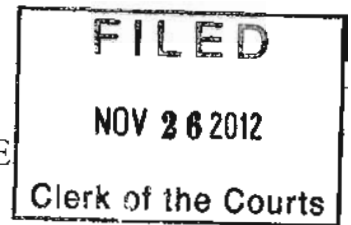


IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE



**IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL  
CONDUCT ON LAWYER ADVERTISING**

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**No. M2012-01129-SC-RL1-RL - Filed: November 26, 2012**

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**ORDER**

On May 31, 2012, the Tennessee Association for Justice (“TAJ”) filed a petition to amend the Rules of Professional Conduct relating to attorney advertising. In August 2012, the TAJ filed a brief in support of its petition, and Attorney Matthew C. Hardin filed a separate petition proposing related but distinct amendments. In an order issued on September 14, 2012, the Court solicited additional briefing to assist in the review of this matter, and both the TAJ and Hardin filed supplemental petitions on November 14, 2012.

Although the Court has made no decision as to whether to amend the Rules of Professional Conduct relating to attorney advertising as proposed by the Petitioners, we have determined that public comment is appropriate. The Court hereby solicits written comments on the proposed amendments to the Rules of Professional Conduct relating to attorney advertising from the bench, the bar, and the public. The November 14, 2012 supplemental petitions, which contain each Petitioner’s proposed amendments, are attached to this Order as Appendix A and Appendix B. The deadline for submitting written comments is January 25, 2013. Written comments should be addressed to

Michael W. Catalano, Clerk  
Tennessee Appellate Courts  
100 Supreme Court Building  
401 7<sup>th</sup> Avenue North  
Nashville, TN 37219-1407

and should reference the docket number set out above.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. This order, including the Appendices, shall be posted on the Court’s website.

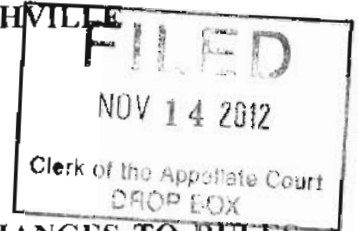
It is so ORDERED.

PER CURIAM

***APPENDIX A***

***Tennessee Association for Justice's  
"Supplemental Petition to Tennessee Supreme Court to Adopt Changes to  
Rules of Professional Conduct on Lawyer Advertising"***

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE



IN RE:

PETITION TO TENNESSEE SUPREME COURT TO ADOPT CHANGES TO RULES  
OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

NO. M2012-01129-SC-RL1-RL

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**SUPPLEMENTAL PETITION TO TENNESSEE SUPREME COURT TO ADOPT  
CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER  
ADVERTISING**

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The Tennessee Association for Justice has petitioned the Supreme Court of Tennessee to adopt changes to the Rules of Professional Conduct on lawyer advertising. In response to the Court's request to supplement the Petition, petitioner herein addresses the scope, purpose, and constitutionality of the proposed amendments to Rule 7.1 and 7.2 in Chapter 7 of the Rules of Professional Conduct.

**I. Introduction**

The Tennessee Association for Justice (TAJ) is a Tennessee professional organization made up of attorneys, paralegals and law students. Among the goals and purpose of the TAJ is to uphold the honor and dignity of the profession of law; to advance the cause of those who are damaged in person or property and who must seek redress; and to uphold and improve the adversary system and trial by jury. To that end, the TAJ is concerned about deceptive television advertising that reflects poorly upon the legal profession and petitions the Tennessee Supreme

Court to review the rules and regulations regarding advertising to eliminate advertisements that reflect poorly upon the legal profession and/or mislead consumers of legal services. Substandard quality legal advertising poses multiple threats to the legal profession including poisoning of the jury pool, a decrease in the public perception of lawyers, and misleading of the public with promises of easy money. The purpose of the Petition filed on behalf of the TAJ is reduce the threats to the civil justice system posed by some advertising in the State of Tennessee and to help civil justice clients receive fair and unbiased consideration by juries.

## **II. Proposed Rule 7.1 Advertising Communications Concerning a Lawyer's Services**

The TAJ has proposed that the Court adopt the following as Rule 7.1:

### **Rule 7.1 Advertising Communications Concerning a Lawyer's Services**

A lawyer shall not make a false, misleading, or deceptive communication about the lawyer or the lawyer's services.

#### **Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.**

- (1) *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it:
  - (A) contains a material misrepresentation of fact or law;
  - (B) is false or misleading;
  - (C) is deceptive; or
  - (D) an actor and/or model plays a client
- (2) *Prohibited Visual and Verbal Portrayals and Illustrations.* A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.

As an overview, Proposed Rule 7.1 forbids any and all false, misleading, or deceptive communications about an attorney or an attorney's services. False and misleading statements confuse the viewer/reader and impair his or her ability to objectively select an attorney. A closer examination of each part of proposed Rule 7.0 follows below.

Proposed Rule 7.1(1) prohibits any advertisement and/or communication that contains a material misrepresentation of fact or law. This proposed Rule is a road map to ethical advertising. An advertisement and/or written communication which violates this Rule not only offends the viewer/reader, but also undermines the integrity of the legal profession.

Proposed Rule 7.1(1)(A) indicates that a communication violates the proposed Rule if it contains a material misrepresentation of fact or law. Such communications would undermine the image of the legal profession and mislead potential clients. This proposed Rule ensures accountability by attorneys and prohibits misrepresentations of facts or law from being utilized to obtain new clients.

Proposed Rule 7.1(1)(B) prohibits false and/or misleading content in advertising and communications. This proposed Rule precludes false advertisements as well as those advertisements which may not appear to be false or misleading on their face, but have tendencies to distract the viewer from what they are seeing. An example of the second category would be utilizing attractive, young and healthy models to portray a client who in reality was grievously injured. A second example would be an advertisement that stretches the bounds of reality such as having space aliens or talking dogs assisting clients in an advertisement.

Proposed Rule 7.1(1)(C) prohibits deceptive advertising. This Rule elaborates on Rule 7.1(2) in that it also prohibits false or misleading statements that develop through the omission of material facts. Further the proposed Rule prohibits any advertisement that is unsubstantiated in

fact. This proposed Rule prevents an attorney from making unverifiable claims. Such claims would undermine the image of the legal profession and mislead potential clients.

Proposed Rule 7.1(1)(D) prohibits the use of an actor and/or model to portray a client. Some advertisements currently disseminated in Tennessee show young, attractive, and healthy individuals leading active lives after receiving large settlements. Individuals who have received such settlement or judgments have typically suffered serious and irreparable harms or death. The use of actors or models to portray clients is thus inherently deceptive. Most people will view these types of advertisements and believe people are getting large amounts of money without substantial injuries or permanent harms.

