

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

12/15/2021

Clerk of the
Appellate Courts

IN RE: RULE 8, RPC 7.6 AND RULE 44, RULES OF THE TENNESSEE
SUPREME COURT

No. ADM2021-01008

ORDER

On September 1, 2021, this Court entered an order publishing for public comment proposed amendments to Tennessee Supreme Court Rule 8, RPC 7.6 and Tennessee Supreme Court Rule 44. These proposed amendments were patterned upon Rule 7.4 of the Revised Rules of Professional Conduct of the North Carolina State Bar, which became effective April 21, 2021. N.C. R. Bar Ch. 2, R. 7.4 (available at <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-74-intermediary-organizations/>). We established November 30, 2021, as the deadline for submitting written comments.

The Tennessee Board of Professional Responsibility and the Tennessee Bar Association timely submitted written comments offering, collectively, three suggested revisions to the proposed amendments. Upon due consideration of the comments, the Court concludes that the suggested revisions are well-taken. Accordingly, the Court hereby adopts amendments to Tennessee Supreme Court Rule 8, RPC 7.6 and Tennessee Supreme Court Rule 44, as set out in the appendices to this order. Appendix 1 contains a clean copy of amended RPC 7.6 and Rule 44. Appendix 2 shows the amendments by underlining new text and striking through deleted text.

These amendments shall take effect on January 1, 2022.

The Clerk shall provide a copy of this order, including the appendices, to LexisNexis and to Thomson Reuters. In addition, this order, including the appendices, shall be posted on the Court's website.

Costs associated with this matter are waived.

It is so ORDERED.

PER CURIAM

APPENDIX 1
AMENDMENTS TO RULE 8, RPC 7.6 AND RULE 44, RULES OF
THE TENNESSEE SUPREME COURT

RULE 7.6: INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, lawyer matching service, online marketing platform, prepaid legal insurance provider, or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance for which the organization does not bear ultimate responsibility. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.

(b) Before and while participating in an intermediary organization, a lawyer shall be licensed and in good standing to practice law in Tennessee and shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;

(2) The intermediary organization, including its agents and employees, does not engage in improper solicitation prohibited by RPC 7.3;

(3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service at the outset of the client's interaction with the intermediary organization;

(4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;

(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs;

(6) The intermediary organization is not owned, controlled, or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; and

(c) If a lawyer discovers the intermediary organization's noncompliance with the lawyer's professional obligations or any of the conditions in paragraph (b), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

Comment.

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies that pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule. Similarly, the process by which tribunals or court agencies appoint or assign lawyers to represent parties should carry with it appropriate safeguards outside of this Rule, and these activities are likewise exempted from this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to make reasonable efforts to ascertain that the organization's conduct complies with the professional obligations of the lawyer, including the conditions set forth in paragraph (b). If a lawyer discovers that an intermediary organization is operating in any of the ways prohibited by paragraph (b), the lawyer shall not begin participation with the intermediary organization. If a lawyer is already participating with an intermediary organization when the lawyer comes to learn of the noncompliance, the lawyer shall either terminate the lawyer's participation with the intermediary organization or seek to have the intermediary organization correct the noncompliance to allow the lawyer's continued participation.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "law firm" *See* RPC 1.0(c)

"Reasonable" or "reasonably" *See* RPC 1.0(h)

RULE 44. [Deleted and Reserved.]

(End of Appendix 1)

APPENDIX 2

AMENDMENTS TO RULE 8, RPC 7.6 AND RULE 44, RULES OF THE TENNESSEE SUPREME COURT

(Additions shown by underlining and deletions by ~~strikeout~~)

RULE 7.6: INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, lawyer matching service, online marketing platform, prepaid legal insurance provider, or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance for which the organization does not bear ultimate responsibility. ~~, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters.~~ A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.

