

# WASHINGTON STATE BAR ASSOCIATION

Board of Governors

Rajeev Majumdar, President

April 28, 2020

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

**re: Comment re the Matter of Revised Proposed Amendment to RPC 7.3 and the Comments Thereto — Solicitation of Clients, Publication Order 25700-A-1287**

Dear Madam Clerk:

As President of the Washington State Bar Association (WSBA), I submit the following comment on behalf of the WSBA in opposition of the proposed amendments of RPC 7.3 and the Comments Thereto — Solicitation of Clients.

With this comment, we hope to provide the Court with the background as we understand it, the steps we have taken to have an analysis done, and the rationale for our opposition to the changes.

In 2018, per the Board of Governors of the Washington State Bar Association (BOG) request, the WSBA's Committee on Professional Ethics (CPE) created a taskforce to provide comprehensive suggested amendments to Title 7 of the Rules of Professional Conduct ("RPC"), including RPC 7.3.

The 2018 Taskforce's suggested amendments were approved to be sent to the Supreme Court by the BOG on March 8, 2018. On January 30, 2020, the Supreme Court, having reviewed the recommendations, published for comment a revised proposed amendment to RPC 7.3. On February 3, 2020, the BOG tasked the CPE to formulate its view on the revised proposed amendments prior to its April 17-18, 2020 meeting as to whether the BOG should submit a comment on the revised proposed amendment and if so, a recommendation as to the content of a comment.

Attached hereto and incorporated by reference are the March 10, 2020 Report and Recommendations of the CPE to the BOG regarding the revised proposed amendment to RPC 7.3 and the comments thereto. In short, the CPE outlines critical concerns that the BOG takes seriously. Their concerns and recommendations are in the attached analysis report. In addition to the specific recommendations, the report also explains that generally there are a number of discrepancies and confusion that the new proposed substantive changes would bring to revised RPC 7.3(a), which do not integrate coherently with other critical changes in the rules as submitted in 2018.

At the April 17, 2020 BOG meeting, CPE subcommittee members Asel Neutze and Pam Anderson presented the Committee's recommendation that the revised proposed amendments should not be



adopted as provided by the Supreme Court revisions published for comment on January 30, 2020. The BOG unanimously adopted this position.

For these reasons, the WSBA respectfully urges the Court not to adopt the Revised Proposed Amendment to RPC 7.3 and the comments thereto.

In Service,



Rajeev D. Majumdar  
WSBA President

RDM/jra

Att: Committee on Professional Ethics' Recommendation on Revised Proposed Amendment to Rule 7.3 (5 pages)



**MEMORANDUM**

TO: The President, President-elect, and Board of Governors  
FROM: Committee on Professional Ethics  
RE: Recommendation on Revised Proposed Amendment to Rule 7.3  
DATE: March 10, 2020

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**ISSUE**

In March 2017, the Board of Governors (BOG) requested the Committee on Professional Ethics (CPE) review suggested amendments to the Rules of Professional Conduct in light of the Association of Professional Responsibility Lawyers (APRL) Report on Lawyer Advertising. The CPE formed a special work group (hereinafter referred to as “2017 workgroup”) which provided a comprehensive report and recommendation on proposed amendments to Title 7 of the Washington Rules of Professional Conduct (“RPC”), including RPC 7.3.

On March 8, 2018, the BOG fully adopted the proposed amendments and submitted them to the Washington Supreme Court. On January 30, 2020, the Supreme Court having reviewed the public comments to the proposed amendments published for comment a revised proposed amendment to RPC 7.3. On February 3, 2020, the BOG requested the CPE to formulate its view on this revised proposed amendment.

In particular, the BOG asked the CPE to provide its recommendation as to whether the WSBA should submit a comment on the revised proposed amendment, and if so, a recommendation as to the content of such a comment.

The CPE believes that the WSBA should submit a comment on the revised proposed amendment and the content of the comment should be as follows.