Proposed Rule 7.1(2) sets forth that attorneys may not use deceptive, misleading, manipulative or confusing visuals in advertising and/or communications. Visuals that manipulate and confuse the viewer undermine the public's perception of attorneys and do not accurately reflect the legal experience to potential clients. Sensationalistic and dramatic visuals in advertisements create unjustified expectations that hinder a potential client from making an informed decision as to which attorney to hire.

### **III. Proposed Rule 7.2 Advertising**

Rule 7.2 is amended only to the extent to add additional language:

#### **Required Content of Advertisements and Unsolicited Written Communications.**

(1) *Name of Lawyer or Lawyer Referral Service.* All advertisements and written communications pursuant to these rules shall include the name of at least one (1) lawyer or the lawyer referral service responsible for their content and a bona fide office in the state of Tennessee. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis. Individual lawyers or lawyers for firms which do not have a bona fide office in the State of Tennessee may not advertise here.

(2) *Location of Practice.* All advertisements and written communications provided for under these rules shall disclose, by city or town, one (1) or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

Section (1) above requires that the name of attorney or referral service be included in the advertisement and/or communication and that such individual or service maintain a bona fide office in the State of Tennessee. This proposed Rule defines a bona fide office as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis. The intent of this Rule is that the attorney must have a bona fide office in Tennessee. The proposed Rule prevents out-of-state attorneys from taking business out of Tennessee. Out-of-state attorneys practicing here limit the client base of Tennessee attorneys. Further, it creates difficulties in bar oversight as to whether or not Tennessee citizens are being treated in an ethical manner by out of state attorneys.

Section (2) above requires the disclosure of the location of at least one bona fide office by city or county in the state of Tennessee from which the attorney will actually perform the service described in the advertisement. This Rule serves to ensure that attorneys and/or referral services claiming to practice in Tennessee do, in fact, physically have an office in Tennessee.

#### **IV. Constitutionality of the Proposed Rules**

The proposed Rules, explained in detail above and in the previously filed Petition, are necessary to prevent excesses and abuses in attorney advertising. The proposed Rules do not violate any Constitutional provisions. The Petition and supplements do not seek to eliminate attorney advertising in Tennessee. The proposed Rules seek to regulate attorney advertising in

Tennessee to prevent the deceptive and misleading abuses of some advertising currently disseminated in this state.

A review of pertinent case law shows that proposed Rules will hold up to a Constitutional challenge. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the United States Supreme Court addressed the role of the First Amendment and commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In that case, the United States Supreme Court held that commercial speech can and does serve an important societal interest: “[T]he free flow of commercial information is indispensable ... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also *indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.*” 425 U.S. at 765, 96 S.Ct. at 1827 (1976) (emphasis added). The Court thus found that commercial speech is invaluable, but determined that commercial speech ought to be regulated to ensure that it serves the purpose of helping consumers form intelligent opinions.

In Bates v. State Bar of Arizona, the United States Supreme Court invalidated a blanket prohibition on attorney advertising and thus, for the first time, expressly allowed attorney advertising. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977). However, the Court, “recognize[d] that many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved, and ... expect[ed] that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly. *Id.* at 384, 2709. The Court thus recognized that the Bar must assure that attorney advertising meets certain standards (e.g., not false, deceptive, or misleading) and further determined that



reasonable restrictions on the “time, place, and *manner of advertising*” are important considerations. Id., see also 425 U.S. at 771, 96 S.Ct., at 1830 (emphasis added).

In Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, the United States Supreme Court developed a four-part analysis for determining whether advertising regulations are constitutional. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343 (1980). (1) First, commercial speech must be protected by the First Amendment. “(False and misleading speech is not protected by the First Amendment). Therefore, in order to be protected by the First Amendment, the commercial speech must, at least, concern “lawful activity and not be misleading.” Id. at 566, 2351. If the commercial speech is protected by the First Amendment, (2) courts must ask whether regulation of that speech serves a substantial state interest, (3) whether the regulation “directly advances” that state interest, and (4) whether the regulation is “not more restrictive than necessary” to serve that state interest. Id.

Consequently, the Hudson test provides a means for determining the constitutionality of attorney advertising restrictions. Some advertisements currently disseminated in Tennessee are false and misleading and receive no First Amendment protection, as illustrated by the first prong of the Hudson test. The second prong of the Hudson test mandates that the any regulation must serve a substantial state interest. Reasonable restrictions on attorney advertising are necessary to prevent advertising abuses and serve a substantial state interest because the dissemination of truthful, informative communications is of utmost importance to the public. The proposed Rules constitute such reasonable restrictions, satisfying the second prong of the Hudson test.

The previous petitions and this one filed with this Court have expounded three main principles: (1) attorneys in Tennessee must have a bona fide office in Tennessee; (2) actors

cannot portray clients in advertisements; and (3) deceptive visuals or sounds should not be allowed in advertisements/

These principles and the corresponding proposed Rules protect the public from advertising abuses in Tennessee and directly advance the state interest of the dissemination of truthful, informative communications. The changes to the ethical rules will provide the public with more accurate and uncluttered information, allowing them to make informed decisions in choosing an attorney. This satisfies the third prong of the Hudson test because the regulations directly advance these state interests. Further, the principles and proposed language are reasonable. Consequently, these regulations satisfy the fourth prong of the Hudson test because they are not more restrictive than necessary. Rather, they are reasonable, rational regulations concerning attorney advertising necessary to prevent advertising abuses in Tennessee.

There is no requirement contained in the TAJ's proposed Rules that require prior approval by any entity, so prior restraint is not at issue.

#### **IV. Conclusion**

The Petitioners propose that the Court adopt the proposed Rules above as part of Tennessee's Rules for Professional Conduct in order to help uphold the honor and dignity of the profession of law.

Respectfully submitted on behalf of the Tennessee Association for Justice,

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Matthew C. Hardin

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***APPENDIX B***

***Attorney Matthew C. Hardin's  
"Second Supplement to Petition to Tennessee Supreme Court to Adopt  
Changes to Rules of Professional Conduct on Lawyer Advertising in  
Response to Court Order"***

ORIGINAL

FILED

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

2012 NOV 14 PM 3:58

APPELLATE COURT CLERK  
NASHVILLE

IN RE:

PETITION TO TENNESSEE SUPREME COURT TO ADOPT CHANGES TO RULES  
OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

01129  
NO. M2012-01833-SC-RL1-RL

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**SECOND SUPPLEMENT TO PETITION TO TENNESSEE SUPREME COURT TO  
ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER  
ADVERTISING IN RESPONSE TO COURT ORDER**

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Attorney Matthew C. Hardin has petitioned the Supreme Court of Tennessee to adopt changes to the Rules of Professional Conduct on lawyer advertising. In response to the Court's request to supplement the Petition and the previously filed Supplement to Petition, petitioner herein addresses the scope, purpose, and constitutionality of all proposed amendments to Chapter 7 of the Rules of Professional Conduct.

