giving someone something of value in exchange for recommending or publicizing a lawyer's services (albeit relocated to RPC 7.3(f) in light of the proposed deletion of RPC 7.2), there are two changes of significance proposed by the TBA.

The first is to add language to make clear that lawyers have the ability to compensate lawyers with whom they practice as well as non-lawyer staff for engaging in such efforts. Law firms, of course, already structure compensation systems for lawyers that give financial credits for bringing in clients for whom other lawyers do the work. Many law firms also have dedicated staff members, who are not licensed lawyers, who focus their work on business development efforts and many lawyers or law firms dedicate time and resources to finding ways to compensate such people, indirectly if necessary, in ways that are only structured as they are out of concern for RPC 7.2's current restrictions. The TBA proposal would allow lawyers and law firms greater freedom as to how to compensate those that they actually employ. Further, the TBA proposal in this respect would not expose the public to unscrupulous practices for at least two reasons. Lawyers would still have responsibility for the supervision of such employees under RPC 5.3 and conduct of any sort by employees involving "coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence" would continue to be prohibited by RPC 7.3 and open the lawyer responsible for supervising them to discipline either under RPC 5.3 or RPC 8.4(a) or both.

The second change is the proposed adoption of the ABA Model Rule provisions allowing for certain reciprocal referral arrangements. (Exhibit A, Proposed RPC 7.3(f)(5)).

Intermediary organizations

As indicated above, the TBA proposal retains Tennessee’s relatively unusual RPC 7.6 but does so with one clarifying change that the TBA believes will significantly reduce existing uncertainty about the scope of the rule. The TBA proposal revises the definition of the term “intermediary organization” in RPC 7.6(a) to remove the “or a similar organization...” language. This clause works as a broad and unstructured “catch-all” net with very uncertain boundaries. In light of the development of new marketing techniques and technologies, the existing uncertainty about when registration is required negatively impacts business models that can assist legal consumers in finding information about available attorneys and discourages attorney participation in such business models for fear of disciplinary exposure. If the TBA revision is adopted, relationships between lawyers and lawyer advertising cooperatives, lawyer referral services, and prepaid legal insurance providers would continue to be governed by RPC 7.6, and those three types of businesses would still have to comply with Tenn. Sup. Ct. R. 44.

CONCLUSION

For all of the reasons set forth above, the TBA petitions this Court to adopt the amendments to Tenn. Sup. Ct. R. 8, RPCs 7.1 through 7.6 that are reflected Exhibit A.

Further, the TBA requests that the costs of filing this Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

TENNESSEE BAR ASSOCIATION

By: MICHELLE GREENWAY SELLERS (BPR No. 20769)
President
Rainey, Kizer, Reviere & Bell PLC
105 S. Highland Avenue
Jackson, TN 38301
Tel: 731-423-2414
msellers@raineykizer.com

EDWARD D. LANQUIST (BPR No. 13303)
General Counsel
Patterson, PC
1600 Division St., Suite 500
Nashville, TN 37203
Tel: 615-242-2400
edl@iplawgroup.com

JOYCELYN STEVENSON (BPR No. 21710)
Executive Director
221 4th Avenue North, Suite 4000
Nashville, TN 37219
Tel: 615-383-7421
jstevenson@tnbar.org

/s/ Brian S. Faughnan

BRIAN S. FAUGHNAN (BPR No. 19379)
Chair, Standing Committee on Ethics
and Professional Responsibility
Lewis Thomason
One Commerce Square
40 S. Main St., 29th Floor
Memphis, Tennessee 38103
Tel: 901-577-6139
bfaughnan@lewisthomason.com

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit C to the petition by email.

A handwritten signature in cursive script that reads "Joycelyn A. Stevenson". The signature is written in black ink and is positioned above a horizontal line.

JOYCELYN A. STEVENSON

EXHIBIT A

CHAPTER 7

Information About Legal Services

RULE 7.1: Communications Concerning a Lawyer's Services

(a) 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 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) Subject to the requirements of paragraph (a) above and RPCs 7.3 and 7.6, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(c) A copy or recording of each advertisement shall be retained by the lawyer for two years after its last dissemination along with a record of when and where the advertisement appeared.

