

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

September 2, 2003

(a) A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) Notwithstanding the prohibitions described in Paragraph (a), a lawyer may solicit professional employment from a prospective client known to be in need of legal services in a particular matter by written communication. Such written communication shall:

(1) include on the bottom left hand corner of the face of the envelope the word "Advertisement" in red ink, with type twice as large as that used for the name of the addressee;

(2) only be sent by regular mail;

(3) not have the appearance of legal pleadings or other official documents;

(4) plainly state in capital letters "ADVERTISEMENT" on each page of the written communication;

(5) begin with the statement that "If you have already retained a lawyer, please disregard this letter";

(6) include the following statement in capital letters: "ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72201"; and,

(7) shall comply with all applicable rules governing lawyer advertising.

(c) In death claims, the written communication permitted by paragraph (b) shall not be sent until 30 days after the accident.

(d) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(e) Even when otherwise permitted by this rule, a lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by

the lawyer;

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

(3) the prospective client is known to the lawyer to be represented in connection with the matter concerning the solicitation by counsel, except where the prospective client has initiated the contact with the lawyer.

(f) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT:

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the lay person to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written communications which may be mailed make 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 in-person or telephone persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a

lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those situations.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence within the meaning of Rule 7.3(e)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(e)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(e).

[6] Letters of solicitation and their envelopes should be clearly marked "Advertisement." This will avoid the recipient perceiving that he or she needs to open the envelope because it is from a lawyer or law firm, only to find he or she is being solicited for legal services. With the envelope and letter marked "Advertisement," the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions.

[7] Paragraph (c) allows targeted mail solicitation of potential plaintiffs or claimants in wrongful death causes of action, but only if mailed at least thirty days after the incident. This restriction is reasonably required by the sensitized state of the potential clients who may be grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation.

[8] In addition, the lawyer or law firm, should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding his or her 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.

[9] Lawyers who use direct mail to solicit employment from accident victims or their survivors normally find the names of these persons, whom they believe may need legal services, in accident reports, newspaper reports, television or radio news, or other publicly available information. Some accident victims later die from their injuries after the

preparation of reports and news dissemination. In the event of such a death, an attorney, who relies in good faith upon all the reasonably and publicly available information which creates the appearance the victim is still alive at the time the lawyer sends a letter soliciting employment, is not in violation of the prohibition against sending written communications within thirty days in cases which may be the basis of wrongful death claims.

[10] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their 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 which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. 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.

[11] The requirement in Rule 7.3(b) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[12] Paragraph (f) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (f) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(e). See 8.4(a).