

Alabama Rules of Professional Conduct

Information About Legal Services

Rule 7.3.

Direct Contact with Prospective Clients.

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule.

(b) Written Communication

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days prior to the mailing of the communication;

(ii) the written communication concerns a civil proceeding pending in a state or federal court, unless service of process was obtained on the defendant or other potential client more than seven (7) days prior to the mailing of the communication;

(iii) the written communication concerns a criminal proceeding pending in a state or federal court, unless the defendant or other potential client was served with a warrant or information more than seven (7) days prior to the mailing of the communication;

(iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the

communication is directed is represented by a lawyer in the matter;

(v) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;

(vi) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;

(vii) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or

(viii) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(i) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed with the office of general counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the office of general counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends the identical communication to additional prospective clients, the lawyer shall, once a month, file with the office of general counsel a list of the names and addresses of those clients contacted since the previous list was filed;

(ii) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by any other form of restricted delivery or by express mail;

(iii) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar;

(iv) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document, and the manner of mailing the written communication shall not

make it appear to be an official document;

(v) the word "Advertisement" shall appear prominently in red ink on each page of the written communication, and the word "Advertisement" shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word "Advertisement" shall appear prominently in red ink on the address panel in 14-point or larger type;

(vi) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked "SAMPLE." The word "SAMPLE" shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words "DO NOT SIGN" shall appear on the line provided for the client's signature;

(vii) the first sentence of the written communication shall state: "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]";

(viii) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer obtained the information prompting the communication;

(ix) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem; and

(x) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication.

[Amended eff. 5-1-1996; Amended eff. 2-19-2009.]

Comment

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the nonlawyer to the private importuning of a trained advocate, in a direct impersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective

self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services. Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising, rather than direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely. Advertising is in the public view and thus subject to scrutiny by those who know the lawyer. This informal review is likely to help guard against statements and claims that might constitute false or misleading communications in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-person scrutiny and consequently are much more likely to approach (and occasionally cross) the line between accurate representations and those that are false and misleading.

Direct written communication seeking employment by specific prospective clients generally presents less potential for abuse or overreaching than in-person solicitation and is therefore not prohibited for most types of legal matters, but is subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disease, death, or injury, but only if the communication is not mailed until thirty (30) days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown can exist in this type of solicitation.

Common examples of written communications that must meet the requirements of subparagraph (b) of this rule are direct mail solicitation sent to individuals or groups selected because they share common characteristics, e.g., persons named in traffic accident reports or notices of foreclosure. Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule. Also not covered by this rule are responses by lawyers and law firms to requests for information from a prospective client or newsletters or brochures published for clients, former clients, those requesting it, or those with whom the lawyer or law firm has a familial or current or prior professional relationship.

Letters of solicitation and the envelopes in which they are mailed should be clearly marked "Advertisement." This will avoid the perception by the recipient that there is a need to open the envelope because it is from a lawyer or law firm, when the envelope contains only a solicitation for legal services. With the envelopes and letters clearly marked "Advertisement," the recipient can choose to read the solicitation or not to read it, without fear of legal repercussions.

In addition, the lawyer or law firm sending the letter of solicitation shall reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee.

This Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its 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 that the lawyer or the law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. 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 Rule 7.2.

Comparison with Former Alabama Code of Professional Responsibility

There is no comparable rule in the former Alabama Code of Professional Responsibility. Rule 7.3, before its amendment effective May 1, 1996, was a direct counterpart to Temporary DR 2-103, which was substantially adopted from Model Rule 7.3. The amendment effective May 1, 1996, changed the rule substantially from what was Temporary DR 2-103.

Note from the reporter of decisions: The order amending Rule 7.3(b)(1), effective February 19, 2009, is published in that volume of *Alabama Reporter* that contains Alabama cases from 999 So.2d.