Comment

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.4(c). See also RPC 8.4(e) for

the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] To assist the public in learning about and 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 risks of practices that are misleading or overreaching.

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, 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; 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.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[8] A lawyer may advertise the fact that a subjective characterization or description has been conferred upon him or her by an organization as long as the organization has made inquiry into the lawyer's fitness and does not issue or confer such designations indiscriminately or for a price.

Area of Expertise/Specialization

[9] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. However, a lawyer may not communicate that the lawyer is a specialist," practices a "specialty," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law unless the communication is regarding patent matters or admiralty law or in accordance with paragraph [10] of this Comment. Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts.

[10] A lawyer is permitted to communicate that the lawyer is a specialist or has been certified or recognized as a specialist when the lawyer has been so certified or recognized by an organization accredited by the American Bar Association's House of Delegates. However, before a lawyer may communicate that the lawyer is a specialist, the lawyer must first register the specialty certification with the Tennessee Commission on Continuing Legal Education in accordance with Tennessee Supreme Court Rule 21. A lawyer shall not state or imply that the lawyer has received any certification of specialty from the Tennessee Commission on Continuing Legal Education.

Firm Names

[11] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[12] Paragraph (c) does not require a change in a law firm's name or letterhead when a member of the firm interrupts his or her practice to serve, for example, as an elected member of the Tennessee General Assembly so long as the lawyer reasonably expects to resume active and regular practice with the firm at the end of the legislative session. Such a hiatus from practice is not for a substantial period of time. If, however, a lawyer were to curtail his or her practice and enter public service for a longer or indefinite period of time, the lawyer's firm would have to alter its name and letterhead.

[13] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Record of Advertising

[14] Paragraph (c) requires that a lawyer retain a copy or recording of any advertisement for two years after its last dissemination along with a record of when and where the advertisement appeared. If advertisements that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by retaining a single copy of the advertisement for two years after the last of the materially similar advertisements are disseminated. A lawyer may comply with the requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of

Professional Responsibility concerning certain types of advertisements, including websites, e mail, or other electronic forms of communication or of changes to such communications.

Definitional Cross-Reference

“Material” and “materially” See RPC 1.0(o)

RULE 7.3: Solicitation of Clients

Solicitation

(a) A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or reasonably can be understood as offering to provide, legal services for a particular matter.

(b) Except as provided by paragraph (d), a lawyer shall not solicit in-person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a potential client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer;**
- (2) is a sophisticated user of legal services;**
- (3) is pursuant to a court-ordered class action notification; or**
- (4) has a family, close personal, or prior professional relationship with the lawyer.**

Written Solicitation

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4). Unless the contents thereof include a solicitation of employment, a lawyer need not include the words "Advertising Material" when sending announcements of associations or affiliations, newsletters, brochures, and other similar communications.

Limitation on Solicitation

(d) A lawyer shall not solicit professional employment from any person if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or**
- (2) the solicitation involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence; or**
- (3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, divorce or legal separation, worker's compensation, wrongful death, or otherwise relates to an accident, filing of divorce or legal separation, or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident, filing of divorce or legal separation, or disaster**

occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family, close personal, or prior professional relationship with the person solicited.

Record Retention

(e) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule shall be retained by the lawyer for two years after its last dissemination along with a record of when, and to whom, it was sent.

Paying Others to Recommend a Lawyer

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

(1) pay the reasonable cost of advertisements and other communications permitted by RPC 7.1, including online group advertising;

(2) pay the usual charges of a registered intermediary organization as permitted by RPC 7.6;

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

(4) pay a sponsorship fee or a contribution to a charitable or other non profit organization in return for which the lawyer will be given publicity as a lawyer; and

(5) 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.

Comment

Solicitation

[1] A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves in-person, face-to-face or live telephone contact by a lawyer with someone known to need legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and

insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, face-to-face or live telephone communication, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under RPC 7.1 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of RPC 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. All solicitations permitted under this Rule must comply with the prohibition in RPC 7.1 against false and misleading communications.

[4] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal, or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes. Consequently, the general prohibition in paragraph (b) and the requirements in paragraph (c) are not applicable in those situations. Also, paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information which is false or misleading within the meaning of RPC 7.1, which involves coercion, duress, or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of paragraph (d)(1), is prohibited. Moreover, if after sending a letter or other communication as permitted by RPC 7.1 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of paragraph (d).

