WASHINGTON STATE ASSOCIATION for JUSTICE

March 29, 2019

The Honorable Chief Justice Mary Elizabeth Fairhurst
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: WSAJ Comment on WSBA Proposed Amendment to RPC 7.1 – 7.5

Dear Chief Justice:

Introduction

The Washington State Association for Justice (WSAJ) respectfully submits this letter regarding the proposed amendments to RPC 7.1-7.5. As discussed below, the proposed amendments to the Rules of Professional Conduct which deregulate solicitation of prospective clients are dangerous to the public and a departure from almost every jurisdiction, the ABA Model Rules, and the Association of Professional Responsibility Lawyers (APRL) suggested changes. WSAJ opposes those changes. WSAJ does, however, support some of the proposed changes which may clarify and update these Rules and Comments for modern application.

Core Reasoning and Approach to PRC 7.1 – 7.5

The Washington State Bar Association (WSBA) began this process of examining the Title 7 Rules of Professional Conduct (PRC) in early 2016.[1] The impetus was a 2015 report by the APRL suggesting changes to the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).[2] The ABA considered the proposal, received extensive comments, and after undergoing an extensive formal process, adopted modifications to Title 7 of the Model Rules on August 6, 2018.[3] Now WSBA is proposing major changes to Title 7 of the RPC's. However, the current proposal before the Supreme Court deviates substantially from the recently adopted ABA Model Rules and the APRL suggested changes of the ABA Model Rules.

[1] Memorandum: Report and Recommendation on Advertising Ethics Rules, by WSBA Committee on Professional Ethics, January 5, 2018, p.1.

[2] *Id.*

[3] https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/

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The proposal before the Supreme Court is out of sync with the rest of the nation in both timing and content.[4] While the ABA and the WSBA proposed rule changes had the same impetus, very different conclusions were reached. WSBA proposal before the Supreme Court differs from the newly adopted Model Rules in form and content. In form, the proposal unnecessarily moves rules and comments. This change is confusing for lawyers that practice in multiple jurisdictions. In function, the rules make two drastic changes which were not adopted in the Model Rules: 1) allowing live person-to-person solicitation initiated by lawyers, and 2) allowing lawyers to claim they "specialize" even when not certified as a specialist. Only the changes to specialization were proposed by APRL, and neither of these were adopted by ABA.

The APLR's purpose in its proposal to the ABA was two-fold: "seeking greater simplicity and uniformity nationally."[5] If the Supreme Court adopts these amendments it will undermine both of these stated goals. Washington will be one of the only states that allows attorneys to advertise or solicit this way, which will thrust Washington outside of national uniformity and contribute to an even more unworkable set of rules in a growing age of interstate commerce.

The Washington Committee on Professional Ethics (CPE) is recommending that Washington State adopt its own Rules of Professional Responsibility that deviate substantially from those of the ABA Model Rules and every other jurisdiction that follows suit. WSAJ opposes this course of action. However, there are specific elements of the proposed rules with which the WSAJ agrees. These are the rules that fall in line with the ABA Model Rules. Although these specifics are offered for consideration, WSAJ believes the best approach would be for the CPE to revisit the rules changing process in light of the since-adopted ABA Model Rules which are directly on point. Below are the opinions of WSAJ adopted by the WSAJ Board of Governors on March 28, 2019.

RPC 7.1

There are no proposed changes to the Rule. WSAJ supports this. There are multiple proposed alterations to the comments which are generally acceptable, with specific exceptions as follows:

Comment 5 – Acceptable[6], but propose removing the sentence and word: "Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However". Additionally, propose removing the final sentence: "Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching." Propose

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[4] There are only two states as of Dec. 2018 which allow for lawyer-initiated live person-to-person solicitation: Maine and Virginia. Variations of the ABA Model Rules of Professional Conduct, Rule 7.3: Direct contact with Prospective Clients, Ed. Dec. 2018. Oregon has recently adopted a similar rule, making it the third state.

[5] *Id.* at p.3

[6] It should be noted that Comment 5, formerly Comment 1 to RPC 7.2 has been stricken entirely in the recently adopted ABA Model Rules.

replacing the last sentence with "Advertising that is misleading or overreaching is not permissible."

