September 29, 2020

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: Revised Proposed Amendment to RPC 7.3, Publication Order 25700-A-1287

Dear Madam Clerk:

We are Washington lawyers who have deep experience practicing in the areas of legal ethics and lawyer professional responsibility. Some of us served on a subcommittee of the WSBA Committee on Professional Ethics that made the original proposals for changes in the advertising and solicitation legal ethics rules now under consideration by the Washington Supreme Court, and we are all long-time members of the Association of Professional Responsibility Lawyers (APRL), a national association of lawyers who are experts in the law of lawyering. One of us (Peter Jarvis) is a co-author of the leading national treatise on legal ethics, two of us (Mark Fucile and Art Lachman) are co-authors and editors of Washington treatises on the same subject, and the fourth of us (Bruce Johnson) has a national media practice and is the author of a treatise on commercial speech under the 1st Amendment law who has also long advised his large law firm on ethics and loss prevention matters.

In our representation of lawyers and law firms, we are well acquainted with the adverse effects of advertising and solicitation restrictions in the ethics rules. In particular, the current bright-line prohibition on in-person solicitation of potential clients in our experience significantly chills lawyers' willingness and ability to explain to people in an effective way when these potential clients have a legal problem and how lawyers can assist them when they do. At a time when the profession should be focusing on increasing access to legal services by people at all income levels, we applaud the Washington Supreme Court's willingness to consider substantial reform to the advertising and solicitation rules. We write here to explain our opposition to continuing absolute prohibitions in RPC 7.3 on in-person solicitation in the four specific practice areas, as contained in the Court's revised proposal.

We understand that the current working draft of amendments to RPC 7.3 that the Court published for public comment on January 30, 2020 (Current Draft), was based on a proposal submitted by the King County Bar Association on April 22, 2019 (KCBA Proposal). The KCBA Proposal, like the Current Draft, added four practice areas in which in-person solicitation or the electronic equivalent is prohibited: "personal injury law, family law, criminal law or bankruptcy law."

We will address the constitutional deficiencies of the KCBA Proposal in the next section. Before we do, however, we believe it is important to note the principal research and drafting deficiencies of the KCBA Proposal:

- The KCBA Proposal includes no data of any kind supporting the proposition that these four areas warrant special treatment. As the Court is aware, the Original Proposal to amend RPC 7.3 was the product of a thorough review by the WSBA that, in turn, reflected extensive research in this area by APRL and the ABA. If there was hard data supporting the practice restrictions suggested in the KCBA Proposal, we would have expected to have seen it in the KCBA's letter of April 22, 2019. There is none referenced—leading to the reasonable conclusion that the KCBA has no data to support its position.

- The KCBA Proposal does not include any definitions for these areas. This is a recipe for confusion among members of the Bar and consequent difficulties in enforcement. For example, because the KCBA Proposal lacks definitions, the prohibition on in-person solicitation for "bankruptcy law" would extend to contacting the CEO of a Fortune 500 company contemplating Chapter 11. Similarly, "family law" might be read so broadly as to preclude a civil rights lawyer from contacting a person known to be interested in litigating a personal rights question that touches on "family" issues.

- The KCBA Proposal does not point to any other states that have adopted such restrictions—let alone implemented them successfully. As noted, the ABA recently amended its Model Rule 7.3 and did *not* include any of these practice restrictions. And as noted below, several states have amended, or have proposed to amend, their versions of RPC 7.3 without specifying specific areas of law.

In sum, if the intent of the KCBA Proposal was to address situations that might involve coercion, duress, or harassment, that is already included in the Original Proposal. The Original Proposal correctly balances the interests of preventing the chilling of lawyers' ability to discuss with potential clients how their legal needs can be served, while creating enforceable restrictions when those contacts cross the line to being abuse abusive. In short, we respectfully believe that it is far better to restrict coercive conduct specifically than entire practice areas generally.