[6] RPC 7.3(d)(3) includes a prohibition against any solicitation of a prospective client within thirty (30) days of the filing of a complaint for divorce or legal separation involving that person, if a significant motive for the solicitation is the lawyer's pecuniary gain. Some divorce or legal separation cases involve either an alleged history of domestic violence or a potential for domestic violence. In such cases, a defendant spouse's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties before the statutory injunctions take effect. See Tenn. Code Ann. § 36-4-106(d) (2014) (imposing specified temporary injunctions, including "[a]n injunction restraining both parties from harassing, threatening, assaulting or abusing the

other,” that take effect “[u]pon the filing of a petition for divorce or legal separation, and upon personal service of the complaint and summons on the respondent or upon waiver and acceptance of service by the respondent”) (emphasis added) The prohibition in RPC 7.3(d)(3) against any solicitation within thirty (30) days of the filing of a complaint for divorce or legal separation is intended to reduce any such risk and to allow the plaintiff spouse in such cases to take appropriate steps to seek shelter, an order of protection, and/or any other relief that might be available.

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer’s firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to, and serve the same purpose as, advertising permitted under RPC 7.1.

[8] The requirement in paragraph (c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. Nor do those requirements apply to general announcements by lawyers, including changes in personnel or office location, newsletters, brochures, and other similar communications which do not contain a solicitation of professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (e) of this Rule requires that a lawyer retain a copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule for two years after its last dissemination along with a record of the name of the person contacted and the person’s address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by retaining a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent.

Paying Others to Recommend a Lawyer

[10] Except as permitted under paragraphs (f)(1)-(f)(5), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates RPC 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by RPC 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client development services, such as publicists,

public relations personnel, business development staff, and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (see RPC 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with RPCs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), the lead generator's communications are consistent with RPC 7.1 (communications concerning a lawyer's services), and subject to RPC 7.6 and Tenn. Sup. Ct. R. 44 if the lead generator qualifies as an intermediary organization pursuant to RPC 7.6. To comply with RPC 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also RPC 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); RPC 8.4(a) (duty to avoid violating the Rules through the acts of another).

[11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See RPCs 2.1 and 5.4(c). Except as provided in RPC 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by RPC 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Definitional Cross-References

“Fraud” See RPC 1.0(d)

“Known” See RPC 1.0(f)

“Written” See RPC 1.0(n)

RULE 7.6: Intermediary Organizations

(a) An intermediary organization is a lawyer advertising cooperative, lawyer referral service, or prepaid legal insurance provider. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.

(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:

(1) the organization:

(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or

(ii) is engaged in the unauthorized practice of law; or

(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or

(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or

(2) the lawyer will be unable to represent the client in compliance with these Rules.

Comment

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies that pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule. Because the concerns arising from the referral of fee generating business to lawyers are not implicated by the referral of a matter for which the lawyer does not expect to be paid a fee, the referral of such matters is exempted from this Rule. Similarly, the process by which tribunals or court agencies appoint or assign lawyers to represent parties should carry with it appropriate safeguards outside of this Rule, and these activities are likewise exempted from this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to

ascertain that the organization meets the standards set forth in paragraph (b). Normally it will be sufficient for the lawyer to ascertain that the organization is registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

Definitional Cross-References

“Firm” and “law firm” See RPC 1.0(c)

“Knows” See RPC 1.0(f)

“Reasonably should know” See RPC 1.0(j)

EXHIBIT B

REDLINE OF THE PROPOSED NEW TENNESSEE RULES TO THE CURRENT TENNESSEE RULES

CHAPTER 7 Information About Legal Services

RULE 7.1: Communications Concerning a Lawyer's Services

~~(a) 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 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) Subject to the requirements of paragraph (a) above and RPCs 7.3 and 7.6, a lawyer may advertise services through written, recorded, or electronic communication, including public media.~~

~~(c) A copy or recording of each advertisement shall be retained by the lawyer for two years after its last dissemination along with a record of when and where the advertisement appeared.~~

Comment

[1] This Rule governs all communications about a lawyer's services. ~~Whatever means are used to make~~ known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] ~~It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.4(c).~~ See also RPC 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] ~~To assist the public in learning about and 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~~

Deleted: , including advertising permitted by RPC 7.2 and solicitations directed to specific recipients permitted by RPC 7.3

services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risks of practices that are misleading or overreaching.

