

PROPOSED (3/12/2020)

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 through live, in person or real time communication that is directed to someone who has not asked the lawyer to contact that person and who the lawyer knows or reasonably should know needs legal services in a particular matter where a motive for the lawyer contacting the prospective client is the lawyer's pecuniary gain. Such communications, ~~regardless of form, whether by text, email, electronic messaging, internet chat, live seminars or presentations, social media, blog, video, telephone, or by other live, real time interactive communication methods,~~ constitute improper solicitation and are subject to these Rules. Communications to another lawyer, former or current client or family member are exceptions to this Rule and are permitted.

(b) A lawyer shall not send, or permit to be sent on the lawyer's behalf, a live, in person or real time communication to a prospective client for the purpose of obtaining professional employment, ~~even if not prohibited in 7.3(a), if as described in Rule 7.3(a) if:~~

- (1) the communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident, event or disaster involving the person to whom the communication is addressed, or a relative or representative of that person, unless the accident, event or disaster giving rise to the cause of action occurred more than thirty (30) days prior to the delivery of the communication;
- (2) the communication concerns a civil proceeding pending in a state or federal court, or an administrative proceeding, unless service of process was obtained on the person involved in the proceeding or other potential client more than seven (7) days prior to the mailing of the communication;

- (3) the communication concerns a criminal proceeding pending in a state or federal court, unless the potential client was served with a warrant or information more than seven (7) days prior to the mailing of the communication;
- (4) the 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 that matter;
- (5) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;
- (6) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;
- (7) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is otherwise improper under these Rules; or
- (8) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor, 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.

(c) A lawyer shall not permit intermediaries, representatives, employees, staff or agents of the lawyer to solicit clients on the lawyer's behalf in violation of these Rules, and the lawyer is responsible for any such improper solicitation by the lawyer's or the lawyer's firm's intermediaries, representatives, employees, staff or agents. A lawyer may not use intermediaries, including non-lawyers, accountants, investigators, police officers, healthcare workers, courthouse personnel, etc. to solicit prospective clients or to otherwise seek or obtain clients for the lawyer or direct clients to the lawyer in violation of these Rules.

(d) A lawyer shall not enter into an agreement for, or charge or collect a fee or other compensation for professional employment obtained in violation of Rule 7.3.

(e) In addition to the requirements of Rule 7.2, direct communications by or on behalf of a lawyer to prospective clients for the purpose of obtaining professional employment which are not prohibited by these Rules are subject to the following additional requirements:

- (1) A sample of each communication and a sample of any envelope used with any mailed communication, along with a list of names and addresses of the recipients, shall be retained by the lawyer for six (6) years and made available on demand to the Office of General Counsel of the Alabama State Bar. If the communication is sent to multiple recipients and it is not reasonably possible for the lawyer to identify specific addresses for the recipients, the lawyer must retain a record sufficient to identify the recipients by group.
- (2) Written communications mailed to prospective clients shall not be sent by registered mail or by any other form of restricted delivery or by express mail or by any other means that could reasonably mislead the recipient;
- (3) It shall not be stated or implied that the communication is approved by the Alabama State Bar;
- (4) The communication shall not resemble a legal pleading, official government form or document (administrative, municipal, federal or state), or other legal document, and the design of the communication and manner of delivering the communication shall not make the communication appear to be an official document;
- (5) If a contract for representation accompanies the communication, it must be presented as a sample contract only and the top of each page of the contract shall be plainly and conspicuously marked "SAMPLE ONLY". The words "SAMPLE ONLY" shall be in bold ink in a color that contrasts

sharply with the background color and in a type size larger than the largest type used in the contract. The words “DO NOT SIGN” shall appear on the client signature line in bold ink in a color that contrasts sharply with the background color and in a type size larger than the largest type used in the contract;

- (6) The first sentence of the written communication shall state clearly and conspicuously: “IF YOU ALREADY HAVE A LAWYER FOR THIS MATTER, PLEASE DISREGARD THIS.”;
- (7) If the written communication is prompted by or is about a specific occurrence (e.g., accident, bankruptcy, divorce, death, arrest, recorded judgment, garnishment), the communication shall disclose, in easily understandable language, how the lawyer obtained that information;
- (8) A written communication to a prospective client seeking employment in a specific matter shall not reveal on the envelope, or on the outside of the self-mailing brochure or pamphlet, the nature of the prospective client’s legal problem or situation;
- (9) The lawyer sending or making the communication must be able to demonstrate promptly on request by a prospective client or by the Office of General Counsel of the Alabama State Bar that all of the information contained in the communication is truthful and is not misleading; and
- (10) If the case or matter referenced in the communication probably will be referred to another lawyer or another law firm, the communication must say that in clear, plain language.

