

On October 27, 2020, the Tennessee Bar Association filed a petition to amend Tennessee Supreme Court Rule 8, RPCs 7.1 through 7.6 regarding lawyer advertising and solicitation. After considering public comments on the TBA's petition, the Court entered an order adopting many of the TBA's suggested amendments, rejecting some, and making further revisions. The following shows the relevant provisions of RPC 7, as amended effective September 1, 2021.

TENNESSEE SUPREME COURT RULES

RULE 8: Rules of Professional Conduct

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. Any communication made under this Rule shall include the name and contact information of at least one lawyer or law firm responsible for its content.

(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] It is not necessary to change 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, email, or other electronic forms of communication or of changes to such communications.

Rule 7.2. [Deleted and Reserved]

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) A lawyer shall not solicit by live person-to-person contact, or permit employees or agents of the lawyer to solicit by live person-to-person contact 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 person who routinely uses for business purposes the type of legal services offered by the lawyer;

(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). 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. 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 nonprofit 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

[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] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, email, or other written communications that recipients may easily disregard. There is a potential for abuse when a solicitation involves live person-to-person 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 live person-to-person contact, 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 live person-to-person contact communications 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 is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. 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)-(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, online 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.

Rule 7.4. [Deleted and Reserved.]

Rule 7.5. [Deleted and Reserved.]

Rule 7.6. Intermediary Organizations

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, prepaid legal insurance provider, 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. 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.