[6] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, 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; 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.

[7] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[8] A lawyer may advertise the fact that a subjective characterization or description has been conferred upon him or her by an organization as long as the organization has made inquiry into the lawyer's fitness and does not issue or confer such designations indiscriminately or for a price.

Area of Expertise/Specialization

[9] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. However, a lawyer may not communicate that the lawyer is a specialist," practices a "specialty," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law unless the communication is regarding patent matters or admiralty law or in accordance with paragraph [10] of this Comment. Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts.

[10] A lawyer is permitted to communicate that the lawyer is a specialist or has been certified or recognized as a specialist when the lawyer has been so certified or recognized by an organization accredited by the American Bar Association's House of Delegates. However, before a lawyer may communicate that the lawyer is a specialist, the lawyer must first register the specialty certification with the Tennessee Commission on Continuing Legal Education in accordance with Tennessee Supreme Court Rule 21. A lawyer shall not state or imply that the lawyer has received any certification of specialty from the Tennessee Commission on Continuing Legal Education.

Firm Names

[11] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[12] Paragraph (c) does not require a change in a law firm's name or letterhead when a member of the firm interrupts his or her practice to serve, for example, as an elected member of the Tennessee General Assembly so long as the lawyer reasonably expects to resume active and regular practice with the firm at the end of the legislative session. Such a hiatus from practice is not for a substantial period of time. If, however, a lawyer were to curtail his or her practice and enter public service for a longer or indefinite period of time, the lawyer's firm would have to alter its name and letterhead.

[13] Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Record of Advertising

[14] Paragraph (c) requires that a lawyer retain a copy or recording of any advertisement for two years after its last dissemination along with a record of when and where the advertisement appeared. If advertisements that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by retaining a single copy of the advertisement for two years after the last of the materially similar advertisements are disseminated. A lawyer may comply with the requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning certain types of advertisements, including websites, e mail, or other electronic forms of communication or of changes to such communications.

Definitional Cross-Reference

"Material" and "materially" See RPC 1.0(o)

Deleted: RULE 7.2: Advertising

Deleted: (a) → Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.1, 7.3, 7.4, 7.5, and 7.6, a lawyer may advertise services through written, recorded, or electronic communication, including public media.[¶]
(b) → A copy or recording of each advertisement shall be retained by the lawyer for two years after its last dissemination along with a record of when and where the advertisement appeared.[¶]
(c) → A lawyer shall not give anything of value to a person for recommending or[¶]
publicizing the lawyer's services except that a lawyer may pay for the following:[¶]
(1) → the reasonable costs of advertisements permitted by this Rule;[¶]
(2) → the usual charges of a registered intermediary organization as permitted by RPC 7.6;[¶]
(3) → a sponsorship fee or a contribution to a charitable or other non profit organization in return for which the lawyer will be given publicity as a lawyer; or[¶]
(4) → a law practice in accordance with RPC 1.17.[¶]
(d) → Except for communications by registered intermediary organizations, any advertisement shall include the name and office address of at least one lawyer or law firm assuming responsibility for the communication.[¶]
Comment[¶]

Deleted: [1] → This Rule governs general advertising through public media and other communications that are not directed to specifically identified individuals. The Rule encompasses all possible media through which such communications may be directed to the public. Communications that are directed to specifically identified recipients are governed by RPC 7.3.[¶]
[2] → To assist the public in learning about and 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. Further, 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 is significant. Nevertheless, advertising by lawyers shall not contain false or misleading communications about the lawyer or the lawyer's services.[¶]
[3] → Among other things, this Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, 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; 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.[¶] ... [1]

Deleted: Record of Advertising[¶]
[5] → Paragraph (b) requires that a lawyer retain a copy or recording of any advertisement for two years after its last dissemination along with a record of when and where the advertisement appeared. If advertisements that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by retaining a single copy of the advertisement for two years after the last of the materially similar advertisements are disseminated. A lawyer may comply with the requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning certain types of advertisements, including websites, e mail, or other electronic forms of communication or of changes to such communications.[¶]

Paying Others to Recommend a Lawyer[¶] ... [2]

RULE 7.3: Solicitation of Clients

Solicitation

(a) A solicitation is a targeted communication initiated by or on behalf of a lawyer, that is directed to a specific person and that offers to provide, or reasonably can be understood as offering to provide, legal services for a particular matter.