Constitutional Considerations

Solicitation of clients is a "fundamental right" that is protected by the First Amendment.[1] While states can reasonably restrict the time, place, and manner of solicitation, promulgate narrowly drawn rules to proscribe solicitation that in fact is "misleading,

[1] *In re Primus*, 436 U.S. 412, 426 (1978).

overbearing" or the like, and "forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils,"[2] such regulations must be supported by competent evidence establishing a compelling governmental interest.

Thus, in 1978, in the *Primus* case, the United States Supreme Court held that South Carolina could not penalize the ACLU's written solicitation of victims of unwanted sterilization operations—a species of what the KCBA Proposal calls "personal injury law"—and stressed that nonprofit organizations such as the ACLU that pursue "civil-liberties objectives"[3] have an absolute First Amendment right to engage in such solicitations.[4]

To the extent the disfavored areas of law listed in the KCBA Proposal reach such noncommercial solicitations, therefore, the proposed Rule is inconsistent with *Primus* and directly violates the First Amendment rights of lawyers and prospective clients.

Of course, the United States Supreme Court has permitted states to promulgate solicitation regulations that prevent in-person solicitation of accident victims in hospitals, in situations where the lawyer is motivated by pecuniary gain.[5] Such pecuniary gain solicitations are considered "commercial speech" and are governed by different First Amendment requirements than nonprofit solicitations. "The constitution allows greater government regulation of commercial speech because commercial speech has a great potential to mislead and because the state has an interest in [protecting the public from those seeking to obtain the public's money."[6]

In those circumstances, the state must satisfy the requirements of the *Central Hudson*[7] test in justifying the four disfavored areas of law in which in-person solicitation or the electronic equivalent is categorically prohibited—"personal injury law, family law, criminal law or bankruptcy law."

In evaluating these "personal injury law, family law, criminal law or bankruptcy law" prohibitions as commercial speech restrictions under *Central Hudson*, the Washington Supreme Court considers the following factors:

> A four-part test determines whether commercial speech restrictions are permissible. *Cent. Hudson*, 447 U.S. at 557, 100

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[2] *Id.* at 438-39.

[3] *Id.* at 422.

[4] Needless to say, there are many nonprofit groups that assist consumers and other individuals in the four disfavored areas of law listed in the KCBA Proposal. These organizations, such as the Legal Foundation of Washington, the Equal Justice Coalition, the Northwest Justice Project, and Columbia Legal Services play valuable roles in facilitating access to justice by individuals with limited means. The KCBA Proposal, without any supporting data, would improperly limit those organizations' outreach to such individuals.

[5] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[6] *Kitsap County v. Mattress Outlet/Kevin Gould*, 153 Wn.2d 506, 511-12, 104 P.3d 1280 (2005).

[7] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

> S.Ct. 2343. The *Central Hudson* test asks (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary. The party seeking to uphold a restriction on commercial speech carries the burden of justifying it. . . .[8]

Apparently, the KCBA Proposal has designated —without any supporting data or supporting evidence whatsoever — four disfavored categories of law and practice for which all in-person and real-time communications about these subjects are to be banned. Absent proof that these restrictions satisfy the four *Central Hudson* requirements, it is likely that a court would strike down the KCBA Proposal as a violation of First Amendment rights, even against commercial lawyer-client solicitations.

Crucially, on the other side of the equation, the U.S. Supreme Court has also noted the significant *benefits* of direct, in-person solicitation by professionals. The Court stated in a 1993 case involving accountants that "[i]n the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. . . . Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation."[9] Thus, the Court required the proponent of solicitation restrictions for accountants to provide evidence "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[10] The KCBA Proposal, citing the four disfavored areas of law without any data or evidentiary support for restrictions on solicitation in those practice areas, certainly fails that test.

Recent Amendments in Other Jurisdictions

Several jurisdictions have recently adopted or proposed changes to the solicitation ethics rule without creating practice or subject area exceptions. The Oregon version of RPC 7.3 was amended in January 2018 to prohibit any form of solicitation only where "(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer; (b) the person who is the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or (c) the solicitation involves coercion, duress or harassment." The rule in Oregon does not make any exception for areas of practice, and to our knowledge, there has no problem in applying and enforcing this rule as revised.

