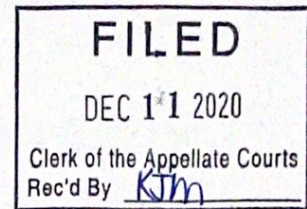


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



**IN RE: PETITION FOR THE ADOPTIONS OF REVISIONS TO TENN.
SUP. CT R. 8, RPCs 7.1, 7.2, 7.3, 7.4, 7.5 AND 7.6**

No. ADM2020-01505

**COMMENT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY
TO PETITION 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 Board of Professional Responsibility (the Board) pursuant to this Court's Order filed November 13, 2020, respectfully submits the following comments to proposed amendments to Tenn. Sup. Ct. R. 8, RPC's 7.1, 7.2, 7.3, 7.4, 7.5 and 7.6.

The Tennessee Bar Association's (TBA) Petition is a compilation of proposed rules from the Association of Professional Responsibility Lawyers (APRL) and amendments to the Model Rules of Professional Conduct approved by the American Bar Association (ABA) in 2018. While numerous states are considering amending these rules, fewer than ten jurisdictions have implemented changes¹.

Proposed RPC 7.1 – Communications Concerning a Lawyer's Services

The TBA's proposed RPC 7.1 adds subsections (b) and (c) which are currently addressed in Tenn. Sup. Ct. R. 8 RPC 7.2(a) and (b). Tennessee's current RPC 7.2(a)

¹ Implementation of Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising. (Jan 2, 2020) https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1-state-action-summary71-75.pdf.

which allows an attorney to advertise services is a dated version of Model Rule 7.2 (a) which allows an attorney to communicate information regarding the lawyer's services. The Board supports the updated language in proposed RPC 7.1(b) but disagrees with moving this provision to RPC 7.1. When the ABA considered revisions to these rules, the ABA's Executive Summary noted the following concern:

A dizzying number of state variations in the rules governing lawyer advertising exist. There are vast departures from the Model Rules and numerous differences between jurisdictions. These differences cause compliance confusion among intra-state and interstate lawyers and firms, time-consuming and expensive litigation, and enforcement uncertainties for bar regulators. At the same time, changes in the law on commercial speech, trends in the profession including increased cross-border practice and intensified competition from inside and outside the profession, and technological advances demand greater uniformity, more simplification, and focused enforcement.²

While the Board understands the TBA's proposed amendments intend to simplify and condense lawyer advertising rules, moving Tennessee's rules contrary to the existing framework in the Model Rules is confusing and contradictory to the need for uniformity in advertising rules as more attorneys and firms practice across state lines. Accordingly, the Board respectfully asserts current Tenn. Sup. Ct. R. 8 RPC 7.2(a) should be updated with the revised language but the rule should remain in RPC 7.2 consistent with the Model Rules. The Board respectfully asserts that current Tenn. Sup. Ct. R.8 RPC 7.2(b) requiring attorneys retain a copy of advertisements not be moved to proposed RPC 7.1(c).

² ABA proposed Model Rules of Professional Conduct 7.1 through 7.5. Revised 101. Executive Summary (August 2018). <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/101.pdf>.

The Board objects to comments [5] and [7] to proposed RPC 7.1 which are not included in the Model Rules. Proposed RPC 7.1 comment [6], which is included as comment [1] to Model Rule 7.2, outlines specific information that attorneys may publicly disseminate. The Board believes comment [6]'s listing of information appropriate for public dissemination is helpful to attorneys and consumers and supports adding comment [6].

The TBA's proposed petition removes current rules for specialization in Tenn. Sup. Ct. R. 8 RPC 7.4 and instead offers guidance in Proposed RPC 7.1 Comments [9] and [10]. Model Rule 7.2(c) addresses specialization requirements similar to existing Tenn. Sup. Ct. R. 8 RPC 7.4. The Board believes these rules provide specificity regarding expertise which is helpful to consumers and attorneys and objects to moving these specialization rules into comments.

The TBA's petition removes requirements for firm names, currently included in existing Tenn. Sup. Ct. R. 8 RPC 7.5, and instead offers direction in proposed RPC 7.1 Comments [11] through [13]. In 2018, the American Bar Association approved amendments removing requirements for firm names from the rules and instead offering guidance in comments [5] through [8] to Model Rule 7.1. The Board recognizes the overarching principle of these proposed amendments is simplifying attorney advertising rules while creating uniformity. Accordingly, the Board supports deleting Tenn. Sup. Ct. R. 8 RPC 7.5 and instead offering guidance regarding firm names in comments [11] through [13].

Proposed Rule 7.3 – Solicitation of Clients

The Board supports proposed RPC 7.3(a) which defines “solicitation” consistent with Model Rule 7.3(a). Proposed RPC 7.3(b) narrows prohibited solicitations to “in-person by face-to-face contact or live telephone”. While the TBA’s proposed RPC 7.3(b) is similar to Model Rule 7.3(b), the Board believes the following language of Model Rule 7.3 comment 2 elucidates the prohibited contact:

“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 or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of 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 an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

Accordingly, the Board respectfully objects to proposed RPC 7.3(b) narrowing the prohibited contact unless comment [2] is added.