(b) Except as provided by paragraph (d), a lawyer shall not solicit in-person by face-to-face contact or live telephone, or permit employees or agents of the lawyer to solicit in person or by live telephone on the lawyer's behalf, professional employment from a potential client when a significant motive for doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer;
- (2) is a sophisticated user of legal services;
- (3) is pursuant to a court-ordered class action notification; or
- (4) has a family, close personal, or prior professional relationship with the lawyer.

Written Solicitation

(c) Every written, recorded or electronic solicitation by or on behalf of a lawyer seeking professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1)-(4). Unless the contents thereof include a solicitation of employment, a lawyer need not include the words "Advertising Material" when sending announcements of associations or affiliations, newsletters, brochures, and other similar communications.

Limitation on Solicitation

(d) A lawyer shall not solicit professional employment from any person if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence; or
- (3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, divorce or legal separation, worker's compensation, wrongful death, or otherwise relates to an accident, filing of divorce or legal separation, or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident, filing of divorce or legal separation, or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family, close personal, or prior professional relationship with the person solicited.

Record Retention

(e) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule shall be retained by the lawyer for two years after its last dissemination along with a record of when, and to whom, it was sent.

Deleted: Potential

Formatted: Font: Not Bold

Deleted: a

Deleted: A

Deleted: by

Deleted: ,

Deleted: real time electronic contact solicit

Deleted: the lawyer's

Deleted: or

Deleted: ; or

(3) has initiated a contact with the lawyer

Formatted: Font: Not Bold

Deleted: b

Deleted: potential client by written, recorded, or electronic communication or by in-person, live telephone, or real time electronic contact even when not otherwise prohibited by paragraph (a),

Deleted: potential client

Deleted: (c)

Formatted: text bold

Deleted: If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send a written, recorded, or electronic communication soliciting professional employment from a specifically identified recipient who is not a person specified in paragraphs (a)(1) or (a)(2) or (a)(3), unless the communication complies with the following requirements:
(1) The words "Advertising Material" appear on the outside of the envelope, if any, in which a communication is sent and at the beginning and ending of any written, recorded or electronic communication.

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or the Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" and the words "DO NOT SIGN" shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to potential clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific potential client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, "IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE."

Deleted: (d)

Deleted: Unless the contents thereof include a solicitation of employment, a lawyer need not comply with the requirements of paragraph (c) above when sending announcements of an ... [4]

Paying Others to Recommend a Lawyer

(f) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

- (1) pay the reasonable cost of advertisements and other communications permitted by RPC 7.1, including online group advertising;**
- (2) pay the usual charges of a registered intermediary organization as permitted by RPC 7.6;**
- (3) pay for a law practice in accordance with RPC 1.17;**
- (4) pay a sponsorship fee or a contribution to a charitable or other non profit organization in return for which the lawyer will be given publicity as a lawyer; and**
- (5) 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.**

Comment

Solicitation[1] ~~v.~~ A lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves ~~in-person, face-to-face or live telephone~~ contact by a lawyer with ~~someone~~ known to need legal services. This ~~form~~ of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The ~~person~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to ~~the public~~, rather than direct ~~in-person, face-to-face or live telephone communication~~, will help to assure that the information flows cleanly as well as freely. The contents of ~~advertisements and communications permitted under RPC 7.1 can be permanently recorded so that they cannot~~ be disputed and ~~may be shared with outers who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of RPC 7.1. The contents of in-person, face-to-face or live telephone communication can be disputed and~~ may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading. ~~All solicitations permitted under this Rule must comply with the prohibition in RPC 7.1 against false and misleading communications.~~

