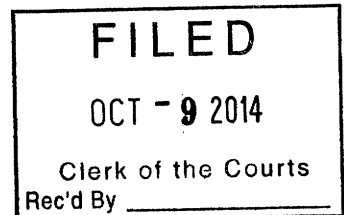


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE RULE 8, RPC 7.3(b)(3),
RULES OF THE TENNESSEE SUPREME COURT

No. ADM2014-01954

ORDER



The Court has received a letter from a private attorney whose law practice is focused on divorce and family law, and that attorney has suggested a possible amendment to Tenn. Sup. Ct. R. 8, RPC 7.3. In pertinent part, the attorney's letter summarizes the issue as follows:

The issue is, very simply, that while the Court protects victims of accidents and workers compensation from attorneys soliciting their business under Supreme Court Rule RPC 7.3 [sic], the Court did not do so with regard to divorce or legal separation issues. Thus, on more than one occasion, I have had a client make the difficult decision to file for a divorce or legal separation, and on one of these occasions, actually put in the divorce complaint the physical and verbal abuse that had occurred. Then, before that client even had an opportunity to have their spouse served with the divorce or legal separation complaint, seek shelter, to be away in the event of service, or tell their spouse that they had filed for divorce, their spouse received a solicitation letter telling them that they had been sued for divorce or legal separation, and asking for their business. . . . This is especially important for spouses and children, who are often the victims of domestic abuse.

It is not unreasonable to ask that they have at least thirty (30) days to decide how and when they are going to serve their spouse with the divorce or legal separation complaint, and how they will protect themselves and their children, should there be a reaction or over-reaction to the filing.

For the foregoing reasons, the letter asks the Court to consider amending RPC 7.3(b)(3) to add “divorce or legal separation” to the other causes of action listed in that provision. In an attachment to her letter, the attorney set out her suggested revision of RPC 7.3(b)(3).

Attached as an appendix to this Order is the attorney’s proposed amendment of RPC 7.3(b)(3). For context, however, the appendix incorporates the attorney’s suggested revision into the full text of RPC 7.3. The Court hereby solicits written comments on the proposed amendment from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments is Monday, November 10, 2014. Written comments should be addressed to:

James Hivner, Clerk
Re: Rule 8, RPC 7.3
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should include the docket number set out above.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order, including the appendix, shall be posted on the Tennessee Supreme Court’s website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

Proposed Amendment to Tenn. Sup. Ct. R. 8, RPC 7.3(b)(3)

(proposed new text indicated by highlighting and underlining)

1 **Rule 7.3. Solicitation of Potential Clients.** — (a) A lawyer shall not by in-person, live
2 telephone, or real-time electronic contact solicit professional employment from a potential
3 client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain,
4 unless the person contacted:

5 (1) is a lawyer; or

6 (2) has a family, close personal, or prior professional relationship with
7 the lawyer; or

8 (3) has initiated a contact with the lawyer.

9 (b) A lawyer shall not solicit professional employment from a potential client by
10 written, recorded, or electronic communication or by in-person, live telephone, or real-time
11 electronic contact even when not otherwise prohibited by paragraph (a), if:

12 (1) the potential client has made known to the lawyer a desire not to be
13 solicited by the lawyer; or

14 (2) the solicitation involves coercion, duress, fraud, harassment,
15 intimidation, overreaching, or undue influence; or

16 (3) a significant motive for the solicitation is the lawyer's pecuniary
17 gain and the communication concerns an action for personal injury, divorce or
18 legal separation, worker's compensation, wrongful death, or otherwise relates
19 to an accident, filing of divorce or legal separation, or disaster involving the
20 person to whom the communication is addressed or a member of that person's
21 family, unless the accident or disaster occurred more than thirty (30) days prior
22 to the mailing or transmission of the communication or the lawyer has a
23 family, close personal, or prior professional relationship with the person
24 solicited.

25 (c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer
26 shall not send a written, recorded, or electronic communication soliciting professional
27 employment from a specifically identified recipient who is not a person specified in
28 paragraphs (a)(1) or (a)(2) or (a)(3), unless the communication complies with the following
29 requirements:

30 (1) The words "Advertising Material" appear on the outside of the
31 envelope, if any, in which a communication is sent and at the beginning and
32 ending of any written, recorded or electronic communication.

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

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

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

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

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

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

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

53 (iii) The first sentence of the communication shall state,
54 "IF YOU HAVE ALREADY HIRED OR RETAINED A

55 LAWYER IN THIS MATTER, PLEASE DISREGARD THIS
56 MESSAGE.”

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

61 (d) Unless the contents thereof include a solicitation of employment, a lawyer need
62 not comply with the requirements of paragraph (c) above when sending announcements of
63 an association or affiliation with another lawyer that complies with the requirements of RPC
64 7.5, newsletters, brochures, and other similar communications.