Comment 7 – Acceptable[7], but propose removing sentences 1,2, and 4. The core of the comment is encapsulated in sentence 3: "Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public."

Comment 8 – Acceptable as to the first 3 sentences. The rest of the comment pertains to certifications that do not exist in Washington, other than Bankruptcy and Maritime. This comment opens the door for certification services for which there are no institutions in place to establish suitable standards and provide oversight.

Comment 10 – The content of this comment is comparable to the newly adopted ABA Model Rule 7.1, Comment 6 which states:

> Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

WSAJ proposes this comment from the ABA Model Rules in whole as a substitute for the currently proposed Comment 10. While the two are similar, the adopted Comment to the Model Rule is more clear and concise. Even in its example of "Springfield Legal Clinic" it gives the opposite and more logical clarification to avoid false or misleading advertising.[8] Additional clarity comes from the first sentence of the Comment to the Model Rule which stands on the premise that a "firm name, letterhead and professional designations are communications concerning a

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[7] It should be noted that Comment 7, formerly Comment 3 to RPC 7.2 has been stricken entirely in the recently adopted ABA Model Rules.

[8] WSBA proposed rules suggests "an express disclaimer that *it is* a public legal aid agency may be required to avoid a misleading implication." ABA Model Rules suggests "an express statement explaining that *it is not* a public legal aid organization may be required to avoid a misleading implication."

lawyer's services." WSAJ believes that this is a core premise when broaching the subject of LLLT's having their names in a firm name. See discussion below on Comment 12.

Comment 12 – WSAJ opposes this comment as written. LLLT's are not attorneys and to list their names in a law firm would mislead the public to think that the person is an attorney. As noted above, in and of themselves "Firm names, letterhead and professional designations are communications concerning a lawyer's services." Examples that would be misleading are clear:

1. "The Law Firm of Smith, LLLT". The use of the term "Law Firm" is misleading in conjunction with the non-attorney to the lay person. It is a dichotomy of terms in that "Law Firm" has always meant lawyers, but the only name is a non-lawyer.
2. "Baker, Smith (LLLT), and Jones, PS". Although there is an indication of the LLLT status of Smith, the law firm name still implies equality between the attorneys and LLLT. This is misleading.

With the high potential to mislead by firm designation, WSAJ opposes this comment as written. With the uncharted territory surrounding the question of legal advertising and the newly formed LLLT designation, WSAJ proposes that the Supreme Court table the comments pertaining to advertising and LLLTs and convene a committee to address this specific issue.[9]

RPC 7.2

This rule is eliminated under the proposal. The content of the Rule is shifted to RPC 7.3 with proposed modifications; while the comments are moved to 7.1. WSAJ is not necessarily opposed to the content being moved. However, the movement is a deviation from the ABA Model Rules, which retains RPC 7.2 with recently adopted modifications. Additionally, the content of RPC 7.2 has been a recent hotbed of conflict in various states concerning what constitutes "payment for a recommendation."[10] Part of the APRL's intent is uniformity among jurisdictions, a concept with which WSAJ agrees. Uniformity in this case would lean toward

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[9] WSAJ would support a rule or comment that 1) prevents LLLTs names in the name of a law firm, 2) Where an LLLT owns and operates a business for legal services, that a) the name not include "law firm" or "law offices", and b) advertising specifically states "this is not a law firm."

[10] NYSBA Ethics Opinion 1132, (2017), holding "A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a);" NJ ACPE 732 (2017) concluded that New Jersey lawyers "may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer;" Pennsylvania 2016-200 (2016) concluded that a hypothetical program similar to Avvo was engaged in "impermissible fee sharing under RPC 5.4(a);" Ohio 2016-3 (2016) ("A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a 'marketing fee' to a nonlawyer for each service completed for a client, is unethical."

retaining 7.2 and reviewing the content in its present context. WSAJ comments are made in the framework of the proposal. See comments on 7.1 and 7.3.

RPC 7.3

WSAJ opposes the amendments to RPC 7.3. As noted above, the proposed changes deviate from the recently adopted ABA Model Rules in form and content. The core issue is that the proposed amendments allow direct person-to-person solicitation of clients. This is dangerous and unwanted in the public. It propels and amplifies the ambulance chaser persona and other negative stereotypes of the legal profession. Instead of creating more clarity and national uniformity, the proposed amendments will separate Washington from most jurisdictions and replace the clear boundary of no person-to-person contact. Instead, there will be gray lines delineating what evidence constitutes "misleading" or the lawyer's knowledge of a person's mental soundness. With the proposed changes to the RPCs accountability will be determined with evidence of he-said she-said interactions.