[4] There is far less likelihood that a lawyer would engage in abusive practices against ~~a former client, or a person with whom the lawyer has a close personal, or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or a sophisticated user of legal services. A sophisticated user of legal services is an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes.~~ Consequently, the general prohibition in ~~paragraph (b)~~ and the requirements ~~in paragraph (c)~~ are not applicable in those situations. Also, ~~paragraph (b)~~ is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social,

- Deleted:** ¶
- Deleted:** A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast,
- Deleted:** a
- Deleted:** direct
- Deleted:**
- Deleted:** , or real time electronic
- Deleted:** a potential client
- Deleted:** ese
- Deleted:** s
- Deleted:** between a lawyer and a potential client
- Deleted:** the layperson
- Deleted:** ontial client
- Deleted:** to
- Deleted:** The restrictions set forth in this Rule, however, do not apply to efforts by a lawyer to get hired as an in-house counsel by a potential client.
- Deleted:** [3]→ This potential for abuse inherent in direct in person, live telephone, or real time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under this Rule offer alternative means of conveying necessary information to potential clients who may be in need of legal services. Advertising and written and recorded communications which may be mailed or electronically transmitted make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in person, live telephone, or real time electronic persuasion that may overwhelm the person's judgment.
- Deleted:** 4
- Deleted:** potential client
- Deleted:**
- Deleted:** , or real time electronic
- Deleted:** ntact
- Deleted:** direct in person, live telephone, or real time electronic conversations between a lawyer and a potential client can
- Deleted:** 5
- Deleted:** an individual
- Deleted:** family,
- Deleted:** or prior professional
- Deleted:** RPC 7.3(a)
- Deleted:** of RPC 7.3
- Deleted:** a

civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to ~~their~~ members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information which is false or misleading within the meaning of RPC 7.1, which involves coercion, duress, ~~or harassment within the meaning of paragraph (d)(2), or which involves contact with someone who has made known to the lawyer a~~ desire not to be solicited by the lawyer ~~within the meaning of paragraph (d)(1), is prohibited.~~ Moreover, if after sending a letter or other communication as permitted by RPC 7.1, ~~the lawyer receives no response, any further effort to communicate with the recipient of the communication, may violate the provisions of paragraph (d).~~

[6] RPC 7.3(d)(3) includes a prohibition against any solicitation of a prospective client within thirty (30) days of the filing of a complaint for divorce or legal separation involving that person, if a significant motive for the solicitation is the lawyer's pecuniary gain. Some divorce or legal separation cases involve either an alleged history of domestic violence or a potential for domestic violence. In such cases, a defendant spouse's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties before the statutory injunctions take effect. See Tenn. Code Ann. § 36-4-106(d) (2014) (imposing specified temporary injunctions, including "[a]n injunction restraining both parties from harassing, threatening, assaulting or abusing the other," that take effect "[u]pon the filing of a petition for divorce or legal separation, and upon personal service of the complaint and summons on the respondent or upon waiver and acceptance of service by the respondent") (emphasis added) The prohibition in RPC 7.3(d)(3) against any solicitation within thirty (30) days of the filing of a complaint for divorce or legal separation is intended to reduce any such risk and to allow the plaintiff spouse in such cases to take appropriate steps to seek shelter, an order of protection, and/or any other relief that might be available.

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties ~~for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer.~~ This form of communication is not directed to ~~people who are seeking legal services for themselves.~~ Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to, and serve the same purpose as, advertising permitted under RPC 7.1.

[8] The requirement in ~~paragraph (c) that certain communications be marked "Advertising Material," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. Nor do those requirements apply to general announcements by lawyers, including changes in personnel or office location, newsletters, brochures, and other similar communications which do not contain a solicitation of professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

[9] Paragraph (c) of this Rule requires that a lawyer retain a copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule for two years after its last dissemination along with a record of the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by retaining a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent.

Paying Others to Recommend a Lawyer

[10] ~~Except as permitted under paragraphs (f)(1)-(f)(5), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates RPC 7.1 and this Rule. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f)(1), however, allows a lawyer to pay for advertising and solicitations permitted by RPC 7.1 and this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees,~~

Deleted: its

Deleted: 6

Deleted: fraud,

Deleted: intimidation, overreaching,

Deleted: undue influence,

Deleted: or which occurs within thirty (30) days after an accident or disaster involving the individual or a member of the individual's family,

Deleted: by RPC 7.3(b).