65 **Comment.**

66 [1] There is a potential for abuse inherent in direct in-person, live telephone, or
67 real-time electronic contact by a lawyer with a potential client known to need legal services.
68 These forms of contact between a lawyer and a potential client subject the layperson to the
69 private importuning of the trained advocate in a direct interpersonal encounter. The potential
70 client, who may already feel overwhelmed by the circumstances giving rise to the need for
71 legal services, may find it difficult fully to evaluate all available alternatives with reasoned
72 judgment and appropriate self-interest in the face of the lawyer’s presence and insistence
73 upon being retained immediately. The situation is fraught with the possibility of undue
74 influence, intimidation, and overreaching. The restrictions set forth in this Rule, however,
75 do not apply to efforts by a lawyer to get hired as an in-house counsel by a potential client.

76 [2] This potential for abuse inherent in direct in-person, live telephone, or real-time
77 electronic solicitation of potential clients justifies its prohibition, particularly since lawyer
78 advertising and written and recorded communication permitted under this Rule offer
79 alternative means of conveying necessary information to potential clients who may be in need
80 of legal services. Advertising and written and recorded communications which may be
81 mailed or electronically transmitted make it possible for a potential client to be informed
82 about the need for legal services, and about the qualifications of available lawyers and law
83 firms, without subjecting the potential client to direct in-person, live telephone, or real-time
84 electronic persuasion that may overwhelm the client’s judgment.

85 [3] The use of general advertising and written, recorded, or electronic communications
86 to transmit information from lawyer to potential client, rather than direct in-person, live

87 telephone, or real-time electronic contact, will help to assure that the information flows
88 cleanly as well as freely. The contents of direct in-person, live telephone, or real-time
89 electronic conversations between a lawyer and a potential client can be disputed and may not
90 be subject to third-party scrutiny. Consequently, they are much more likely to approach (and
91 occasionally cross) the dividing line between accurate representations and those that are false
92 and misleading.

93 [4] There is far less likelihood that a lawyer would engage in abusive practices against
94 an individual with whom the lawyer has a family, close personal, or prior professional
95 relationship, or in situations in which the lawyer is motivated by considerations other than
96 the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person
97 contacted is a lawyer. Consequently, the general prohibition in RPC 7.3(a) and the
98 requirements of RPC 7.3(c) are not applicable in those situations. Also, paragraph (a) is not
99 intended to prohibit a lawyer from participating in constitutionally protected activities of
100 public or charitable legal-service organizations or bona fide political, social, civic, fraternal,
101 employee, or trade organizations whose purposes include providing or recommending legal
102 services to its members or beneficiaries.

103 [5] But even permitted forms of solicitation can be abused. Thus, any solicitation that
104 contains information which is false or misleading within the meaning of RPC 7.1, which
105 involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence,
106 which involves contact with a prospective client who has made known to the lawyer a desire
107 not to be solicited by the lawyer, or which occurs within thirty (30) days after an accident or
108 disaster involving the individual or a member of the individual's family, is prohibited by RPC
109 7.3(b). Moreover, if after sending a letter or other communication to a client as permitted by
110 RPC 7.2 the lawyer receives no response, any further effort to communicate with the
111 potential client may violate the provisions of RPC 7.3(b)(1). Communications directed to
112 specifically identified recipients must be identified as advertisements, may need to be marked
113 with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead
114 the recipient about the nature of the communication.

115 [6] This Rule is not intended to prohibit a lawyer from contacting representatives of
116 organizations or groups that may be interested in establishing a group or prepaid legal plan
117 for their members, insureds, beneficiaries, or other third parties if the lawyer's purpose is to
118 inform such entities of the lawyer's willingness to cooperate with the plan in compliance
119 with RPC 7.6. This form of communication is not directed to a potential client. Rather, it is
120 usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal
121 services for others who may, if they choose, become potential clients of the lawyer. Under
122 these circumstances, the activity which the lawyer undertakes in communicating with such

123 representatives and the type of information transmitted to the individual are functionally
124 similar to, and serve the same purpose as, advertising permitted under RPC 7.2.

125 [7] The requirement in RPC 7.3(c) that certain communications be marked as
126 advertisements and contain other disclaimers do not apply to communications sent in
127 response to requests of potential clients or their spokespersons or sponsors. Nor do those
128 requirements apply to general announcements by lawyers, including changes in personnel or
129 office location, newsletters, brochures, and other similar communications which do not
130 contain a solicitation of professional employment.

131 [8] Paragraph (c)(6) requires that a lawyer retain a copy of each written, audio, video,
132 or electronically transmitted communication sent to a specific recipient under this Rule for
133 two years after its last dissemination along with a record of the name of the person contacted
134 and the person's address, telephone number, or telecommunication address to which the
135 communication was sent. If communications identical in content are sent to two or more
136 persons, the lawyer may comply with this requirement by retaining a single copy of the
137 communication together with a list of the names and addresses of the persons to whom the
138 communications were sent.

139 *[end of Appendix]*