

9-4

Del Ciampo, Joseph

From: Giovanna Shay <GShay@ghla.org>
Sent: Monday, May 6, 2019 9:48 AM
To: Del Ciampo, Joseph
Cc: Shelley White; Nilda Havrilla
Subject: Legal Services Comment on Proposed RPC 7.3 Commentary
Attachments: GHLA_CLS_NHLAA_Proposed_RPC_7.3_Comment_5.6.19.pdf

Dear Attorney Del Ciampo,

Please find attached a comment submitted by Greater Hartford Legal Aid (GHLA), New Haven Legal Assistance Association (NHLAA), and Connecticut Legal Services (CLS), expressing concern about the line in the proposed commentary to the revised RPC 7.3 which states that "live person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled."

As you know, the prohibition on in-person contact in the circumstances listed in proposed RPC 7.3(c) applies even when in-person contact is "not otherwise prohibited" by the proposed RPC 7.3(b), which permits in-person contact with prospective clients "under the auspices of a public or charitable legal services organization" when pecuniary gain is not a significant motive. Without repetition of the express carve-out for public or charitable legal services organizations in the commentary to RPC 7.3, we are concerned that this language in the commentary could chill outreach to or the provision of free legal services to these vulnerable populations, and potentially run afoul of First Amendment rights.

Thank you for the opportunity to comment.

Respectfully,

Giovanna Shay
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Greater Hartford Legal Aid



Connecticut Legal Services



NEW HAVEN
LEGAL
ASSISTANCE
ASSOCIATION, INC.

VIA ELECTRONIC MAIL

May 6, 2019

Rules Committee of the Superior Court
Attn: Joseph J. Del Ciampo, Counsel
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Joseph.DelCiampo@jud.ct.gov

Re: Proposed Commentary to RPC 7.3

Dear Rules Committee,

We write on behalf of the undersigned legal services programs to submit this comment regarding a proposed change to the Commentary to Rule of Professional Conduct (RPC) 7.3 (attached), which deals with Solicitation of Counsel. Greater Hartford Legal Aid (GHLA), Connecticut Legal Services (CLS), and New Haven Legal Assistance Association (NHLAA) provide free legal services to indigent clients, including the elderly, immigrants, and the disabled. Our attorneys practice in areas including housing, family violence, elder law, education, employment, public benefits, and immigration law.

We are troubled by the bolded language in the following line of the proposed commentary to RPC 7.3 which reads: "live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress **is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.**" As described below, we are concerned that this language will chill the provision of free legal services to these vulnerable populations, as well as outreach to these groups to advise them of their legal rights and the availability of free legal services.

As the Committee is aware, the prohibition on live person-to-person contact with prospective clients contains an exception for contact with prospective clients "under the auspices of a public or charitable legal services organization." Current RPC 7.3(a)(2); Proposed RPC 7.3(b)(2). The Proposed Revision to RPC 7.3 reaffirms this "safe harbor" for free legal services, by stating affirmatively that the prohibition on live person-to-person contact applies only "when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain" Proposed RPC 7.3(b).

These safe harbor provisions for free legal services in our Connecticut rules are in part a recognition of the First Amendment case law affirming a lawyer's right to contact a prospective client when the lawyer's motivation is protected speech and association. See *In re Edna Smith Primus*, 436 U.S. 412 (1978) (actions of attorney cooperating with ACLU in contacting women who were sterilized as a condition of receiving public medical assistance to advise them of their rights and of the availability of free legal assistance from nonprofit organization was not subject to disciplinary action under South Carolina bar rules, because it constituted protected speech under First Amendment); see also *NAACP v. Button*, 371 U.S. 415 (1963).

However, in the Proposed Rule RPC 7.3, "even when not otherwise prohibited by subsection (b)", a lawyer shall not solicit professional employment from a prospective client when certain other conditions are present. Proposed RPC 7.3(c). Such situations include "coercion, duress, or harassment." Proposed RPC 7.3(c)(3).

Our concern is that the new commentary to this trumping rule states that live person-to-person contact with "the elderly, those whose first language is not English, or the disabled" is "ordinarily not appropriate," without any carve-out for the provision of free legal services.

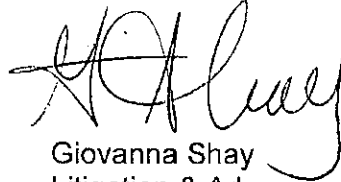
GHLA, CLS, and NHLAA serve many immigrant communities whose members' first language is not English, as well as Spanish-speaking members of the Puerto Rican community, not only in immigration matters, but also in other civil legal service practice areas. We serve the elderly, including conserved persons who are seeking legal advice regarding the actions of their conservators and/or the Probate Courts. We also serve the disabled, sometimes in contexts such as employment, housing, education, public benefits, and others. Our legal services attorneys do outreach to members of the community regarding these services – at senior centers, libraries, community health clinics, schools, places of worship, and many other locations.

Without repetition of the clear, express carve-out for free legal services, we are concerned that the prohibition in the Revised RPC 7.3(c), coupled with the new Commentary, could be interpreted overly broadly, to cancel out the protection for live person-to-person contact "[u]nder the auspices of a public or charitable legal services organization" when pecuniary gain is not a significant motive. Revised RPC 7.3(b). This could chill the provision of free legal services to some of the groups most in need of them and least able to access the legal system without an attorney. It also could run afoul of First Amendment protections.