Deleted: 2

Deleted: potential client

Deleted: RPC 7.3(b)(1)

Deleted: Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

Deleted: a

Deleted: b

Deleted: b

Deleted: ¶

Deleted: if the lawyer's

Deleted: is to

Deleted: willingness to cooperate with the plan in compliance with RPC 7.6.

Deleted: a potential client

Deleted: otential

Deleted: 2

Deleted: RPC 7.3

Deleted: as advertisements and contain other disclaimers

Deleted: c)(6)

Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, business development staff, and website designers, as long as the employees, agents and vendors do not direct or regulate the lawyer's professional judgment (see RPC 5.4(c)). Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with RPCs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), the lead generator's communications are consistent with RPC 7.1 (communications concerning a lawyer's services), and subject to RPC 7.6 and Tenn. Sup. Ct. R. 44 if the lead generator qualifies as an intermediary organization pursuant to RPC 7.6. To comply with RPC 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also RPC 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); RPC 8.4(a) (duty to avoid violating the Rules through the acts of another).

[11] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See RPCs 2.1 and 5.4(c). Except as provided in RPC 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (f) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by RPC 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Definitional Cross-References

- "Fraud" See RPC 1.0(d)
- "Known" See RPC 1.0(f)
- "Written" See RPC 1.0(n)

Deleted: RULE 7.4: Communication of Fields of Practice and Specialization

Subject to the requirements of RPCs 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes, or is certified or recognized as a specialist in a particular field of law.

(c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(d) A lawyer who has been certified as a specialist in a field of law by an organization accredited by the American Bar Association's House of Delegates, and who has registered such certification with the Tennessee Commission on Continuing Legal Education, may state that the lawyer "is certified as a specialist in [field of law] by [accredited organization]."

Comment

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] However, a lawyer may not communicate that the lawyer is a specialist, "practices a specialty," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office, as reflected in paragraph (c).

[3] Paragraph (d) permits a lawyer to communicate that the lawyer is a specialist or has been certified or recognized as a specialist when the lawyer has been so certified or recognized by an organization accredited by the American Bar Association's House of Delegates. However, before a lawyer may communicate that the lawyer is a specialist, the lawyer must first register the specialty certification with the Tennessee Commission on Continuing Legal Education in accordance with Tennessee Supreme Court Rule 21. A lawyer shall not state or imply that the lawyer has received any certification of specialty from the Tennessee Commission on Continuing Legal Education.

Definitional Cross-Reference

"Substantially" See RPC 1.0(l)

.....Column Break.....

RULE 7.5: Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of RPC 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court

RULE 7.6: Intermediary Organizations

(a) An intermediary organization is a lawyer advertising cooperative, lawyer referral service, ~~or prepaid legal insurance provider. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.~~

(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:

(1) the organization:

(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or

(ii) is engaged in the unauthorized practice of law; or

(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or

(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or

(2) the lawyer will be unable to represent the client in compliance with these Rules.

Comment

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies that pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule. Because the concerns arising from the referral of fee generating business to lawyers are not implicated by the referral of a matter for which the lawyer does not expect to be paid a fee, the referral of such matters is exempted from this Rule. Similarly, the process by which tribunals or court agencies appoint or assign lawyers to represent parties should carry with it appropriate safeguards outside of this Rule, and these activities are likewise exempted from this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to ascertain that the organization meets the standards set forth in paragraph (b). Normally it will be sufficient for the lawyer to ascertain that the organization is registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

Definitional Cross-References

"Firm" and "law firm" See RPC 1.0(c)

"Knows" See RPC 1.0(f)

"Reasonably should know" See RPC 1.0(j)

Deleted: , or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility

Page 4: [1] Deleted **Faughnan, Brian S.** **2/4/19 9:03:00 PM**



Page 4: [2] Deleted **Faughnan, Brian S.** **2/4/19 9:22:00 PM**



Page 5: [3] Deleted **Faughnan, Brian S.** **2/3/19 8:10:00 PM**



Page 5: [4] Deleted **Faughnan, Brian S.** **2/3/19 8:18:00 PM**



Page 9: [5] Deleted **Faughnan, Brian S.** **2/3/19 9:13:00 PM**

