NOTICE TO THE BAR

PUBLICATION FOR COMMENT – OUT-OF-CYCLE REPORT OF SUPREME COURT PROFESSIONAL RESPONSIBILITY RULES COMMITTEE ON REQUESTS TO AMEND RPC 7.3 (RE: SOLICITATION LETTERS)

The Supreme Court Professional Responsibility Rules Committee (PRRC) has submitted to the Court an Out-of-Cycle Report on Referral of Requests to Amend RPC 7.3 to Ban Attorneys' Direct Solicitation Letters to Potential Clients. The Court has directed that the PRRC report be published for comment. Publication of the report accompanies this Notice.

Those seeking to comment must do so, in writing, by Friday, September 4, 2009, at the following address:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on PRRC Report
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

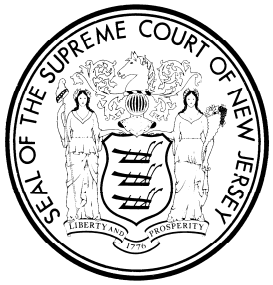
As an alternative, comments on the PRRC report may also be submitted via Internet e-mail at the following address: Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will not consider comments submitted anonymously. Those who seek to have the Court consider their comments must include both their name and address. Comments submitted in response to this Notice will be publicly available after the Court has acted on the report.

Mark Neary, Esq.
Clerk of the Supreme Court

Dated: July 1, 2009

Out-of-Cycle Report
of the
Professional Responsibility Rules Committee



On Referral of Requests to Amend RPC 7.3 to Ban Attorneys' Direct Solicitation Letters to Potential Clients

June 3, 2009

INTRODUCTION

In this report, the Professional Responsibility Rules Committee (PRRC or Committee) responds to two related requests for amendments to RPC 7.3. One attorney organization, the New Jersey Association for Justice (NJAJ) (formerly the Association of Trial Lawyers of America – New Jersey (ATLA-NJ)), has asked that "all direct solicitation of accident victims" be banned unless there is a "previous or existing professional, personal or familial relationship with the person being solicited." Another attorney organization, the Trial Attorneys of New Jersey (TANJ), recently requested a prohibition of "all direct solicitation letters by attorneys to potential clients." In light of First Amendment concerns, the Committee does not recommend a ban on all solicitation letters. Instead, the Committee recommends extending the scope of the thirty-day waiting period, which currently applies only to communications sent after a mass-disaster event, to solicitations concerning events causing personal injury or death, unless the person contacted has a family, close personal, or prior professional relationship with the lawyer.

BACKGROUND

Current Restrictions on Attorney Contact with Potential Clients

The Committee's analysis begins with a summary of the relevant Rule of Professional Conduct. RPC 7.3(b) sets forth several circumstances under which an attorney may not contact or send written communications to prospective clients for the purpose of obtaining employment. A lawyer may not solicit a person when the lawyer should know that the physical or emotional state of the person is such that the person could not exercise reasonable judgment in employing a lawyer. RPC 7.3(b)(1). A lawyer may not solicit a potential client within thirty days after "a specific mass-disaster event" when the "contact concerns potential compensation arising from the event." RPC 7.3(b)(4). For other "specific events," or when more than thirty days have

passed since a mass disaster occurred, attorneys remain prohibited from contacting prospective clients, with one exception: a lawyer may "send a letter by mail" that states it is an "ADVERTISEMENT" and contains other required notices. RPC 7.3(b)(5). Attorneys who violate RPC 7.3 are subject to discipline and possible criminal sanctions. See N.J.S.A. 2C:40A-5 (providing it is third-degree crime to violate RPCs "by contacting an accident or disaster victim or an accident or disaster victim's relative, using means other than written communication, to solicit professional employment . . . .").

Requests for Amendments to RPC 7.3

NJAJ argues that solicitation of accident victims creates more confusion than it provides a service to the public, and thereby tarnishes the image of the legal profession. Although the Committee invited NJAJ, then ATLA-NJ, to provide background information about the concerns expressed in its request, the Committee did not receive any such information. TANJ, which recently requested a ban on all direct solicitation letters, argues that some attorneys send a "barrage of letters filled with fear-invoking, worst case scenarios" to traffic offense defendants and accident victims; that the "privacy and self-esteem of private citizens" should be protected; that targeted mass mailings may cause confusion; and that the result is a negative perception of the legal profession. TANJ also stated that the public has access to other channels of communication for information about legal services.

Committee on Attorney Advertising Recommendation

Before receipt of the recent TANJ request, the Committee on Attorney Advertising (CAA) considered NJAJ's request for a ban on direct mail solicitation of accident victims and reported its proposal to the PRRC. Because a complete ban raises First Amendment concerns, the CAA recommends extending the scope of RPC 7.3(b)(4)'s thirty-day waiting period so it

applies not only to mass disaster-related communications, but also to contact concerning "an event causing personal injury or death." The CAA recognizes that a person involved in an accident causing personal injury or death is not likely to be in the appropriate physical, emotional, or mental state to appreciate solicitation letters shortly after the accident. Finding that this concern applies even when the person being solicited is a prior client or has a relationship to the attorney, the CAA does not recommend an exception for letters sent to such individuals.