(b) ~~—A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:~~

~~(1) the organization:~~

~~(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or~~

~~(ii) is engaged in the unauthorized practice of law; or~~

~~(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or~~

~~(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or~~

~~(2) the lawyer will be unable to represent the client in compliance with these Rules.~~

(b) Before and while participating in an intermediary organization, a lawyer shall be

licensed and in good standing to practice law in Tennessee and shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;

(2) The intermediary organization, including its agents and employees, does not engage in improper solicitation prohibited by RPC 7.3;

(3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service at the outset of the client's interaction with the intermediary organization;

(4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;

(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs;

(6) The intermediary organization is not owned, controlled, or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; and

(c) If a lawyer discovers the intermediary organization's noncompliance with the lawyer's professional obligations or any of the conditions in paragraph (b), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

Comment.

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately

bear the liability of their insureds, liability insurance companies that pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule. ~~Because the concerns arising from the referral of fee-generating business to lawyers are not implicated by the referral of a matter for which the lawyer does not expect to be paid a fee, the referral of such matters is exempted from this Rule.~~ Similarly, the process by which tribunals or court agencies appoint or assign lawyers to represent parties should carry with it appropriate safeguards outside of this Rule, and these activities are likewise exempted from this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to make reasonable efforts ~~act reasonably~~ to ascertain that the organization's conduct complies with the professional obligations of the lawyer, including the conditions ~~meets the standards~~ set forth in paragraph (b). ~~Normally it will be sufficient for the lawyer to ascertain that the organization is registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements.~~ If a lawyer discovers that an intermediary organization is operating in any of the ways prohibited by paragraph (b), the lawyer shall not begin participation with the intermediary organization. If a lawyer is already participating with an intermediary organization when the lawyer comes to learn of the noncompliance, the lawyer shall either terminate the lawyer's participation with the intermediary organization or seek to have the intermediary organization correct the noncompliance to allow the lawyer's continued participation. ~~If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.~~

DEFINITIONAL CROSS-REFERENCES

“Firm” and “law firm” *See* RPC 1.0(c)

“Reasonable” or “reasonably” *See* RPC 1.0(h)

RULE 44. REGULATION OF LAWYER INTERMEDIARY ORGANIZATIONS

[Deleted and Reserved.]

~~This Rule shall govern intermediary organizations as defined in RPC 7.6(a). An intermediary organization is a lawyer advertising cooperative, lawyer referral service, prepaid legal service provider, or similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee-generating legal services or the payment for or provisions of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.~~

~~A. Registration and Reporting Requirements.~~

~~(1) Each intermediary organization shall file an initial registration statement and annual registration statements with the Board of Professional Responsibility, each of which shall be certified by an officer or authorized representative of the organization.~~

~~(2) The initial registration statement shall set forth or be accompanied by the following:~~

~~(a) A copy of the organization's basic organizational document, including the articles of incorporation, articles of association, articles of organization, operating agreement, partnership agreement, trust agreement, or other organizational document and all amendments, addenda, or exhibits to any such document.~~

~~(b) A copy of all bylaws, operating agreements, rules, regulations, or similar documents, if any, regulating the conduct of the organization's internal affairs.~~

~~(c) A list of the names, addresses, and official positions of, and biographical information concerning, any individuals who are responsible for conducting the organization's affairs.~~

~~(d) A list of the names, addresses, and official positions of, and biographical information concerning, any shareholder or beneficial owner of an ownership interest in the organization of 5% or greater.~~

~~(e) A list of the names, addresses, and Board of Professional Responsibility disciplinary numbers of all lawyers participating in the organization and providing legal services for Tennessee residents.~~

~~(f) A specimen copy of the form of all contracts made or to be made between the organization and any participating lawyers.~~

~~(g) A specimen copy of the form of any contract made or to be made between the organization and any person, corporation, partnership, or other entity for the performance on the organization's behalf of any function, including, but not limited to, marketing, administration, enrollment, investment management, and subcontracting for the provision of legal services.~~

~~(h) A specimen copy of the form of any group or prepaid legal services contract that is to be issued to employers, unions, trustees, individuals, or other organizations and a specimen copy of any form of evidence of coverage to be issued to subscribers.~~