First, neither the APRL or the ABA include this rule. CPE states that the 2015 APRL report was the impetus for this rule change, but the APRL never proposed reform that would allow person-to-person solicitation in that report.[11] Therefore, the proposed rules venture far afield from APRL or ABA recommendations on the matter and the Model Rules adopted.

CPE gives a few reasons for the proposed allowance of person-to-person solicitation. First, is an access to information argument. CPE claims people have a great need to know their legal rights and lawyers should be able to contact them to advise of those rights. This argument fails on multiple counts. Access to information and legal opinions is far greater than it has ever been. Free information is widely available on the internet, with some sites even facilitating brief legal input from attorneys to individuals who pose a legal question. Additionally, lawyers advertise online, radio, billboards, television, and in many other ways.

The second argument of the CPE is that freedom of speech dictates that lawyers should be able to make contact with prospective clients. However, the Supreme Court rejected that argument in *Ohralik v. Ohio State Bar Ass'n*.[12] The Court upheld an RPC preventing in-person solicitation by an attorney for pecuniary gain. This ruling rejected First Amendment free speech arguments by the attorney and instead classified it as commercial speech which is afforded a limited measure of Constitutional protection. In short, the RPCs as they stand are constitutional.[13]

The dangers of allowing this person-to-person solicitation are significant. First is the public perception. The United States Supreme Court has outlined public perception of lawyers and legal advertising in *Florida Bar v. Went For It, Inc.*[14] It is no secret that people have negative

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[11] APRL 2015 Report of the Regulation of Lawyer Advertising Committee, June 22, 2015.
[12] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).
[13] Furthermore, the ABA Model Rules support this position and also fall under *Ohralik*.
[14] *Florida Bar v. Went For It, Inc.* 515 U.S. 618, at 626 (1994).

perceptions of lawyers, ascribing to them terms such as "ambulance chasers." The proposed amendments will only worsen the problem and push our profession further in the public eye from justice toward greed.

The terrifying part of allowing in-person solicitation is that it will not only be attorneys who cross ethical lines and sacrifice attorney perception for financial gain. Allowing person-to-person solicitation creates a market for third-party advertisers to make the contact with potential clients and point those clients to the firm that agrees to "pay the reasonable cost of advertisements."[15] These third-party vendors already exist. They are already making phone calls and have already received backlash from the public and the news media. These agencies search for police reports, get phone numbers, call injured victims, and set initial consultations with chiropractors. This is not our industry, but the parallel is the hand writing on the wall for the fate of the perception of the legal profession in Washington State.

KOMO 4[16] and KING 5[17] News Stations have both done reports on the third party direct solicitations on behalf of chiropractors.[18] The medical professionals, according to the articles are not the ones making the calls, it is third-party advertisers. They use high-pressured sales techniques to persuade people to set up a first appointment. They make repeated phone calls even when asked to be left alone. There are no regulations on these third party entities and they do not have professional degrees and licensures to protect. In fact, one news article described one of these third-party advertisers in this way:

> "On a page illustrated by a "Shhh... Top Secret!" graphic and a picture of a briefcase full of stacks of $100 bills, the site explains that JustUs will call recent auto-accident victims, but promises to keep the identity of the clinic behind the call secret."[19]

Third-party advertisers have everything to gain with this amendment and lawyers have much to lose. Even the CPE highlighted this in its Memorandum. It stated that the APRL's 2016 Supplemental Report modified Rule 7.2 to include "a definition of solicitation in the black letter of the rule, and the general ban on solicitation would be limited to in-person and telephonic

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[15] Proposed Rule 7.3(b)(1)

[16] https://komonews.com/news/consumer/dont-fall-victims-to-ambulance-chasers-after-a-crash

[17] https://www.king5.com/article/news/local/doctors-accused-of-misleading-accident-victims-to-collect-insurance/247021872

[18] It should be noted that WSAJ is not suggesting that any chiropractor has done anything wrong, but rather makes the point that a system that allows live person-to-person solicitation incentivizes third party advertisers and is fraught with high pressured sales tactics which can cross the line of propriety.

