

FILED

MAR 11 2021

Clerk of the Appellate Courts  
Rec'd By Lmm

IN THE SUPREME COURT OF TENNESSEE

IN RE:

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

No. ADM2020-01505

**REPLY OF THE TENNESSEE BAR ASSOCIATION TO THE COMMENT  
OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO 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 reply to the comment submitted by the Board of Professional Responsibility to the TBA’s petition asking the Court to adopt revisions to the portions of the Tennessee Rules of Professional Conduct focused on advertising of services by attorneys. The Board organized its Comment into three sections (Proposed Rule 7.1, Proposed Rule 7.3, and Proposed Rule 7.6), and this reply will address each section below. The TBA has only addressed the portions of the Board’s Comment that include objections but appreciates that the Board has not objected to parts of its proposed amendments.

**PROPOSED RPC 7.1**

**Moving RPC 7.2(a) and 7.2(b) to RPC 7.1(b) and 7.1(c):** The Board did not object to the revised, updated language of proposed RPC 7.2(a) and 7.2(b), however the Board objected to the TBA’s proposal to move RPC 7.2(a) and RPC 7.2(b) to create RPC 7.1(b) and (c). The TBA believes that moving proposed, revised RPC 7.2(a) and RPC 7.2(b) into RPC 7.1(b) and (c) is consistent with the goal of streamlining the focus of these provisions towards one rule that simply

prohibits false and misleading advertising. Accordingly, the TBA affirms its position that proposed, revised RPC 7.2(a) and RPC 7.2(b) should be moved into RPC 7.1(b) and (c).

**Proposed Addition of Comments to RPC 7.1:** The Board supports the addition of proposed Comment [6] to RPC 7.1, however, it objected to proposed Comments [5] and [7]. According to the Board, proposed Comments [5] and [7] are not in the Model Rules. The Board provides no further objection or argument for the exclusion of those comments. For the reasons detailed in its Petition, the TBA affirms its position that proposed Comments [5] and [7] should be added to RPC 7.1.

**Proposed Addition of Rules Regarding Specialization in RPC 7.1 and Removal from RPC 7.4:** The Board's comment indicates that it would prefer to keep rules for specialization separate, in RPC 7.4, arguing that those rules are helpful to consumers and attorneys. Respectfully, the TBA disagrees that a separate RPC 7.4 regarding specialization is more helpful to consumers and attorneys. The TBA believes that lawyers ought to be free to advertise any practice areas or specializations if the advertisement is not false or misleading. Accordingly, the TBA affirms its position that specialization guidance best fits in the comments to RPC 7.1

### **PROPOSED RPC 7.3**

**Proposed RPC 7.3(b):** The Board objects to the TBA's proposed RPC 7.3(b), unless comment [2] from the ABA Model Rules is added. The TBA believes that the Board's suggestion is helpful and that comment [2] from the ABA Model Rules should be added.

**Proposed RPC 7.3(b)(2) Regarding Solicitation of Potential Clients:** The TBA proposed to expand the category of potential clients that may be solicited to include "sophisticated user of legal services." The Board opposes this expansion, advocating for the ABA Model Rule exception of "person who routinely uses for business purposes" instead. The Board's argument

involves concern that individuals involved in protracted domestic litigation or multiple criminal charges might qualify as sophisticated users of legal services. The TBA believes that there are people who can be fairly viewed for purposes of solicitation as “sophisticated users of legal services” beyond just businesspeople. The TBA respectfully also submits that the rules, even under the TBA’s proposal, would still provide protections such as the inability to solicit individuals in a divorce case for 30 days and still provide protections against solicitations involving fraud, duress, coercion, or overreaching in any circumstances. Accordingly, the TBA affirms its position that the category of potential clients that may be solicited as an exception to the general rule should be expanded to include “sophisticated user of legal services.”

**Proposed RPC 7.3(c):** The Board objects to the deletion of the requirement in RPC 7.3(b)(6)(ii) that the nature of a proposed representation appear on the outside of any envelope sent as advertising material to a proposed client. The TBA agrees with the Board’s objection, however, only as to envelopes or other communications that are actually mailed. Given the increasing use of electronic media for communications, similar requirements should not be imposed upon emails, text messages, or other forms of electronic communications.

**Proposed RPC 7.3(f):** The TBA has proposed language in RPC 7.3(f) to allow a lawyer to compensate employees or lawyers in their own firm for recommending or securing the attorney’s services. The Board opposes this proposal, arguing that it may be contrary to the prohibition on fee sharing in RPC 5.4. The TBA submits that RPC 7.3(f) would not change the restriction on fee-sharing with non-lawyers in RPC 5.4. Indeed, proposed RPC 7.3(f) makes plain that while an attorney can provide compensation, such compensation cannot be in the form of sharing a fee or part of a fee. The TBA reaffirms the belief that it remains important and constructive to consider that many Tennessee law firms already pay in-house employees who help

with marketing efforts, and this proposed revision to the rules would operate to level the playing field for firms that may not have the resources to hire, for example, a Chief Marketing Officer. Further, to the extent that the Board's objection is driven by any concerns regarding pay to paralegals or other employees of a firm for helping bring in clients, it is also important to emphasize that the TBA's proposed revision would not change the fact that any solicitations that involve "coercion, duress, fraud, harassment, intimidation, overreaching or undue influence" would still be prohibited as would solicitations during the first 30 days after a personal injury.