DISCUSSION

As explained below, the PRRC has determined to recommend a modified version of the amendment suggested by the CAA. The proposed amendment would extend the thirty-day waiting period to written solicitation concerning an event causing personal injury or death. It also would contain an exception to permit letters sent to a person who has a "family, close personal, or prior professional relationship with the lawyer."

The requests to bar attorney direct-mail solicitation implicate several concerns. The public interest in access to information about their legal options and the interest of attorneys in engaging in commercial speech activity weigh against a ban on this type of advertising. For example, small firms may rely on advertisements such as solicitation letters to generate business and to develop name recognition. See John Phillips, Note, Six Years After Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights, 14 GEO. J. LEGAL ETHICS 197, 208-10 (2000) (suggesting that anti-solicitation rules decrease competition from smaller firms, shut off avenues of information for accident victims, and provide unfair advantage to insurance companies that may settle quickly before victim retains lawyer); Jack W. Kennedy, Jr., Comment, The Widespread Embrace of the Waiting Period Upheld in Florida Bar v. Went For It, Inc.: Toward a Nationwide Thirty-Day Wait for Justice?, 75 TUL. L. REV. 777 (2001) (arguing

that states have overreacted to perceived problems with written solicitation and that thirty-day waiting periods give unfair advantage to potential defendants, frustrate goals underlying rules that prevent opposing counsel from contacting represented parties, and create barriers to potential plaintiffs in obtaining information about legal rights). Conversely, policies of protecting individuals' privacy interests and protecting the reputation of the legal profession are furthered by restrictions on activity that may harm those interests. The following constitutes the First Amendment framework for the PRRC's consideration of the requested bans on targeted direct-mail solicitation by attorneys.

If a lawyer's advertisement is not false or misleading and does not concern an unlawful activity, it is commercial speech entitled to some First Amendment protection. Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995). When a state seeks to regulate protected commercial speech, it must satisfy the three-pronged test set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564-65 (1980): (1) the state "must assert a substantial interest in support of its regulation;" (2) the state "must demonstrate that the restriction on commercial speech directly and materially advances that interest;" in other words, the cited harms must be "real" and the restriction must "in fact alleviate them to a material degree[;]" and (3) the regulation must be "narrowly drawn," which, although not requiring the "least restrictive means," does require a reasonable "fit" between the means and the ends. Went for It, supra, 515 U.S. at 624, 626, 632 (internal citations and quotations omitted).

In 1988, the United State Supreme Court held that a professional conduct rule that banned written solicitation was inconsistent with the First Amendment: "[M]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech." Shapero v.

Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988). The Supreme Court noted that the goals identified by the proponent of the ban, which included the prevention of overreaching, intimidating, or misleading communications, could be achieved using "far less restrictive and more precise means," such as screening solicitation letters to penalize actual abuses. Ibid.

A similar decision was reached by a federal circuit court of appeals facing a narrower ban on solicitation. In Revo v. Disciplinary Bd. of Supreme Court of New Mexico, 106 F.3d 929 (10th Cir.), cert. denied, 521 U.S. 1121 (1997), the court concluded that a ban, which prohibited all direct mail solicitation of personal injury victims and family members of wrongful death victims, violated the First Amendment. Applying the Central Hudson test, the court in Revo agreed that the state asserted two substantial interests: "maintaining the public's respect for the legal system – respect which may be eroded by personal injury solicitation letters," and "protecting the privacy of accident victims." Id. at 933. The court further found that the asserted harms were "real," id. at 934, and that the restriction materially advanced one of those interests – protecting accident victims' privacy – because it completely eliminated the letters. Id. at 934-35. The court concluded, however, that the state had not established that the restriction on commercial speech was sufficiently narrowly drawn. Id. at 935. Recognizing that the existence of "numerous and obvious less-burdensome alternatives" to the ban is relevant to a determination of the reasonableness of its "fit," the court observed that the state had not shown why the desired results could not be achieved using other options, including: subjecting personal injury-related direct mail letters to a screening process, limiting the duration of the ban, or enhancing enforcement of existing disciplinary rules. Id. at 935-36.

By comparison, a thirty-day ban on direct-mail solicitation of accident victims withstood First Amendment scrutiny in a case in which the Supreme Court found that: (1) the state bar

established that it had substantial interests both in protecting the privacy and tranquility of potential clients from intrusion on their personal grief, and in preventing the outrage and irritation with the legal profession that results from direct solicitation within days of accidents; (2) the bar's unrefuted, 106-page summary of a study on attorney advertising and public perception was sufficient to establish that the restriction targeted concrete, non-speculative harms; and (3) the restriction was reasonably well tailored to the stated objectives. Went for It, supra, 515 U.S. at 625-36. But see Went For It, 515 U.S. at 640-41 (Kennedy, J., dissenting) (criticizing bar's summary as "unvalidated study" containing "self-serving and unsupported statements," with no actual surveys, few indications of sample size, and no explanation of methodology). In response to concerns that a thirty-day restriction prevents the public from learning about legal options, the Court found that such a point "would have force" if the rule "were not limited to a brief period and if there were not many other ways for injured [citizens] to learn about the availability of legal representation during that time." Id. at 633 (emphasis added).