**A. The CPE’s view on the proposed revised amendment to Rule 7.3**

1. The revised proposed amendment to RPC 7.3(a) imposes a general prohibition against professional employment solicitation by attorneys in the areas of “personal injury law”, “family law,” “criminal law,” or “bankruptcy law.” The CPE is sympathetic to the sentiment that these enumerated areas of law may encompass clients who are more vulnerable and susceptible to solicitation by attorneys than the general population. However, the CPE sees numerous significant concerns with this proposal and recommends that the BOG consider submitting a comment objecting to prohibition of solicitation in the enumerated areas of law.
2. First, the RPCs do not provide any definitions of what constitutes personal injury law, family law, criminal law, or bankruptcy law. The proposed RPC 7.3(a) will confuse attorneys who will have no clear guidance as to whether they, their clients, or the legal issues fall into one of these areas.
3. Second, the CPE does not see why attorneys practicing in other areas of law should be given different treatment. There are vulnerable clients in other areas of law, such as, for instance, immigration law, employment law, and elder law. Vulnerable clients should be protected across all areas of law and the CPE believes this would be accomplished by the safeguards provided in the proposed RPC 7.3(a)(1), (2), (3), and (4), which prohibit solicitation where it is false or misleading, where the client is in an emotional or mental state interfering with the client’s reasonable judgment, where the client expressed a desire not to be solicited, and where the solicitation involves coercion, duress, or harassment. For instance, in *In re Flack*, 272 Kan. 465, 33 P.3d 1281, 2001 Kan. LEXIS 785, the Supreme Court of Kansas applied the Kansas Rule of Professional Conduct 7.3(b) and upheld the Kansas Bar’s determination that a wills, trusts, and estate lawyer violated this Rule because he had targeted in his solicitations the vulnerable population of elderly widows. The Kansas RPC 7.3(b) does not identify specific areas of law where solicitation is prohibited, but rather states that an otherwise permissible solicitation violates the Rule if it involves coercion, duress, or harassment. Similarly, in *In re Anis*, 126 N.J. 448, 599 A.2d 1265, 1992 N.J. LEXIS 1, the Supreme Court of New Jersey held that a lawyer who sent a solicitation letter to a plane crash victim’s family violated New Jersey’s RPC 7.3(b)(1), which prohibits solicitation in cases where the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer. As above, the New Jersey RPCs do not enumerate specific areas of law for blanket solicitation prohibitions, but rather protect all vulnerable clients. The State of Washington should adopt this approach and should implement a rule that is based on the conduct of the attorney and the emotional

or mental state or stated preferences of the prospective client rather than a given area of law.

4. Finally, the CPE was not able to locate any other rules of professional conduct governing solicitations that enumerate and treat differently specific areas of law. The CPE contacted various ethics counsel in Washington as well as other jurisdictions and they expressed concerns, which the CPE echoes, about the enforceability and clarity of this revised proposed Rule. If the Supreme Court is worried about vulnerable clients in particular legal areas, perhaps this could be noted in the Comments section.
5. The CPE would also like to point out an incongruity in the revised proposed RPC 7.3(a). As it is now proposed, the Rule states that a lawyer may solicit in all other areas of law “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” This implies a possible prohibition against solicitation where the lawyer does not have pecuniary gain, such as in non-profit context. Such prohibition does not appear to make logical sense given the rest of this Rule. The CPE recommends that the language about significant motive be removed or revised so as not to create such implication.

#### **B. The CPE’s view on the revised proposed Comments to RPC 7.3**

1. As stated above, the Supreme Court’s proposed amendment to RPC 7.3 modifies the original amendment proposed by the 2017 work group by retaining the historical prohibition against solicitation for certain enumerated practice areas. The Supreme Court proposed few changes to the 2017 work group’s recommendation on the Comments, leaving the 2017 work group’s proposed changes to the Comments largely intact. This creates ambiguity and confusion related to the Comments because the 2017 work group had recommended that many of the Comments to RPC 7.3 be deleted because they would be erroneous or practically irrelevant if solicitation is generally permissible under the Rule.
2. Comments 2-4: In large part, the prohibition against solicitation in four enumerated practice areas now stands alone, without the clarification provided by the current comments to RPC 7.3. For instance, Comments 2-4 explain why solicitation presents risks to the public that call for regulation. These Comments provide justification for the regulation of the profession and the imposition of discipline.
3. Comment 5: The current version of RPC 7.3(a)(2) creates, and Comment 5 explains, an exception for the prohibition against solicitation when the subject is known to the attorney through a close personal or family relationship. Under the Supreme Court’s

proposal, solicitation would be prohibited in four practice areas where individuals might be expected to turn to a close friend or family members, but there is no exception that would allow the attorney to reach out to them in person. If this is not the intent of the Supreme Court, it would be appropriate to retain a provision relating to this exception in the Rule and retain a modified version of Comment 5.