Comments

As used in this Rule, “lawyer” includes the lawyer’s firm.

Even permitted forms of solicitation can violate these Rules if the solicitation contains false or misleading information.

There is a potential for abuse inherent in live, person-to-person direct or real time solicitation by a lawyer of prospective clients known to need legal services. These forms of solicitation subject the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal 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 communications permitted under Rule 7.2 offer 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 impair or overwhelm the client's judgment.

~~Direct written communication~~ Communications by a lawyer seeking employment by specific prospective clients that is not real time or in person generally presents less potential for abuse or overreaching than in-person real time solicitation and ~~is~~ are therefore not prohibited for most types of legal matters, but ~~is~~ are subject to reasonable restrictions, as set forth in these Rules, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. Thus, email and text communications, for example, are not real time person to person communications prohibited under 7.3(a), but are still subject to the other provisions and requirements of these Rules.

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, disaster, death, or injury, but only if the communication is not made until thirty (30) days after the incident or matter. 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 by the abuses that experience has shown can exist in this type of solicitation.

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 the communications permitted under Rule 7.2.

This Rule does not prohibit communications ordered by a court or by other official tribunal recognized as such by the Office of General Counsel of the Alabama State Bar.

A lawyer's communication typically does not constitute prohibited solicitation under these Rules if it is directed to the general public, such as through a billboard, an internet banner advertisement, a website or a commercial on television on radio, or if it is in response to a request for information or is automatically generated in response to an internet search.

A non-electronically transmitted written communication must be plainly marked "ADVERTISEMENT" both on the top of its first page and on the face of the envelope or other packaging used to transmit the communication. The word "ADVERTISEMENT" must be in bold print larger than the largest print in the communication and in a color that contrasts sharply with the background color.

An electronic mail or message communication must be plainly and conspicuously designated "ADVERTISEMENT" in the subject portion of the electronic communication in print larger than the largest print in the electronic communication and at the very beginning of the communication's text.

An audio or video communication, internet or social media communication, electronic communication, or a recorded telephone message, must plainly and clearly disclose that it is an "ADVERTISEMENT" at the very beginning of the

communication before any other writing or any other words being spoken, and again at the communication's conclusion.

~~The requirements of this Rule do not apply to communications between lawyers, between lawyers and their current or former clients, and between lawyers and their family members.~~

This Rule does not prohibit a lawyer from referring clients to another lawyer or a non-lawyer professional pursuant to a reciprocal agreement if the reciprocal referral agreement is not exclusive, the client is fully informed in writing of the existence and nature of the agreement prior to the referral and agrees to the referral, and the referral does not otherwise violate these Rules.

The first sentence of a targeted direct mail or email advertisement must be *"IF YOU HAVE ALREADY RETAINED A LAWYER FOR THIS MATTER, PLEASE DISREGARD THIS COMMUNICATION,"* prominently and clearly presented.

A targeted or direct mail communication is one that is prompted by a specific occurrence. Direct mail or email advertisements sent out generally, such as bulk mailers to a specific zip code, are not targeted communications unless the lawyer knows those recipient(s) has or have a specific legal problem.

Disclosures under 7.3(e)(7) must be reasonably specific. For example, if a lawyer obtained a prospective client's name from a police accident report, any solicitation permitted by these Rules should state that the name was obtained from a "police accident report", rather than a more vague reference to "public records." If a prospective client's name is obtained from a jail inmate's list or booking log, that should be stated in the communication. If the prospective client's name was obtained from a foreclosure list in a specific newspaper, the appropriate language should state that the lawyer obtained the name from "foreclosure list in [name of newspaper]".