**I. Introduction**

Petitioner seeks to establish new ethical Rules that pertain to attorney advertisements disseminated in Tennessee. Unfortunately, some current and past lawyer advertisements rely on outrageous, misleading, and deceptive advertising techniques. These forms of advertising do not educate the public on the services performed by attorneys in this state, but rather distract, confuse, and mislead. The principles and proposed Rules provided in the previous petition and supplement are necessary to prevent advertising abuses and to encourage attorneys to advertise professionally and respectfully within Tennessee. The establishment of new ethical rules on

attorney advertising will ensure that the public is provided with necessary and pertinent information in order to make informed decisions in choosing an attorney.

This second Supplement to the Petition examines the proposed language in detail, and provides an explanation of the purpose and scope (when applicable) of all of the proposed Rules. Two typographical errors have been corrected as well in the previously submitted proposed Rules. In addition, this Supplement includes minor changes to two existing Rules, Rule 7.2 and Rule 7.4, which have been edited to add references to the proposed Rules. After addressing the purpose and scope of these Rules individually, this second supplement then addresses the constitutionality of the Rules in their entirety. A copy of all proposed Rules is attached as Exhibit 1.

## **II. Proposed Rule 7.0 General**

As an overview, proposed Rule 7.0 provides the general parameters of attorney advertising in Tennessee. In addition, Rule 7.0 contains a non-exhaustive list of permissible forms of attorney advertising, provides that Subchapter 7 Rules apply to attorney advertising in Tennessee and proffers a guide for how attorneys should conduct business with family members, former clients, and potential clients. A closer of examination of each part of proposed Rule 7.0 follows below.

Rule 7.0(a) provides a non-exhaustive list of permissible mediums through which an attorney may advertise, providing that the attorney complies with all other Rules of this subchapter. The Rule states that advertising can be disseminated in the following forms: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and

written communications. By making the list non-exhaustive, it allows the Rule to apply to new advertising mediums as they are developed in the future. This Rule clarifies the scope of permissible types of advertising.

Rule 7.0(b) explains that the subchapter applies to Tennessee attorneys and attorneys outside Tennessee whose advertisements are disseminated in Tennessee and which seeks to solicit Tennessee citizens. This Rule explains the scope of the subchapter.

Rule 7.0(c) sets forth that a licensed attorney may advertise in Tennessee only if the attorney has a bona fide office in Tennessee (Rule 7.0(c)(1)) and conducts business in Tennessee (Rule 7.0(c)(2)). This Rule has been proposed in order to ensure that a licensed Tennessee attorney will be working on a matter advertised for in our state. In addition, the Rule stems the flow of potential clients to out of state firms. Potential clients should know where the attorney they hire practices law. Otherwise the advertisement is deceptive. With many out of state firms advertising in Tennessee, it is often difficult to tell where the firm is located.

Rule 7.0(d) affirms that this subchapter does not apply to attorneys in jurisdictions other than Tennessee. Effectively, this section indicates these proposed Rules are to apply to attorney advertisements in Tennessee only.

Rule 7.0(e) provides that this subchapter does not apply to communications between attorneys. This Rule is included so that attorneys may freely communicate with one another and refer cases to other attorneys without same being considered advertising and/or solicitation.

Rule 7.0(f) states that this subchapter does not apply to communications between an attorney and his or her family members. This Rule is included so that attorneys may freely communicate with members of his or her family without same being considered advertising and/or solicitation.

Rule 7.0(g) states that this subchapter does not apply to communications between an attorney and his or her current or former clients. The Rule further explains that an attorney is prohibited from advertising for another attorney to his or her current or former clients. This Rule allows attorneys to keep up with former clients who are often referral sources for attorneys. For example, many attorneys send holiday cards to former clients or firm announcements whenever attorneys are hired. Rule 7.0(g) allows these types of practices to continue. The proposed Rule further prohibits soliciting a client to hire an out of firm attorney as an end around to the solicitation Rules.

Rule 7.0(h) sets forth that this subchapter does not apply to communications between an attorney and an unsolicited prospective client. This Rule allows for attorneys to communicate with prospective clients who contact that attorney without same being considered advertising or solicitation.

Rule 7.0(i) provides that in all communications an attorney must abstain from dishonesty, deceit, or misrepresentation, regardless of whether this subchapter applies. This Rule requires that attorneys must adhere to ethical guidelines regarding all communications, irrespective of whether the Rules outlined in this subchapter apply to the communication. The proposed Rule 7.0(i) prevents dishonesty, deceit, or misrepresentation by attorneys in any form advertising or otherwise. Honest representation and discourse is the goal of this proposed Rule.

### **III. Proposed Rule 7.1 Advertising Communications Concerning a Lawyer's Services**

Proposed Rule 7.1 provides for required content and permissible content of advertisements. Rule 7.1(a) affirms that the name of one attorney be included in each advertisement who



maintains responsibility for the content. This proposed Rule ensures accountability as is reflected below.

Rule 7.1(a)(2) requires the disclosure of the location of at least one bona fide office in the state of Tennessee from which the attorney will actually perform the service described in the advertisement. This Rule defines a bona fide office as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis. The intent of this Rule is that the attorney must have a bona fide office in Tennessee. This proposed Rule prevents out-of-state attorneys from taking business out of Tennessee. Out-of-state attorneys practicing here limit the client base of Tennessee attorneys. Further, it creates difficulties in bar oversight as to whether or not Tennessee citizens are treated ethically by out of state attorneys.

Rule 7.1(b) provides a list of content and information that is permissible in attorney advertisements and unsolicited written communications under the presumption that the content contained therein is true and accurate. This Rule concerns only communications made by attorneys in order to obtain legal employment.

Rule 7.1(b)(1) applies specifically to attorneys and law firms. It provides a list of information that is permitted to be included in advertisements and unsolicited written communications.

Rule 7.1(b)(1)(A) sets forth that the following are permitted in attorney advertisements: name of an attorney or law firm [subject to the requirements of this Rule and Rule 7.5], a listing of attorneys associated with the firm, office locations, parking arrangements, disability accommodations, telephone numbers, website addresses, electronic mail addresses, hours of operation, and a designation such as “attorney” or “law firm.” This Rule outlines allowable

content of an attorney advertisement and, informative content that should be encouraged to be included in an advertisement.

Rule 7.1(b)(1)(B) allows the following to be included in advertisements: date of admission to the Board of Professional Responsibility; the date of admission to any other bars; current or former membership or positions held in the Board of Professional Responsibility; former positions of legal employment; years of experience practicing law; the number of attorneys in the advertising firm; and a list of federal courts and jurisdictions other than Tennessee where the attorney is licensed to practice be included. The purpose of this content is to inform the potential client of the background of the advertising attorney.

Rule 7.1(b)(1)(C) articulates that other technical and professional licenses, including dates and institutions, are permissible to be included in content. This proposed Rule allows an attorney to advertise his or her other degrees and licenses. Such information provides a potential client with a more thorough description of the attorney and allowing the potential client to make a better-informed decision as to whom he or she hires.

