

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO ADOPT PROPOSED SUPREME COURT RULE 44

No. M2003-00394-SC-RL1-RL - Filed June 29, 2004

For Publication

ORDER

On April 14, 2004, the Board of Professional Responsibility (“Board”) filed a “Petition to Reconsider, Alter or Amend” Rule 8, RPC 7.6 and Rule 44 of the Rules of the Supreme Court of Tennessee. In summary, the petition states that the Board “mailed initial registration packets and forms to twenty-six (26) organizations which were preliminary [sic] identified as potential intermediary organizations[.]” The petition states that the Board has received responses from a number of those organizations, some of which assert that they are not intermediary organizations for purposes of Rule 44. The petition asks the Court to alter or amend Rule 8, RPC 7.6 and Rule 44 “for clarification and guidance to the Board relating to the issues identified [in the petition].” The petition, however, does not explicitly state any particular legal issue(s), nor does it present the Court with any specific recommendations as to amendments that the Board deems advisable or necessary. For the reasons stated below, the Court respectfully denies the petition.

We begin by observing that Rule 44 serves to implement the provisions of Rule 8, RPC 7.6 (“RPC 7.6”). RPC 7.6 provides:

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.

(Emphasis added.)

As RPC 7.6 clearly indicates, the burden is on the lawyer who wishes to participate in the activities of an “intermediary organization” to confirm that the organization is in compliance with Rule 44. *If* the organization is an “intermediary organization” listed in RPC 7.6 and Rule 44, and *if* the organization is not in compliance with the requirements of Rule 44, the lawyer may not ethically “seek or accept a referral of a client, or compensation for representing a client, from [the] intermediary organization.” If the lawyer does seek or accept a referral or compensation from a non-complying organization, he or she is subject to disciplinary sanctions for violating RPC 7.6. Thus, it is the *lawyer* who can be sanctioned for participating with a non-complying intermediary organization, and not the intermediary organization itself. The text of Rule 44 supports the foregoing conclusion.

Rule 44(F)(1) (“Registration”) provides:

(1) If an organization complies in all material respects with this Rule, the Board of Professional Responsibility shall register the

organization under this Rule. If an organization fails to comply in any material respect with this Rule, the Board shall deny registration to the organization. If an organization registered under this Rule is found to no longer be in compliance with the requirements of this Rule, the Board shall revoke the registration of the organization.

Under Rule 44(F)(1), the Board's power over an intermediary organization is limited to: (1) registering a complying organization; (2) denying registration to a non-complying organization; or (3) revoking the registration of an organization that is no longer in compliance. If an organization asserts that it is not an intermediary organization and therefore does not have to register with the Board, Rule 44 does not authorize the Board to take any enforcement action against the organization. In such situations, the burden of risk (under Rule 8, RPC 7.6) falls on any lawyer who participates in an unregistered intermediary organization's activities (e.g., lawyer advertising cooperative, lawyer referral service, or prepaid legal service provider). Such a lawyer is subject to the filing of a disciplinary complaint against him or her for violating RPC 7.6. If a disciplinary complaint were to be filed, the status of the particular organization then would be resolved in the disciplinary proceeding against the lawyer.

Because the petition does not state any specific legal issue(s) to be resolved and does not request any specific amendment(s) of RPC 7.6 and/or Rule 44, and based upon the foregoing analysis of those two rules, the Court concludes that the Petition to Reconsider, Alter or Amend should be DENIED. Due to the nature of the petition and in recognition of the valuable public service performed by the Board of Professional Responsibility, the Court hereby waives the costs relating to the petition.

IT IS SO ORDERED.

PER CURIAM