**Proposed RPC 7.3(f)(5)**: The Board also opposes the TBA's proposed RPC 7.3(f)(5) allowing reciprocal referral agreements. It appears that the Board's only argument for its opposition involves repeating the concerns that are encompassed in proposed comment [11] to the revision. The TBA disagrees with the Board's objection, and notes that the very purpose of Comment [11] is to provide guidance relating to reciprocal agreements so that they are undertaken in compliance with the rule and not otherwise. The TBA believes the guidance, prohibitions, and safeguards in place are adequate to protect against the Board's concerns. Accordingly, the TBA affirms its position that RPC 7.3(f)(5) should be revised as proposed in its Petition.

#### **PROPOSED RPC 7.6**

**Proposed Removal of Catch-All Language in RPC 7.6**: The TBA proposed removing the "catch-all" language in RPC 7.6. The Board opposes removing the catch-all language, arguing that this language is a necessary safeguard to ensure quality representation. For the reasons detailed in its Petition, the TBA affirms its position that the catch-all language should be removed from RPC 7.6.

Respectfully submitted,

TENNESSEE BAR ASSOCIATION

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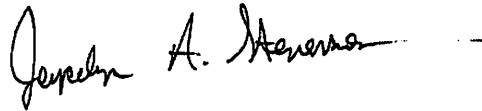
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/s/ Brian S. Faughnan

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**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 A to the petition by email.

A handwritten signature in black ink, appearing to read "Joycelyn A. Stevenson", with a horizontal line extending to the right from the end of the signature.

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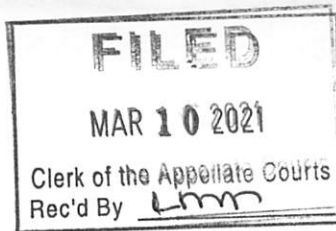
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Clerk James M. Hivner  
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Nashville, TN 37219-1407

RE: Proposed Changes to Lawyer Advertising Rules: No. ADM 2020-01505

Dear Mr. Hivner and Members of the Tennessee Supreme Court:

On behalf of the Tennessee Trial Lawyers Association (TTLA), the TTLA would like to register its support for the Board of Professional Responsibility's changes in proposed rules submitted and the 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.

Of particular concern to the TTLA are the Rules which address solicitation of clients following a car wreck. The TTLA shares the Board of Professional Responsibility's concerns related to use of the term, "sophisticated user of legal services" as having potential to expand solicitation in such a manner that would potentially shield unscrupulous business practices. It is TTLA's position that third party gunners, medical groups and the like who solicit individuals within thirty (30) days after car wrecks should not be protected as appropriate business development under the Rules. It is the potential injury clients and those who have lost loved ones who are most vulnerable immediately after an accident and need protection.

There is a fine line that must be taken between providing access to attorneys and unwanted solicitation. It is TTLA's belief that the Board of Professional Responsibility's suggestions better protect potential clients, and it is our hope that the Supreme Court adopts their suggestions.

Sincerely,

Matthew C. Hardin

John Griffith

Immediate Past President of the TTLA

President of the TTLA



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**appellatecourtclerk - ADM 2020-01505**

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**Date:** 3/10/2021 5:47 PM  
**Subject:** ADM 2020-01505  
**Cc:** Matt Hardin <matt@matthardinlaw.com>  
**Attachments:** TTLA ltr to Clerk Hivner 3-10-21.pdf

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See attached letter.

BEVERLY WASHINGTON  
Paralegal

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March 5, 2021

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James Hivner, Clerk of Appellate Courts  
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Re: No. ADM2020-01505

Dear Mr. Hivner:

I am writing to you and the Tennessee Supreme Court on behalf of the Knoxville Bar Association (KBA) Board of Governors regarding the proposed changes to TENN. SUP. CT. R. 8, RPCs 7.1, 7.2, 7.3, 7.4, 7.5, and 7.6.

The KBA's Professionalism Committee carefully considered the Court's Order and recommended the following to the KBA Board of Governors at its meeting on February 19, 2021:

- (1) Objection to the vagueness of the first part of the proposed definition of the term "sophisticated user of legal services" in R.P.C. 7.3(b)(2), which is in Comment [4] (any individual "who has had significant dealings with the legal profession");
- (2) Request clarification of R.P.C. 7.3(b) regarding the phrase "except as otherwise provided in paragraph (d)," since (b) and (d) are both phrased as prohibitions;
- (3) Objection to proposed R.P.C. 7.3(f) in its entirety, given concerns about the approval of providing things of value to "employees" or other nonlawyer agents for recommending a lawyer's services and the express approval of "reciprocal referral agreements" with nonlawyer professionals; and
- (4) Objection to the proposed deletion of the definition of "intermediary organization" in R.P.C. 7.6 and to the deletion of the catchall reference to other "similar organizations."