Rule 7.1(b)(1)(D) provides that military service, including branch and dates of service, is considered permissible content for attorney advertising. This proposed Rule similarly provides a potential client with a more thorough understanding of the background of an attorney and enables the attorney to advertise the service he or she has given to our country.

Rule 7.1(b)(1)(E) states that an explanation of foreign language ability is considered permissible content. This Rule allows a potential client to gain a better understanding as to whether he or she will be able to communicate with a prospective attorney. Tennessee has a growing number of citizens who speak languages other than English and this information will be useful to those individuals.

Rule 7.1(b)(1)(F) sets forth that listing the fields of law in which the lawyer practices is permissible content. The proposed Rule also allows official certification logos which are subject to the requirements set forth in subdivision (c)(6) of this Rule regarding use of terms such as “certified,” “specialist,” and “expert.” The proposed Rule likewise will provide a potential client with information as to what areas of law an attorney practices in and will help the potential client make a better-informed decision regarding his or her choice of an attorney.

Rule 7.1(b)(1)(G) provides that the naming of prepaid or group legal service plans in which the lawyer participates is permissible content. This Rule ensures that the client better understands how his or her potential attorney will charge for services.

Rule 7.1(b)(1)(H) states that advertising the acceptance of credit cards is permissible. This Rule allows an attorney to advertise an alternate method of payment to prospective clients that may need the credit card option in order to pay for attorney services.

Rule 7.1(b)(1)(I) states that an advertisement may contain information on the fee, if any, for an initial consultation and may include information on fee costs and fee schedule. This proposed Rule stipulates that the advertisement of fees and fee schedules must comply with subdivisions (c)(7) and (c)(8) of this Rule. The Rule allows an attorney to be forthcoming with prospective clients regarding the cost of legal services and allows a client to know going in what those legal services will cost.

Rule 7.1(b)(1)(J) allows for common salutary language such as, “best wishes,” “good luck,” “happy holidays,” or “pleased to announce” in advertisements. This proposed Rule simply provides for an attorney to reflect common courtesy in advertisements.

Rule 7.1(b)(1)(K) allows for punctuation marks and common typographical marks to be included in advertisements. This Rule allows punctuation and typographical marks to be included for printed materials and after sentences as appropriate.

Rule 7.1(b)(1)(L) states that the following illustrations may be included in advertisements: the scales of justice, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Tennessee flag, an unadorned set of law books, the inside or outside of a courthouse, columns, diplomas, and/or a photograph of the attorney or group of attorneys in a law firm against a plain, single-colored background or unadorned set of law books are all permissible advertising content. These illustrations may set apart one advertisement from another, but are not deceptive and misleading. These illustrations either stand for justice or are effectively neutral in terms of persuasion. The illustration may not be the official logo of the board of Professional Responsibility or similar to other official logos.

Rule 7.1(b)(1)(M) allows to be included in advertisements that an attorney has engaged in public service. This Rule allows an attorney to highlight his or her commitment and service to the community, state and/or nation.

Rule 7.1(b)(2) is related to lawyer referral services. This proposed Rule states that a lawyer referral service may advertise its name, location, telephone number, referral fee, hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the lawyers practice, its non-profit status (if applicable), its status as a lawyer referral service approved by the Board of Professional Responsibility, and the logo of its sponsoring bar association. The proposed Rule allows lawyer referral services to advertise in a manner similar to practicing attorneys and law firms. It provides a scope of permissible content for the lawyer referral service to reference.

Rule 7.1(b)(3) is related to public service announcements. It states that an attorney and/or law firm may be listed as a sponsor of a public service announcement or charitable event as long as the announcement complies with subdivision (b)(1) of this Rule and Rule 7.10(b). Rule 7.10(b) provides a list of criteria to be considered in determining whether an attorney or law firm's presence in a public service announcement or charitable event serves the interests of the community or the attorney or law firm.

Rule 7.1(c) is a section which provides a list of content and information that is prohibited in attorney advertisements and unsolicited written communications.

Rule 7.1(c)(1) forbids any and all false, misleading, or deceptive communications about the attorney or the attorney's services. Communications which constitute same are further described under Rule 7.1(c)(1)(A) through (K) below.

Rule 7.1(c)(1)(A) prohibits any advertisement that contains a material misrepresentation of fact or law. This proposed Rule is a road map to ethical advertising. An advertisement that violates this Rule not only offends the viewer/reader, but also undermines the integrity of the legal profession.

Rule 7.1(c)(1)(B) prohibits any advertising that is false or misleading. False and misleading statements confuse the viewer/reader and impair his or her ability to objectively decide on an attorney.

Rule 7.1(c)(1)(C) prohibits any advertisement that fails to disclose material information which is necessary to prevent the advertisement from being false and misleading. This Rule elaborates on Rule 7.1(c)(1)(B) in that it also prohibits false or misleading statements that develop through the omission of material facts.

Rule 7.1(c)(1)(D) prohibits any advertisement that is unsubstantiated in fact. This proposed Rule prevents an attorney from making unverifiable claims. Such claims would undermine the image of the legal profession and mislead potential clients.

Rule 7.1(c)(1)(E) prohibits any advertisement that is deceptive. This proposed Rule precludes advertisements which may not appear to be false or misleading on their face, but have tendencies to distract the viewer from what they are seeing. An example would be utilizing attractive, young and healthy models to portray a client who in reality was grievously injured. A second example would be an advertisement that stretches the bounds of reality such as having space aliens or talking dogs assisting clients in an advertisement.

Rule 7.1(c)(1)(F) prohibits an advertisement or unsolicited written communication that contains any reference to past successes or results obtained. This Rule is necessary because advertisements are brief and unsolicited written communications which should be limited in scope. Advertisements cannot generally fully explain the facts and circumstances surrounding large settlements or verdicts. Advertisements that reference past successes and results obtained do not typically illustrate the severity of the injuries and/or damages suffered by the client who received such a large settlement or judgment. Those individuals who have recovered large sums of money have usually suffered serious and irreparable harms, yet this is not typically mentioned in advertisements. This practice is deceptive. Further, these types of advertisements do not contain information on whether the settlement or verdict indicated was actually collected. A default judgment can be used as a past success, however, if none or very little of the money has actually been collected for the client, such advertising is deceptive. A blanket prohibition on references to past successes and results obtained, with an exception for website and other internet

advertisements whereby the facts of the case can be more fully explained, prevents deception in advertising.

Rule 7.1(c)(1)(G) prohibits an advertisement or unsolicited written communication that promises results or references ease of results. The reasoning behind this Rule is similar to that in Rule 7.1(c)(1)(F) because clients who have received such large settlements have typically been involved in long and drawn-out legal battles. Lawsuits and resolution of same is typically not an easy process and it should not be illustrated as such. Suggesting to prospective clients that the legal process is easy is inherently deceptive. A prohibition against false promises of results and ease of results will prevent this type of deception in Tennessee attorney advertising.