~~(i) A schedule of rates and charges for each contract to be used.~~

~~(j) A description of any proposed marketing efforts.~~

~~(k) A description of the organization's grievance or complaint procedure for its customers, members, or beneficiaries.~~

~~(l) As to prepaid legal insurance providers, a copy of a Certificate of Authority to sell legal insurance issued by the Commissioner of the Tennessee Department of Commerce and Insurance.~~

~~(m) A copy of the organization's most recent financial statements audited by an independent certified public accountant.~~

~~(3) The annual registration statements shall set forth or be accompanied by the following:~~

~~(a) A copy of the organization's most recent financial statements audited by an independent certified public accountant.~~

~~(b) A narrative description of any material changes that may have occurred since the organization's last filing with the Board, including updated or current copies of any information or documents previously filed with the Board of Professional Responsibility that have materially changed.~~

~~(4) The following organizations are exempt from filing initial or annual registration statements with the Board:~~

~~(a) Legal aid or public defender offices:~~

~~(i) operated or sponsored by a duly accredited or approved law school; or~~

~~(ii) operated or sponsored by a governmental agency;~~

~~(b) A military legal assistance office;~~

~~(c) A lawyer referral or legal aid service operated by the Chattanooga Bar Association, Knoxville Bar Association, Memphis Bar Association, Nashville Bar Association, Tennessee Bar Association, or Tennessee Trial Lawyers Association.~~

~~B. Compliance.~~

~~An intermediary organization complies with this Rule if it registered as provided in Section F and has complied with the requirements of Sections A, C, D, and all of the following additional requirements:~~

~~(1) The organization shall not be owned or controlled by any participating lawyer, a law firm with which a participating lawyer is associated, or a lawyer with whom a participating lawyer is associated in a firm.~~

~~(2) The customer, member, or beneficiary of the organization, and not the organization, shall be the client of the participating lawyer.~~

~~(3) The organization shall assert no improper influence upon, nor shall it infringe upon, the attorney-client relationship or the independent professional judgment of the participating lawyer.~~

~~(4) The organization shall not limit the objectives of the representation to be provided by participating lawyers to its customers, members, or beneficiaries, or the means to be used to accomplish those objectives, if such a limitation would materially impair the lawyer's ability to provide the client with the quality of representation that would be provided to a client who had not been referred to the lawyer by the organization.~~

~~(5) The organization shall not request or require that a participating lawyer reveal information that is privileged or protected by RPC 1.6.~~

~~(6) The organization shall not request or require that a participating lawyer take any action prohibited by, or fail to take any action required by, the Tennessee Rules of Professional Conduct.~~

~~(7) Customers, members, or beneficiaries of the organization shall be informed that they may file a complaint of unethical conduct by a participating lawyer with the Board of Professional Responsibility, and informed of the method by which they may do so.~~

~~(8) Any organization that is a prepaid legal insurance provider shall comply with Tennessee Code Annotated, Title 56, Chapter 43, known as the Tennessee Legal Insurance Act.~~

~~(9) The organization shall permit the participation of not less than four (4) lawyers licensed to practice in Tennessee, not associated with each other in a firm, and each of whom maintains an office in the geographical area served by the organization; provided, however, that the organization may require such participating lawyers to:~~

~~(a) meet reasonable and objectively determinable standards of competence and experience; and~~

~~(b) pay a reasonable participation fee in conformance with RPC 5.4(a).~~

~~(10) The organization shall not condition referral of its customers, members, or beneficiaries to participating lawyers upon a preliminary determination by the organization that the client's claims or defenses have merit or economic value; however, the organization may perform call screening as necessary to determine the applicability and availability of appropriate non-legal services.~~

~~(11) The organization shall utilize reasonable procedures to assure that participating lawyers are properly licensed and competent to handle the matters referred to them.~~