Against that backdrop, the PRRC believes that a complete ban on solicitation letters, or ban on solicitation letters targeted at accident victims, would be vulnerable to a constitutional challenge. Thus, the PRRC does not recommend amending RPC 7.3 to ban written solicitation as requested by NJAJ and TANJ.

The PRRC notes that no other jurisdiction has a complete ban on written solicitation of potential clients. Thirteen jurisdictions require attorneys to wait a period of time before sending written solicitation letters if "the communication concerns an action for personal injury or wrongful death" or "otherwise relates to an accident or disaster." See ABA Ctr. Prof'l Responsibility, Differences Between State Advertising and Solicitation Rules and ABA Model

Rules of Prof'l Conduct, 62-65 (Apr. 15, 2009) (collecting and describing rules), available at www.abanet.org/cpr/professionalism/state-advertising.pdf. A handful of other states impose a cool-off period for written communications relating to "death claims," to a "disaster" (like New Jersey's current rule), or, more broadly, to a "particular transaction" or "specific occurrence." See ibid. Model RPC 7.3 has no waiting period.

Accordingly, the PRRC recommends a thirty-day waiting period for solicitation letters concerning events causing personal injury or death. A limited-duration ban may sufficiently address the concerns identified by NJAJ and TANJ. Such a temporary restriction is narrowly drawn and promotes a real and substantial interest, namely, protecting the "privacy and tranquility" of individuals from intrusion during a period of trauma and personal grief.

NJAJ has criticized the practice by some attorneys of making unsolicited telephone calls and in-person visits to accident victims. Those concerns are addressed by enforcement of existing law, which does not permit non-written solicitation of such persons. See RPC 7.3(b)(5); N.J.S.A. 2C:40A-5.

The PRRC also recommends an exception to allow written solicitation directed at a person with whom the lawyer "has a family, close personal, or prior professional relationship." That language is borrowed from Model RPC 7.3(a)(2), which allows attorneys to have telephone and other "live" contact with such persons. The PRRC's proposed exception relates only to a thirty-day waiting period for written solicitation. Unlike the Model RPC, the proposed exception does not contemplate an exception for oral communications. Still, the rationale underlying the PRRC's position is similar to the rationale underlying Model RPC 7.3(a)(2). An exception recognizes that the need to protect persons during a period of grief is alleviated when the person has a relationship with the attorney sending the letter. Cf. Model RPC 7.3 cmt. 4 ("There is far

less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship[] . . . .").

The PRRC considered but decided not to recommend other amendment options, such as combining current RPC 7.3(b)(1) (prohibiting contact when lawyer knows or should know person is not capable of exercising reasonable judgment in hiring lawyer) with a revised version of subparagraph (b)(4) that would broaden the application of the thirty-day waiting period. The Committee concluded that those provisions address different concerns, and should remain separate. For example, even after thirty days, a person may still be so fragile that the lawyer should know the person is not capable of exercising reasonable judgment in hiring a lawyer.

The PRRC also observed that it may be argued that "personal injury" means something more than "bodily injury," and that there may be questions about the limits of the terms "close personal" or "family" relationship in the proposed exception. The Committee concluded that if such questions arise, they may be addressed under the circumstances of the particular case.

Finally, the PRRC recognizes that TANJ seeks a ban on "all solicitation letters," not merely on those relating to events causing personal injury or death. TANJ specifically criticized the use of targeted mail to solicit traffic offenders and other potential clients. When solicitation involves a traffic offense – or any of a host of other events in respect of which direct solicitation letters are sent using public information, such as tax appeals, bankruptcy filings, or other publicized incidents from which it may be inferred that legal representation may be helpful – the concerns are sufficiently distinct from the concerns raised by solicitation of personal injury victims, and the issues may require different resolution. For example, if the return date of a traffic summons is within thirty days of the offense, as a practical matter even a limited-duration ban on written solicitation could be tantamount to a total ban. In conclusion, the Committee

simply notes that the Court may wish to review the issue of restricting written solicitation in other circumstances.

The text of the Committee's proposal follows. Proposed new text is underlined, as are existing paragraph designations and captions. No change in the text is indicated by ". . . no change."

PROPOSED AMENDMENT TO RPC 7.3

RPC 7.3. Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) 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; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event or an event causing personal injury or death, unless the person contacted has a family, close personal, or prior professional relationship with the lawyer, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.

(c) through (f) . . . no change.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997; paragraph (b)(5) amended November 17, 2003 to be effective January 1, 2004, paragraph (b)(4) amended _____, 2009 to be effective _____, 2009.

* * * * *

The Committee thanks the Court for this privilege to be of service.

Respectfully submitted,

Professional Responsibility Rules Committee

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