Rule 7.1(c)(1)(H) prohibits an advertisement that either states or implies that an attorney can achieve results by means that violate the Rules of Professional Conduct or other law. Advertising simply should not occur under any circumstances where an attorney advertises that he or she will violate court rules or state law in order to win a case.

Rule 7.1(c)(1)(I) prohibits a comparison to another lawyers' services unless the comparison can be factually substantiated. This proposed Rule prevents the mudslinging often found in political advertisements and prevents personal attack advertisements on other attorneys.

Rule 7.1(c)(1)(J) prohibits an advertisement or unsolicited written communication that contains a "fictional" testimonial. It appears that word "fictional" was left out of the initial version of this proposed Rule and has been added to the Rule in Exhibit 1. Allowing fictitious testimonials does not help a client obtain proper legal representation.

Rule 7.1(c)(1)(K) prohibits the use of actors or models portraying clients. Some advertisements currently disseminated in Tennessee show young, attractive, and healthy individuals leading active lives after receiving large settlements. Individuals who have received

such settlement or judgments have typically suffered serious and irreparable harms or death. The use of actors or models to portray clients is thus inherently deceptive. Most people will view these types of advertisements and believe people are getting large amounts of money without substantial injuries or permanent harms. The proposed Rule applies equally to other non-personal injury areas of law where such advertising is utilized as well. Examples of same would be advertisements showing reduction of tax burdens by attorneys and bankruptcy attorney advertising.

Rule 7.1(c)(2) prohibits the use of descriptive statements characterizing the quality of an attorney or law firm's service. Such statements about quality of services are likely to be unsubstantiated and have the potential to effectuate unreasonable expectations in clients.

Rule 7.1(c)(3) prohibits any visual or verbal descriptions, depictions, illustrations, or portrayal of persons, things, or events, that are deceptive, misleading, manipulative, or otherwise likely to confuse the viewer/reader. Visuals or verbal descriptions that manipulate and confuse the viewer undermine the public's perception of attorneys and do not accurately reflect the legal experience to potential clients. Sensationalistic and dramatic advertisements create unjustified expectations that hinder a potential client from making an informed decision as to which attorney to hire.

Rule 7.1(c)(4) prohibits an attorney from advertising regarding an area of practice in which the attorney does not actually practice. This Rule prevents clients from hiring attorneys who do not have experience in the area advertised.

Rule 7.1(c)(5) prohibits an attorney from stating or implying that the attorney or the communication has received approval from the Board of Professional Responsibility. Adhering



to the Rules required of all attorneys who practice Tennessee is not a cause for celebration. This kind of advertising may confuse the viewer and is thus misleading.

Rule 7.1(c)(6) states that an attorney may disclose that the attorney does or does not practice in a particular area of law. The attorney must not state or imply that he or she is “certified,” “board certified,” a “specialist,” or an “expert” except when Rule 7.1(c)(6)(A) is complied with. This Rule prohibits false and misleading advertising as to certification or specialization, which is detrimental to both the public and the perception of the legal profession.

Rule 7.1(c)(6)(A) provides that an attorney may state that he or she is a certified in a specific area of practice if the attorney complies with the Tennessee Certification Plan set forth in Rule 7.4. Such a communication should first identify the certifying organization and then state that the attorney is “certified,” a “specialist,” or an “expert” in the particular area in which the attorney has become certified.

Rule 7.1(c)(7) provides for the disclosure of liability for expenses other than fees. This Rule requires that any advertisement that contains information about an attorney’s fee, including advertisements indicating that there will be no fee unless there is a recovery, must state whether the client will be liable for any expenses in addition to the fee. This Rule encourages attorneys to be forthcoming regarding fees and other expenses.

Rule 7.1(c)(8) states that an attorney who advertises a fee or range of fees, including online advertisements, must honor that fee for at least 90 days unless the advertisement explicitly specifies a shorter period. For advertisements in telephone directories or other forms of media not published more frequently than annually, the attorney must honor the fee or range of fees for at least one year. This proposed Rule similarly encourages attorneys to be forthcoming regarding fee arrangements.

Rule 7.1(c)(9) states that an attorney may not advertise services under a name that violates Rule 7.5. This Rule prohibits an attorney from falsely advertising.

Rule 7.1(c)(10) provides that any words or statements that are required by the subchapter must appear in the same language, whether it is in English or otherwise, in which the advertisement appears. If more than one language is used in the advertisement, the required words or statements must appear in both languages on the advertisement. This ensures that the viewer/reader of an advertisement understands the required language and can thus make an informed decision regarding an attorney.

Rule 7.1(c)(11) states that any words or statements required by this subchapter must be clearly legible if written or clearly intelligible if spoken. This prevents an attorney from misleading the viewer/reader by effectively omitting the required language.

Rule 7.1(c)(12) prevents an attorney from paying, either directly or indirectly, for the cost of an advertisement of a lawyer not in the same firm. This Rule is necessary to prevent an attorney that does not have responsibility for the potential client taking a business interest in a firm he or she is not financially and ethically responsible for.

Rule 7.1(c)(13) prohibits an attorney from giving anything of value to a person or entity that recommends the attorney except for paying reasonable advertising costs. This Rule ensures that a recommendation from a person or entity regarding an attorney and the attorney's services is above board.

Rule 7.1(c)(14) prohibits the use of an image or voice of a celebrity who is generally recognizable to the public. This type of "endorsement" may mislead a viewer into choosing an attorney based on a celebrity's reputation or star quality rather than based on the attorney's merits.

Rule 7.1(c)(15) prohibits any sound or visual that is inherently deceptive, misleading, manipulative, or otherwise likely to confuse the viewer/listener. This Rule is included so that false, misleading, deceptive, and manipulative advertising is prohibited to allow potential clients to objectively select an attorney.

#### **IV. Proposed Rule 7.7 Advertisements in Electronic Media Other Than Computer-Accessed Communications**

Proposed Rule 7.7(a) addresses advertisements in electronic media other than computer accessed communications and explains that all advertisements in the electronic media, such as television and radio, are subject to the requirements set forth in Rule 7.1.

Rule 7.7(b) provides a brief list of non-computer electronic media such as (1) prohibited content and (2) permissible content in all television and radio advertisements.

##### *(1) Prohibited Content:*

7.7(b)(1)(A) prohibits any content that is deceptive, misleading, manipulative, or otherwise likely to confuse the consumer.

7.7(b)(1)(B) prohibits any spokesperson's voice that is generally recognizable to the public. This practice would likely to mislead the consumer because a potential client may choose an attorney based on the recognized spokesperson instead of an attorney's legal skills, diligence, and reputation.