Accordingly, the undersigned legal services organizations propose the amendment of the proposed Commentary as reflected in the following bolded language: "Live person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate **if pecuniary gain is a significant motive; while the elderly, those whose first language is not English, or the disabled may be offered free legal services through in-person contact under the auspices of a public or charitable legal services organization, this will ordinarily not be appropriate if pecuniary gain is a significant motive.**"

We appreciate the opportunity to comment. Thank you for your consideration.

Respectfully submitted,



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AMENDMENT NOTE: The purpose of the amendments to Rules 7.1–7.5 and to Section 2-28A is to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising.

Rule 7.3. Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

[(a)](b) A lawyer shall not [initiate personal,] ~~solicit professional employment by live [telephone, or real-time electronic] person-to-person contact~~[, including telemarketing contact, for the purpose of obtaining professional employment, except in the following circumstances:] when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain unless the contact is:

(1) [If the target of the solicitation is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client] ~~With a lawyer or a person who has a family, close personal or prior business or professional relationship with the lawyer;~~

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization;

(4) [if the target of the solicitation is] With a person who routinely uses for business purposes the type of legal services offered by the lawyer or with a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.

[(b)](c) A lawyer shall not [contact or send a written or electronic communication to any person for the purpose of obtaining] solicit professional employment even when not otherwise prohibited by subsection (b) if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer;

(2) [It has been] The target of the solicitation has made known to the lawyer [that the person does not want to receive such communications from] a desire not to be solicited by the lawyer;

(3) The [communication] solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

[(4) 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;] or

[(5)](4) The [written or electronic communication] solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the [communication] solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to

the mailing of the [communication] solicitation, or the recipient is a person or entity within the scope of subsection (b) of this Rule.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~[(c)](e)~~ Every written [communication] solicitation, as well as any [communication] solicitation by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from anyone known to be in need of legal services in a particular matter, must be clearly and prominently labeled "Advertising Material" in red ink on the first page of any written [communication] solicitation and the lower left corner of the outside envelope or container, if any, and at the beginning and ending of any [communication] solicitation by audio or video recording or other electronic means. If the written [communication] solicitation is in the form of a self-mailing brochure or pamphlet, the label "Advertising Material" in red ink shall appear on the address panel of the brochure or pamphlet. [Brochures] Communications solicited by clients or any other person, or if the recipient is a person or entity within the scope of subsection (b) of this Rule, the solicitation need not contain such marks. No reference shall be made in the [communication] solicitation to the [communication] solicitation having any kind of approval from the Connecticut bar. Such written [communications] solicitations shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

(d) The first sentence of any written communication concerning a specific matter shall be: "If you have already retained a lawyer for this matter, please disregard this letter."

(e) A written communication seeking employment 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 legal matter.

(f) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "Sample" in bold letters in red ink in a type size one size larger than the largest type used in the contract and the words "Do Not Sign" in bold letters shall appear on the client signature line.

(g) Written communications shall be on letter-sized paper rather than legal-sized paper and shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(h) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the target of the solicitation.]

[(i)](f) Notwithstanding the prohibitions in [subsection (a)] this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses [in-person or telephone] live person-to-person contact to [solicit] enroll members[hips] or sell subscriptions for the plan from persons

who are not known to need legal services in a particular matter covered by the plan.

COMMENTARY: [A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a] Subsection (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication [typically does not constitute] is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to [Internet] electronic searches.

[Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.]

"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

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"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 over-reaching.

The potential for [abuse] overreaching inherent in [direct in-person, live telephone or real time electronic solicitation] live person-to-person contact justifies [their] its prohibition, [particularly] since lawyers have alternative means of conveying necessary information [to those who may be in need of legal services]. In particular, communications can be mailed or transmitted by e-mail or other electronic means that [do not involve real time contact and] do not violate other laws [governing solicitations]. These forms of communications [and solicitations] make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to [direct in-person, telephone or real-time electronic] live person-to-person persuasion that may overwhelm a person's judgment.

[The use of general advertising and written, recorded and electronic communications to transmit information from lawyer to the public,

rather than direct in-person, live telephone, or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be 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, live telephone, or real-time electronic] live person-to-person contact can be disputed and [are] may not be subject to a 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.

There is far less likelihood that a lawyer would engage in [abusive practices] overreaching against a former client, or a person with whom the lawyer has a close personal, [or] family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for [abuse] overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. [Consequently, the general prohi-

bition in Rule 7.3 (a) and the requirements of Rule 7.3 (c) are not applicable in those situations. Also, nothing in this Commentary] Sub-section (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[In determining whether a contact is permissible under Rule 7.3 (b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Moreover, if after sending a letter or other communication to a member of the public as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the person may violate the provisions of Rule 7.3 (b).

The requirement in Rule 7.3 (c) that certain communications be marked "Advertising Material" 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 any person known to be in need of legal services within the meaning of this Rule.]

A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c) (2), or that involves contact with

someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 (c) (1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

This Rule [is] ~~does~~ 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 people who are seeking legal services for themselves. 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. [Subsection (i) 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.]

someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 (c) (1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

This Rule [is] does 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 people who are seeking legal services for themselves. 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. [Subsection (i) 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.]

Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Subsection [(i)](f) of this Rule permits a lawyer to participate with an organization that 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 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, subsection [(i)](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 ensure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (b). [See 8.4(a).]

AMENDMENT NOTE: The purpose of the amendments to Rules 7.1–7.5 and to Section 2-28A is to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising.

[Rule 7.4. Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.