4. Comment 7: This comment to the current Rule clarifies that a lawyer may contact representatives of prepaid legal services organizations in person. The 2017 work group had proposed deletion of this Comment. Because the Supreme Court's revised proposed version retains prohibition against solicitation in certain practice groups, Comment 7 would need to be reinstated as to those practice groups. If the revised proposed version of the Rule is to be adopted, Comment 7 should also be amended to clarify that, in the areas of practice enumerated by the Supreme Court, such contacts are permissible.
5. Comment 9: Similarly, Comment 9 clarifies when and how the lawyer may participate in a prepaid legal services plan that uses in person contacts to solicit members. This Comment still has value as long as there are broad prohibitions against solicitation.
6. Washington Comment 10: The 2017 work group proposed deletion of Washington Comment 10, which covers the topic of in-person, live telephone, or real time electronic contact with prospective clients who have been referred to the lawyer. Comment 10 was replaced with language relating to the coercion and harassment exception found in RPC 7.3(a)(4). If the Supreme Court's proposed rule is adopted, the language in current Comment 10 is useful and should be the subject of a separate comment, although it should be modified and limited to those practice areas in which solicitation is prohibited.
7. Washington Comment 11: Current Comment 11 relates back to RPC 7.3(a)(3) concerning referrals from not for profit referral services. The 2017 work group recommended deletion of these provisions and the Supreme Court amendment does not alter these recommendations. However, if solicitation is to be prohibited in certain practice areas, Comment 11 provides useful guidance for lawyers practicing in those areas and should be retained. Both the 2017 work group and the Supreme Court recommended a new comment (designated as new Comment 11) verifying that the restrictions on a lawyer's own conduct extend to the lawyer's agents and employees. This language should be retained in a separate comment.
8. Washington Comment 12: The 2017 work group's recommendation was as follows:

*[12] Washington did not adopt paragraph (c) of the Model Rule relating to labeling of communications ~~with prospective clients~~ and solicitations. Washington has not adopted subsection (c) of the Model Rule creating a safe harbor for in-person and telephonic solicitations in the context of a prepaid or group legal services plan because solicitations of professional employment by any means and in all contexts are permitted subject to the exceptions contained in subsections (a)(1)-(4). In addition, prior provisions and comments under RFC 7.3 in Washington relating to in-person, telephonic, or real-time electronic solicitations in the context of referrals from a third party or a lawyer referral service have been removed because solicitations by any means in this context are permitted subject to the exceptions contained in subsection (a)(1)-(4) of this rule.*

The Supreme Court revision deleted the first sentence (perhaps unintentionally), but did not recommend changes to the remaining language. However, the language is not helpful in light of the Supreme Court's proposed amendments, particularly if the Supreme Court intended to allow solicitations in the context of a prepaid legal series plan or referrals from not for profit services plans even in the otherwise prohibited practice areas. The Comment should be deleted or clarified.

## **CONCLUSION**

For the reasons articulated above, the CPE believes that in RPC 7.3(a) there should be no enumeration of areas of law where there is a blanket prohibition against the solicitation of clients. The CPE recommends that the first sentence of the revised proposed RPC 7.3(a) be deleted or modified in a way that does not single out a specific area of law for blanket prohibition. The CPE also recommends that the second sentence of the revised proposed RPC 7.3(a) be changed so as not to give an implication that it prohibits solicitation where the lawyer's motive is something besides pecuniary gain.

Additionally, the CPE recommends that the BOG bring to the Supreme Court's attention the discrepancies and confusion created as a result of the Supreme Court proposing a substantive change to the revised Rule 7.3(a) while at the same time adopting the 2017 work group's recommended changes to the Comments.

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Tracy, Mary](#)  
**Subject:** FW: To Justice Charles Johnson, Chair of Supreme Court Rules Committee - re: RPC 7.3 and the Comments Thereto — Solicitation of Clients, Publication Order 25700-A-1287  
**Date:** Friday, April 24, 2020 3:59:11 PM  
**Attachments:** [Letter President Majumdar to Rules Committee RPC 7.3 Comment of opposition.pdf](#)  
**Importance:** High

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**From:** Rajeev Majumdar [mailto:rajeev@northwhatcomlaw.com]  
**Sent:** Friday, April 24, 2020 3:57 PM  
**To:** Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>  
**Cc:** Stephens, Justice Debra L. <Debra.Stephens@courts.wa.gov>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Terra Nevitt <terran@wsba.org>; Jeanne Marie Clavere <jeannec@wsba.org>  
**Subject:** To Justice Charles Johnson, Chair of Supreme Court Rules Committee - re: RPC 7.3 and the Comments Thereto — Solicitation of Clients, Publication Order 25700-A-1287  
**Importance:** High

Dear Justice Johnson,

Please find attached a courtesy copy of a comment/request to the Court's Rules Committee from the WSBA in support of the proponent's request to withdraw their submitted proposed Comment 8 to RPC 6.5.

Though as a courtesy the Clerk of the Court has been copied on this e-mail, a hard copy will be sent pursuant to Publication Order 25700-A-1287, as our comment with its attachment is greater than 1500 words.

Warmly,

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