7.7(b)(1)(C) allows only for instrumental background music and prohibits any other background sound. Other background sounds, such as honking horns, ambulance sirens, and ringing cash registers, serve only to mislead the viewer.

7.7(b)(1)(D) prohibits any actor or model from portraying a client. An actor or model portraying a client is inherently misleading and thus incompatible with the Rules herein because

it gives clients unrealistic expectations and often does not reflect the actual physical appearance or state of the client the actor/model is portraying.

*(2) Permissible Content:*

7.7(b)(2)(A) allows for any images in television advertisements that otherwise conform to the Rules herein. This allows attorneys to utilize images in television advertisements as long as they are not misleading, deceptive, or likely to confuse the viewer.

7.7(b)(2)(B) allows for a non-attorney spokesperson to speak on behalf of an attorney or firm as long as it conforms to the Rules herein, but provides that the spokesperson must make a disclosure that he or she is a spokesperson and not an attorney to avoid confusion.

**V. Proposed Rule 7.8 Evaluation of Advertisements**

Rule 7.8(a) explains that, subject to exemptions, all advertisements through the public media or in unsolicited written communications must be filed with the Board of Professional Responsibility in Nashville in order to assess an advertisement's compliance with the Rules.

Rule 7.8(a)(1) applies to television and radio advertisements. Rule 7.8(a)(1)(A) mandates that all television and radio advertisements be filed for review by the Board of Professional Responsibility in Nashville. This review process allows the Board of Professional Responsibility to assess such advertisements and ensure adherence to the ethical rules.

Rule 7.8(a)(1)(B) allows for a voluntary filing of a television or radio advertisement in order to obtain an advisory opinion regarding the potential advertisement. This process allows an attorney to obtain an opinion on whether or not the potential advertisement complies with the Rules and allows an attorney to make any changes necessary before dissemination of the advertisement. However, there is no requirement to obtain prior approval before making the advertisement public.

Rule 7.8(a)(1)(C) provides for the evaluation of advertisements by the Board of Professional Responsibility. The Rule indicates that the Board of Professional Responsibility will notify the attorney of the compliance or non-compliance of an advertisement within 15 days of receipt of the filing plus 5 days mailing time – in other words, within 20 days of filing. If the Board of Professional Responsibility does not notify the attorney of the compliance or non-compliance of the advertisement within the prescribed time period, the advertisement is considered approved. The supplemental Proposed Rule 7.8 has a typographical error in Rule 7.8(a)(1)(C) where it is indicated that “If the Board of Professional Responsibility does not send any communication ...,” the part that indicates “seven (7) days should read “twenty (20) days.” That change is reflected in Exhibit 1. This Rule allows for the dissemination of an advertisement before approval by the Board of Professional Responsibility, but stipulates that the advertisement must adhere to all of the Rules set forth in this subchapter. If the Board of Professional Responsibility determines that an advertisement is not in compliance with the Rules, the attorney may face disciplinary actions and/or sanctions, which may include the removal of the advertisement from the media. The Rule allows an advertisement to be disseminated before approval by the Board of Professional Responsibility, but places an ethical duty on every attorney to advertise according to the Rules or face disciplinary action or sanctions. It further allows for members of the public and/or attorneys to submit a complaint outside of those parameters as well. The Rule is necessary for a check and balance on the system. The advertisements most widely disseminated across the state will be reviewed by the Board of Professional Responsibility.

Rule 7.8(a)(1)(D) explains that the evaluation of radio and television advertisements is limited to an evaluation of an advertisement’s compliance with these Rules only. It also

explicitly states that the attorney is responsible for the truth of all factual claims and statements in any advertisement. This Rule limits the scope of the Board of Professional Responsibility's review, but places the ethical duty on the attorney to advertise within the proposed Rules.

Rule 7.8(a)(1)(E) provides that an attorney may advertise without approval by the Board of Professional Responsibility, but that the advertisement must be in compliance with this subchapter, and if it is found not in compliance, the attorney may be subject to discipline and/or sanctions. This Rule serves as a warning to attorneys who advertise without approval that their advertisements are subject to the rules stated herein.

Rule 7.8(a)(1)(F) states that an evaluation by the Board of Professional Responsibility which is deemed in compliance with these rules is binding and a post review complaint will be considered only in light of the rules set forth herein. This provides a bright-line rule for advertising attorneys to follow by stating that the advertisements must comply with the rules set forth in this subchapter.

Rule 7.8(a)(2) applies to advertisements other than television and radio and contains the following subsections:

Rule 7.8(a)(2)(A) states that all other forms of advertisement may be filed for review either prior to or concurrently with the first dissemination of the advertisement or written communication. This ensures that all other forms of advertisement comply with these Rules and provides a mechanism by which other attorneys do not have to report non-compliance and/or grievances regarding advertising.

Rule 7.8(a)(2)(B) allows for a voluntary filing of a potential advertisement or written communication in order for an attorney to obtain an advisory opinion regarding the potential advertisement or communication. This allows an attorney to obtain an opinion on whether or not

the potential advertisement complies with the Rules and allows an attorney to make any changes necessary before dissemination of the advertisement.

Rule 7.8(a)(2)(C) explains the process of evaluation of advertisements and written communication by the Board of Professional Responsibility. The Board of Professional Responsibility will notify the attorney of the compliance or non-compliance of an advertisement within 15 days of receipt of the filing. This Rule states that any reasonable doubt as to the advertisement's compliance with these Rules will be communicated to the attorney or firm within this 15-day time period and further examination will be done within a reasonable time. If the Board of Professional Responsibility does not send any communication within this 15-day time period, the advertisement is considered approved. This Rule does not apply to advertisements that are exempt from filing, as outlined in Rule 7.10. This Rule allows for the dissemination of an advertisement before approval by the Board of Professional Responsibility, but stipulates that the advertisement must adhere to all of the Rules set forth in this subchapter. This Rule places an ethical duty on every attorney to advertise according to the Rules or face disciplinary action and/or sanctions.

Rule 7.8(a)(2)(D) states that the Board of Professional Responsibility may request substantiating information regarding the content of an advertisement or written communication. This ensures that an investigation is fair to all concerned.

Rule 7.8(a)(2)(E) concerns an advertisement deemed not in compliance with these rules. It states that the Board of Professional Responsibility will notify the attorney of the non-complying advertisement and states that continued dissemination of the advertisement or written communication may result in disciplinary action and/or sanctions. This Rule ensures that an

attorney will be notified of an offending advertisement so that the attorney may remove the advertisement from circulation.

Rule 7.8(a)(2)(F) states that a notice of compliance from the Board of Professional Responsibility is binding in any grievance proceeding unless the advertisement's non-compliance is not apparent on the face of the advertisement. This allows an attorney to use the notice of compliance as evidence of adherence to these Rules should any complaint arise concerning an advertisement.