Proposed Rule 7.3(b)(2) expands the category of potential clients that may be solicited to include “sophisticated user of legal services”. This term is defined in proposed RPC 7.3, Comment [4] as “an individual who has had significant dealings with the legal profession or who regularly retains legal services for business purposes”. The Board is concerned that the proposed definition of a sophisticated user could arguably be expanded to include an individual involved in protracted domestic litigation or multiple criminal charges. Accordingly, the Board

objects to the language in comment [4] “an individual who has had significant dealings with the legal profession”. Model Rule 7.3(b)(3) allows an attorney to solicit a “person who routinely uses for business purposes the type of legal services offered by the attorney.” The Board supports this exception using the language of Model Rule 7.3(b)(3).

Proposed RPC 7.3(c) requires the words “Advertising Material” be included on the “outside envelope, if any...” but deletes the requirement of current Tenn. Sup. Ct. R. 8, RPC 7.3(c)(6)(ii) that any communication seeking employment by a specific client in a specific matter shall not disclose the subject matter of the proposed representation on the outside of the envelope. The Board respectfully asserts that a potential client may not want their specific legal matter (example a DUI, etc.) specified on a postcard or self-mailing brochure. Accordingly, the Board objects to the deletion of Tenn. Sup. Ct. R. 8, RPC 7.3(c)(6)(ii)’s requirement from proposed RPC 7.3(c).

Proposed RPC 7.3(f) allows an attorney to compensate a person who is an employee or lawyer in the same firm for recommending or securing the services of the attorney. This proposed Rule is broader than Model Rule 7.2(b) and current Tenn. Sup. Ct. R. 8, RPC 7.2(c) which prohibits an attorney from giving anything of value to a person for recommending the lawyer’s services with limited exceptions. The Board respectfully suggests the broad language allowing compensation for referrals to “an employee or lawyer in the same firm” in proposed RPC 7.3(f) may be contrary to the prohibition of fee sharing with nonlawyers outlined in Tenn. Sup. Ct. R. 8, RPC 5.4(a) and therefore the Board objects to proposed RPC 7.3(f).

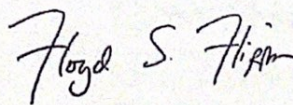
Proposed RPC 7.3(f)(5) and RPC 7.3 Comment [11] allow reciprocal referral agreements similar to Model Rule 7.2(b)(4). Proposed comment [11] lists the potential ethical problems raised by reciprocal agreements, i.e. interference with the lawyer’s professional

judgement, fee sharing and conflicts of interest. The Board objects to proposed RPC 7.3(f)(5) allowing reciprocal agreements based upon the concerns outlined in proposed comment [11].

Proposed RPC 7.6: Intermediary Organizations

Proposed RPC 7.6 deletes the substance of the definition of an “intermediary organization” and is inconsistent with the definition of an intermediary organization in Tenn. Sup. Ct. R. 44. The purpose of current Tenn. Sup. Ct. R 8 RPC 7.6 and Tenn. Sup. Ct. R. 44 is to protect the public from unscrupulous business models by requiring participating attorneys to ensure the referring organization meets criteria specified in Tenn. Sup. Ct. R. 44. While recognizing the great need for access to justice, the Board respectfully objects to this amendment due to concern that the amendment diminishes the current safeguards in place to ensure quality representation.

RESPECTFULLY SUBMITTED,



Floyd Flippin, Chair (BPR No. 010442)
Board of Professional Responsibility of the
Supreme Court of Tennessee

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Certificate of Service

I certify that the foregoing has been mailed to Joycelyn Ashanti Stevenson, Esq., Executive Director, Tennessee Bar Association, 221 4th Avenue North, Suite 400, Nashville, Tennessee 37219 by U.S. mail, on this the 11th day of December, 2020.

By:

Floyd S. Flippin

Floyd Flippin, Chair (BPR No. 010442)
Chairman of the Board

By:

Sandy Garrett

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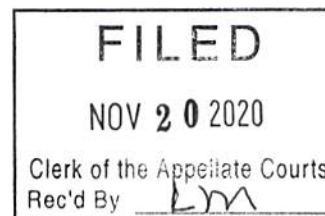
*RULE 31 MEDIATOR

**ALSO LICENSED IN KENTUCKY

*CERTIFIED AS A SPECIALIST IN
CIVIL TRIAL AND PRETRIAL
PRACTICE BY NATIONAL BOARD
OF TRIAL ADVOCACY

November 17, 2020

James M. Hivner
Clerk of Tennessee Appellate Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219



ADM 2020-01505

Re: Petition for the Adoption of Revisions to Supreme Court Rule 8 – Advertising

Dear Mr. Hivner:

While I do not have a problem with most of the proposed changes, I do believe that Tennessee needs to adopt and include in its advertising requirements that out of state law firms specify that they are not licensed in Tennessee or located in Tennessee. I believe this protects the public, and that there are sufficient unique issues under Tennessee law such that outside firms often make serious errors that do not serve the public as well as attorneys licensed and educated in Tennessee law. Many other states have this requirement, and it appears to me that it is in the public's best interest.

With best wishes, I remain,

Very truly yours,

Helen Sfikas Rogers

HSR/zc

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