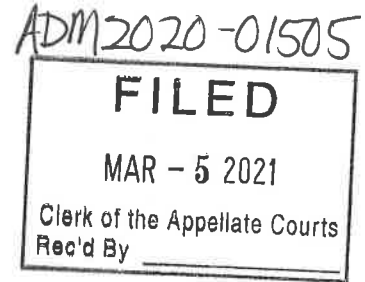
During the meeting, the Board of Governors engaged in extended discussion about the proposed changes and unanimously voted to support the Professionalism Committee's recommendation.

As always, the KBA appreciates the invitation to consider and comment on proposed rules changes.

Sincerely,

Cheryl G. Rice, President  
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)



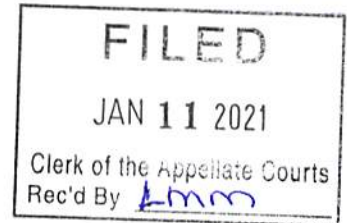
LAW OFFICES OF  
**SUMMERS, RUFOLO & RODGERS, P.C.**

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January 6, 2021



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Re: Proposed Changes to Lawyer Advertising Rules; No. ADM 2020-01505

Dear Mr. Hivner and Members of the Tennessee Supreme Court,

By way of introduction I am a seventy-nine-year-old member of the Tennessee bar since 1966 with a trial practice representing plaintiffs primarily in personal injury cases, defendants in criminal cases, and labor unions. I have also served as an assistant district attorney, municipal court judge, and finalist for a federal judgeship appointment.

Although I do not believe that the original intent in the decision of Bates v. State Bar of Arizona in 1977 has been followed in the field of lawyer advertising, I am not writing to advocate the elimination of that plague upon the public, legal profession, and judiciary. That horse has left the barn jumped the fence and is gone out of reach.

I do continue my opposition and distaste for "deceptive advertising" as depicted in the blog I wrote from 2017-2020 titled [www.truthinlawyeradvertising.com](http://www.truthinlawyeradvertising.com). The articles included in the blog state the objections to what myself and other individuals have with deceptive lawyer advertising.

Rather than expand the rules on the subject I respectfully suggest and would hope that the Tennessee Supreme Court would re-address the contents of a proposed plan around 2012 that was submitted for some consideration to tighten rather than loosen the regulations on lawyer advertising. The beneficiaries of lawyer advertising for the most part are a few law firms that spend large amounts of money overstating their credentials, accomplishments, and records in all forms of the media that do not benefit the public or the legal profession.

I speak only for myself individually and not on behalf of any organization that I have been or are a member in my fifty-four years of law practice.

Sincerely yours,

SUMMERS, RUFOLO & RODGERS, P.C.

By: \_\_\_\_\_

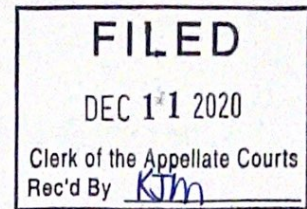
Jerry H. Summers

A handwritten signature in blue ink that reads "Jerry H. Summers". The signature is written over a horizontal line that serves as the "By:" line.

JHS/cnw



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**

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**No. ADM2020-01505**

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**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 changes<sup>1</sup>.

**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)

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<sup>1</sup> 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](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.<sup>2</sup>

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).

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<sup>2</sup> 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

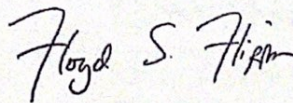


judgement, fee sharing and conflicts of interest. The Board objects to proposed RPC 7.3(f)(5) allowing reciprocal agreements based upon the concerns outlined in proposed comment [11].

### **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,



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

1302 Main Street  
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*Sandy Garrett*

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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 4<sup>th</sup> Avenue North, Suite 400, Nashville, Tennessee 37219 by U.S. mail, on this the 11<sup>th</sup> day of December, 2020.

By:

*Floyd S. Flippin*

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

By:

*Sandy Garrett*

Sandy Garrett (#013863)  
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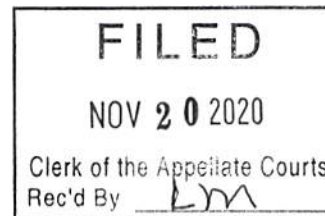
\*RULE 31 MEDIATOR

\*\*ALSO LICENSED IN KENTUCKY

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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,

A handwritten signature in blue ink, appearing to read "Helen Sfikas Rogers".

Helen Sfikas Rogers

HSR/zc

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