[8] *Kitsap County v. Mattress Outlet/Kevin Gould*, 153 Wn2d at 512.
[9] *Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993).
[10] *Id.* at 770-71.

The same is true in Virginia, which revised its version of RPC 7.3 several years ago to prohibit solicitation in any manner only where "(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involved harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits."

And the District of Columbia's version of the solicitation rule, in D.C. RPC 7.1(b), has long provided that even in-person solicitation is permitted unless "(1) The solicitation involves use of a statement or claim that is false or misleading . . .; (2) The solicitation involves the use of coercion, duress or harassment; or (3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer."

Utah recently made significant revisions to its advertising and solicitation rules, effective on August 14, 2020, deleting RPC 7.3 in its entirety and simply prohibiting lawyers in revised RPC 7.1(b) from "interact[ing] with a prospective client in a manner that involves coercion, duress, or harassment." A comment to the rule now notes: "In order to avoid coercion, duress, or harassment, a lawyer should proceed with caution when initiating contact with someone in need of legal services, especially when the contact is 'live,' whether that be 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."

While the recently revised solicitation rule in Arizona, effective on January 1, 2021, retains its ban on in-person solicitation in certain situations, in the more general prohibition against all forms of solicitation, the court there chose to *remove* a specific reference to solicitation relating to "a personal injury or wrongful death [that] is made within thirty (30) days of such occurrence," leaving that ban covering only situations in which "(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment." Contrary to the modification being proposed here, the Arizona Supreme Court has moved away from solicitation restrictions focused on a specific practice area.

And a July 2020 proposal to amend Illinois RPC 7.3 by a Chicago Bar Association/Chicago Bar Foundation task force, like the pending proposal here in Washington, would *permit* solicitation in any form as long as the target has not made known to the lawyer a desire not to be solicited, or the solicitation does not involve coercion, duress, or harassment. As noted in a proposed comment (on page 76 of the report), this proposal also adds a narrow exception to permitted solicitation in RPC 7.3 "to address lawyers' contact with prospective clients at a point in an ex parte proceeding when contact poses a substantial risk of physical harm to the party seeking the protective order."

In enacting the revised version of RPC 7.3 as originally proposed and presented by the WSBA, the Washington Supreme Court would be joining these jurisdictions, and likely others also considering reform, in recognizing that a lawyer's ability to communicate about a potential

client's legal problems, including assisting them in determining whether such clients even have a legal problem, is a good thing, not a bad thing. Of course, there is potential for abuse in these situations, but the rule continues to prohibit such conduct. Creating vague practice or subject area exceptions to permitted solicitation would only serve to continue chilling lawyers' ability to inform clients about their legal needs and their access to needed legal advice.

For the foregoing reasons, we respectfully encourage the Court to adopt the Original Proposal for revisions to Washington RPC 7.3, without carving out practice area exceptions, as well as the additional amendments to the advertising and solicitation rules as contained in the earlier proposal. We are available at your convenience to answer any questions you may have.

Sincerely,

Mark J. Fucile, WSBA #23736
Peter R. Jarvis, WSBA #13704
Bruce E.H. Johnson, WSBA #7667
Arthur J. Lachman, WSBA #18962

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Comment on Proposed Amendment to RPC 7.3 -- Publication Order No. 25700-A-1287
Date:	Tuesday, September 29, 2020 9:02:56 AM
Attachments:	ltr to court re 7.3 solicitation proposal 9-29-20.pdf

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From: Arthur Lachman [mailto:artlachman@lawasart.com]
Sent: Tuesday, September 29, 2020 8:57 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to RPC 7.3 -- Publication Order No. 25700-A-1287

Madam Clerk, attached is a comment submitted on the above-referenced rule proposal. This comment is submitted on behalf of WSBA members Mark Fucile, Peter Jarvis, Bruce Johnson, and myself. I was informed by email that we are permitted to submit this comment by email notwithstanding that it exceeds 1,500 words. Please let me know if you have any questions.

Thank you,

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