Rule 7.8(a)(2)(G) provides a list of advertising methods that do and do not have to be reviewed by the Board of Professional Responsibility. The Rule states that the Board of Professional Responsibility does not have to review advertising on websites or the internet, telephone directories, advertising in the form of search engine optimization, paid and/or unpaid subscription internet listing services, magazines or newspapers. The Rules stated herein are still applicable to those type of advertisements. The Rule further states that billboards, public advertising (such as restroom signs) and direct mail advertising must be reviewed by the Board of Professional Responsibility. The proposed Rule makes clear what types of advertising should be submitted for review and what forms of advertising need not be submitted.

Rule 7.8(b) provides what must be included in a filing with the Board of Professional Responsibility. The proposed Rule makes clear what is required of an advertising attorney in regards to filing and review.

Rule 7.8(b)(1) requires a copy of the advertisement in the form the advertisement will be disseminated to the public be attached to the filing. A copy of the advertisement must be available for duplication. The proposed Rule gives the Board of Professional Responsibility the ability to properly review an advertisement to ensure compliance with these Rules.



Rule 7.8(b)(2) requires a transcript if the advertisement is in video form or audiotape in the filing. This Rule provides the Board of Professional Responsibility a method to fully review an advertisement for compliance where it may be difficult to decipher each and every word.

Rule 7.8(b)(3) requires a printed copy of all text used in the advertisement in the filing, which includes both spoken and on-screen language. This proposed Rule provides the Board of Professional Responsibility with the proper means to ensure compliance with the Rules.

Rule 7.8(b)(4) requires an accurate English translation in the filing if the advertisement is disseminated in a language other than English. This Rule ensures that the Board of Professional Responsibility can promptly and adequately review the filing.

Rule 7.8(b)(5) requires a sample envelope in which a written communication will be enclosed in the filing if the communication is in mail form. This Rule also provides the Board of Professional Responsibility with the ability to properly review an advertisement to ensure compliance with these Rules.

Rule 7.8(b)(6) requires the filing to contain a statement listing the mediums in which the advertisement will be disseminated, the anticipated frequency of the dissemination, and the anticipated time period of the dissemination of the advertisement. The proposed Rule provides the Board of Professional Responsibility with a guideline of the scope and purpose of the advertisement.

Rule 7.8(b)(7) requires the filing to contain a fee paid to the Board of Professional Responsibility in the amount of \$150 for a timely filing and \$250 for a submission not timely filed. The proposed Rule further states that the amount of fee shall be subject to an increase of 3% per annum once these Rules are adopted or as otherwise established by the Tennessee Supreme Court. The filing fee offsets the costs of evaluation and review of the advertisements

submitted under these Rules and offsets the cost of enforcing these Rules. This Rule provides a mechanism by which the Board of Professional Responsibility can effectively implement these Rules and will pay for appropriate staffing for same.

Rule 7.8(c) concerns changes in circumstances and the necessity to re-file if such a change occurs. The proposed Rule states that, should a change in circumstances occur that raises a substantial possibility that the advertisement may no longer be in compliance with these Rules; the attorney must re-file the advertisement with the Board of Professional Responsibility in Nashville, Tennessee, including an explanation in the change of circumstances. The re-filing and review may include an additional review fee not to exceed \$100. The proposed Rule ensures the continuing compliance to these proposed Rules for advertisements in Tennessee.

Rule 7.8(d) requires an attorney to maintain a copy of the advertisement filed with the Board of Professional Responsibility for at least three years after its last dissemination. The proposed Rule further states that written communications sent to two or more prospective clients must also be retained for three years with the names and addresses of the persons to which the communication was sent. This proposed Rule ensures accountability among advertising attorneys by requiring them to keep records of their advertisements' disseminations and protects attorneys in the event that grievances are brought forth.

#### **VI. Proposed Rule 7.9 Computer-Accessed Communications**

Rule 7.9(a) defines the term "computer-accessed communications" as information that is read, viewed, or heard directly through the use of a computer, including, but not limited to, internet websites, unsolicited electronic mail communications, and information concerning an

attorney's services found on search engines. This Rule serves to define the scope of the term "computer-accessed communication" in order to avoid any ambiguity.

Rule 7.9(b) concerns websites and internet presence controlled and maintained by an attorney and/or law firm. Rule 7.9(b) is a conjunctive Rule and thus requires all three subsections.

Rule 7.9(b)(1) provides that websites and other internet presences must disclose all jurisdictions in which an attorney or members of a firm are licensed to practice law. This proposed Rule serves to inform the reader/viewer of the website about the attorney or law firm. Full disclosure of such information is essential to a potential client making an informed decision in choosing an attorney.

Rule 7.9(b)(2) requires the disclosure of at least one bona fide office, as detailed above in Rule 7.1. This Rule serves to ensure that attorneys claiming to practice in Tennessee do, in fact, physically practice in Tennessee.

Rule 7.9(b)(3) states that the information detailed above is considered to be provided upon request.

Rule 7.9(c) concerns electronic mail communications and prohibits unsolicited electronic mail communications from an attorney, firm, or on behalf of an attorney or firm, unless certain conditions are met. Rule 7.9(c) is also a conjunctive Rule and thus requires all three subsections.

Rule 7.9(c)(1) requires that all requirements of Rule 7.3 (Solicitation of Potential Clients) are to be met with respect to unsolicited electronic mail communications. This Rule ensures adherence to Rule 7.3 for computer-accessed communication and maintains the integrity of the legal profession by preventing unnecessary and outrageous unsolicited communications.

Rule 7.9(c)(2) requires the disclosure of at least one bona fide office, as detailed in Rule 7.1 above. This Rule serves to ensure that attorneys claiming to practice in Tennessee do, in fact, practice in Tennessee.

Rule 7.9(c)(3) requires that the subject line of the communication states, "Legal Advertisement." This ensures that the recipient of an unsolicited electronic mail communication knows he or she is receiving an advertisement from an attorney.

Rule 7.9(d) concerns all other computer-accessed communications not encompassed in sections (b) and (c) of this Rule. It provides that any other form of computer-accessed communications must comply with Rule 7.1. The proposed Rule further indicates that past results and successes may be advertised as computer-accessed communications. To advertise in this manner, the advertising attorney must obtain the written permission of the former client and provide a detailed description of the case which accurately and truthfully reflects the injuries and/or damages incurred. This Rule states that any advertisement regarding prior services must, in bold and capital letters, state that "**PRIOR RESULTS DO NOT GUARANTEE FUTURE RESULTS.**" This Rule ensures that all alternative forms of computer-accessed communications similarly comply with the rules herein. Allowing prior results and past successes is permissible in this setting because the facts of the case can be explained thoroughly and is less likely to give a potential client unrealistic expectations about his or her case.

## **VII. Proposed Rule 7.10 Exemptions From the Filing and Review Requirement**

This proposed Rule provides a list of other forms of advertisements and communications that are exempt from the filing and review requirement. The proposed Rule is an addition to the exemptions listed in other proposed Rules from this subchapter.