[19] https://www.inlander.com/spokane/crash-andgt-click-andgt-cash/Content?oid=2834087

contacts."[20] The Memorandum goes on to say that the Workgroup subsequently met with the intent "to analyze whether the APRL proposal would be viable and appropriate in Washington ...and the extent to which the APRL proposal might be improved upon to address issues of over-regulation of advertising."[21] The result of their meetings is the current proposal which allows such in-person solicitation—a significant change from APRL report and where the CPE began. It is not only the small third-party advertisers who have a financial interest in this change, it is the very large advertisers such as Avvo and LexisNexis (who acquired BuyCrash.com – "The Nations Leading Provider of Police Crash Reports"[22]).

The proposed Amendments will put a welcome mat out for these advertisers and WSBA will be called into question by public opinion and the news media for it. For these reasons WSAJ opposes the proposed amendments to RPC 7.3.

As an alternative, WSAJ proposes the ABA Model Rules as recently amended. They are a balanced approach after considering the APRL proposals. They are the rules that state bar associations look to as a starting point for uniform application.

RPC 7.4

WSAJ opposes the proposed changes to RPC 7.4. The new rules will allow attorneys to advertise that they are a specialist or that they specialize in a particular field of law. This change will fail to bring about the stated goals of simplicity and uniformity in the rules, and at worst will harm the public. This change can harm the public and the reputation of the bar association by allowing lawyers to self-appoint as specialists without any objective criteria or certification body. If a member of the public hires the lawyer who claims to specialize in the area of practice and later finds out that the lawyer is limited in years of practice in the particular area, there becomes a question of misrepresentation in advertising. Did the client get the quality of service as advertised? The rule and violation become less clear, and each instance becomes a fact-specific determination of whether that lawyer was specialized enough to take on that particular case. This leaves lawyers guessing as to what constitutes specialization enough for the bar association and what the advertising implies to the general public. Without fixed standards, prosecution of violations will be inconsistent, if not non-existent.

Additionally, if the Supreme Court adopts the proposed changes to PRC 7.4, Washington will be inconsistent with nearly every other state in the union on the matter.[23] This is a departure

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[20] Memorandum: Report and Recommendation on Advertising Ethics Rules, by WSBA Committee on Professional Ethics, January 5, 2018, page 3.

[21] *Id.*

[22] http://www.buycrash.com.

[23] There are only two states as of Feb. 2019 which lawyers to advertise as a specialist without being certified: Texas and Louisiana. Variations of the ABA Model Rules of Professional Conduct, Rule 7.2: Communications Concerning A Lawyer's Services, Ed. Feb. 22, 2019.

from the ABA Model Rules, which were recently examined and modified.[24] As we see more multijurisdictional law firms and practice, the Supreme Court should be hesitant to make a departure from a nearly unanimous nation on the subject.

RPC 7.5

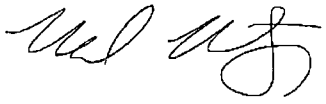
The proposed change removes RPC 7.5 and the Comments are moved to RPC 7.1. WSAJ is not opposed to removing PRC 7.5, provided that the Comments are modified as noted above in 7.1. It should be noted, however, that the Supreme Court should not approve each change for 7.5 on a piecemeal basis. The better approach is to re-evaluate all of these changes in light of the ABA's recently Revised Model Rules of Professional Conduct.

RPC 5.5

WSAJ does not oppose the proposed changes to RPC 5.5.

Sincerely,

Ann Rosato
WSAJ President



Michael Montgomery
WSAJ Board of Governors

Jane Morrow
Chair, WSAJ Court Rules Committee

[24] ABA Model Rules did remove 7.4 from the model rules, but retained the core of the rule and its prohibition against advertising as a specialist by moving the content to Model Rule 7.2(c). ABA Model Rules. In contrast, the proposal before the WSBA does not move the content to Rule 7.2

Tracy, Mary

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Subject: Comment letter for RPC 7.1-7.5
Attachments: 2019.03.29.WSAJ Comment Legal Advertising RPCs FINAL.PDF

Thanks!!

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