~~(12) The organization shall utilize reasonable procedures to provide substitute counsel in the event that a lawyer to whom a matter is referred cannot undertake or continue the representation in compliance with the Rules of Professional Conduct or this Rule.~~

~~(13) If the organization is a not for profit lawyer referral service, it may charge a fee calculated as a percentage of legal fees in compliance with RPC 5.4(a)(6).~~

~~(14) The organization shall establish and implement a reasonable grievance or complaint procedure for the resolution of complaints or grievances by customers, members, or beneficiaries who are dissatisfied with the services or fees provided by the organization or its participating lawyers.~~

~~(15) An organization shall apprise itself of any public disciplinary history of any participating lawyer and shall, when appropriate, review the files of the Board of Professional Responsibility concerning any such public discipline imposed on any participating lawyer before allowing that lawyer to participate in providing services.~~

~~C. Advertising and Marketing Requirements.~~

~~An intermediary organization shall not:~~

~~(1) Make a statement about its services, its participating lawyers, or the services they will or may provide, that would violate RPC 7.1 if made by a lawyer.~~

~~(2) An intermediary organization shall not identify any of its participating lawyers as specialists, as specializing in, or as certified or recognized as a specialist in a particular field of law unless all participating lawyers are certified as specialists in the identified field of law by the Tennessee Commission on Continuing Legal Education and Specialization.~~

~~(3) If a significant motive for the solicitation is the pecuniary gain of the organization or its participating lawyers,~~

~~(a) Solicit employment for its participating lawyers in specific matters by in person, live-telephone, or real-time electronic contact with a person who has not initiated the contact; or~~

~~(b) Solicit employment for its participating lawyers by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a specifically identified person who has not initiated the contact communication if a participating lawyer would be prohibited from doing so by RPC 7.3(b) or (c).~~

~~D. Qualification of Lawyers.~~

~~An approved intermediary organization shall take reasonable steps to determine that all of its participating lawyers meet the following requirements:~~

~~(1) That the lawyer is on active status and in good standing with the Board of Professional Responsibility and with the lawyer licensing authority in each jurisdiction in which the lawyer is licensed;~~

~~(2) That the lawyer is in compliance with the CLE requirements of Rule 21;~~

~~(3) That the lawyer agrees to permit the organization to release and furnish any information from the lawyer's application to the lawyer's clients or potential clients; and~~

~~(4) That the lawyer agrees to participate in and abide by the organization's procedures concerning grievances or complaints by customers, members, or beneficiaries.~~

~~E. Other Requirements Imposed by Organization.~~

~~Nothing in this Rule prohibits an organization registered under this Rule from imposing upon its participating lawyers, and a registered organization may impose upon its participating lawyers, other lawful requirements as a condition of participation, including, for example, requirements that participating lawyers waive any confidentiality of disciplinary complaints or proceedings under Supreme Court Rule 9, Section 32, that participating lawyers agree to participate in the arbitration of disputes concerning their fees~~

~~or services provided in connection with their participation in the organization, or that participating lawyers maintain professional liability insurance at certain levels. Further, accurate communications concerning any such requirements in any advertising by the organization do not violate any provision of this Rule. An organization may establish specific subject matter panels of participating lawyers, whose eligibility for such panels shall be determined on the basis of experience and other substantial objectively determinable criteria.~~

~~F. Registration.~~

~~(1) If an organization complies in all material respects with this Rule, the Board of Professional Responsibility shall register the organization under this Rule. If an organization fails to comply in any material respect with this Rule, the Board shall deny registration to the organization. If an organization registered under this Rule is found to no longer be in compliance with the requirements of this Rule, the Board shall revoke the registration of the organization.~~

~~(2) All documents or information provided to the Board of Professional Responsibility by or on behalf of the organization shall be open for public inspection in the offices of the Board of Professional Responsibility during its regular business hours. The Board may charge a reasonable fee for copying any such documents or information.~~

~~G. Amendments to This Rule.~~

~~Any interested person or organization may petition this Court to change this Rule.~~

(End of Appendix 2)