Rule 7.10(a) states that advertisements in mediums such as phonebooks and social media, including, but not limited to, Yellow Pages, Facebook, Twitter postings, and telephone directories, are exempt from the filing and review requirement as long as they comply with the permissible and impermissible forms of illustrations and information as outlined in Rule 7.1. This proposed Rule provides flexibility for some forms of advertising regarding the filing and review requirement, but also are subject to the limitations outlined as identified elsewhere in the proposed Rules to ensure that no outrageous or deceptive advertising is disseminated in Tennessee.

Rule 7.10(b) sets forth that advertisements which reflect that an attorney or law firm is a charitable contributor or part of a public service announcement are exempt from the filing and review requirement as long as the announcement otherwise complies with the limitations outlined in Rule 7.1. The Rule provides a list of criteria that may be considered in determining whether an announcement qualifies as a public service announcement, which are as follows:

Rule 7.10(b)(1) provides that a consideration of whether the content of the announcement appears to serve the interests of the public versus an attorney or law firm is relevant in this consideration. This Rule provides a balancing test of sorts to determine whether the announcement truly serves the public or the interests of an attorney or law firm.

Rule 7.10(b)(2) states that a consideration of whether the announcement contains information concerning the attorney or law firm's area of practice, legal background, or expertise is also relevant in determining whether the announcement should be considered a public service announcement or an advertisement for the attorney.

Rule 7.10(b)(3) provides that a consideration of whether the announcement contains the address and/or telephone number of the attorney or law firm is another means of determining the purpose of the announcement or advertisement.

Rule 7.10(b)(4) provides that a consideration of whether the announcement concerns a legal subject can be a factor to consider.

Rule 7.10(b)(5) states that a consideration of whether the announcement contains legal advice is a factor to consider.

Rule 7.10(b)(6) indicates that a consideration of whether the attorney or law firm paid to have the announcement published is an important factor in determining whether the announcement qualifies as a public service announcement.

Rule 7.10(c) states that a listing or entry in a lawyer list or bar publication is exempt from the filing and review requirement. This is intuitively appropriate, as a listing such as this has a low risk for non-compliance with the Rules set forth herein. It further lessens the volume of review for the Board of Professional Responsibility.

Rule 7.10(d) provides that a communication made only to existing clients, former clients, or other lawyers is exempt from the filing and review requirement. The proposed Rule also has little risk as such individuals are likely to already have established relationships with the sending attorneys.

Rule 7.10(e) indicates that professional announcement cards stating changes in associations, offices, and similar attorney-related matters that are mailed only to other attorneys, relatives, close personal friends, and existing or former clients are exempt from the filing and review requirement. This exemption is appropriate because these materials are not disseminated to the general public.

Rule 7.10(f) provides that computer-accessed communications as described in subdivision (b) of Rule 7.9 are exempt from the filing and review requirement. This exemption is appropriate because the requirements of subdivision (b) of Rule 7.9 set forth reasonable restrictions on computer-accessed communications.

Rule 7.10(g) sets forth that interviews with print or broadcast media are exempt from the review requirement. This exemption is appropriate because the media has a duty to report news effectively and promptly. Attorneys are still required to adhere to the ethical rules established in Tennessee.

#### **VIII. Rules Not Amended**

The following Rules under Subchapter 7 are not amended: Rule 7.3, Rule 7.5, and Rule 7.6

#### **IX. Rules Amended to Reference Rules Within the Chapter**

Rule 7.2 is amended only to the extent that it references all pertinent Rules within this chapter. It should read as follows:

Rule 7.2(a) Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.0, 7.1, 7.2, 7.4, 7.5, **7.7, 7.8, 7.9 and 7.10**, a lawyer may advertise services through written, recorded, or electronic communication, including public media. (emphasis added).

This amendment is necessary because this section needs to be include all pertinent Rules within the chapter.

Rule 7.4 is amended only to the extent that it references all pertinent Rules within this chapter. The introduction to the Rule should read as follows:

“Subject to the requirements of RPCs 7.0, 7.1, 7.2, 7.3, 7.7, 7.8, 7.9 and 7.10,” (emphasis added).

This amendment is necessary because this section needs to be include all pertinent Rules within the chapter.

### **X. Constitutionality of the Proposed Rules**

The proposed Rules, explained in detail above in the previously filed pleadings and this Second Supplement to the Petition, are necessary to prevent excesses and abuses in attorney advertising. The proposed Rules do not violated any Constitutional provisions. The Petition and supplements do not seek to eliminate attorney advertising in Tennessee. It seeks to regulate attorney advertising in Tennessee to prevent the deceptive, and misleading abuses of some advertising currently disseminated in this state.

A review of pertinent case law shows that proposed Rules will hold up to a Constitutional challenge. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the United States Supreme Court addressed the role of the First Amendment and commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In that case, the United States Supreme Court held that commercial speech can and does serve an important societal interest: “[T]he free flow of commercial information is indispensable ... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also *indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.*” 425 U.S. at 765, 96 S.Ct. at 1827 (1976) (emphasis added). The Court thus found that commercial speech is invaluable, but determined that commercial speech ought to be regulated to ensure that it serves the purpose of helping consumers form intelligent opinions.



In Bates v. State Bar of Arizona, the United States Supreme Court invalidated a blanket prohibition on attorney advertising and thus, for the first time, expressly allowed attorney advertising. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977). However, the Court, “recognize[d] that many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved, and ... expect[ed] that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly. *Id.* at 384, 2709. The Court thus recognized that the Bar must assure that attorney advertising meets certain standards (e.g., not false, deceptive, or misleading) and further determined that reasonable restrictions on the “time, place, and *manner of advertising*” are important considerations. *Id.*, see also 425 U.S. at 771, 96 S.Ct., at 1830 (emphasis added).

In Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, the United States Supreme Court developed a four-part analysis for determining whether advertising regulations are constitutional. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343 (1980). (1) First, commercial speech must be protected by the First Amendment. “(False and misleading speech is not protected by the First Amendment). Therefore, in order to be protected by the First Amendment, the commercial speech must, at least, concern “lawful activity and not be misleading.” *Id.* at 566, 2351. If the commercial speech is protected by the First Amendment, (2) courts must ask whether regulation of that speech serves a substantial state interest, (3) whether the regulation “directly advances” that state interest, and (4) whether the regulation is “not more restrictive than necessary” to serve that state interest. *Id.*

Consequently, the Hudson test provides a means for determining the constitutionality of attorney advertising restrictions. Some advertisements currently disseminated in Tennessee are

false and misleading and receive no First Amendment protection, as illustrated by the first prong of the Hudson test. The second prong of the Hudson test mandates that the any regulation must serve a substantial state interest. Reasonable restrictions on attorney advertising are necessary to prevent advertising abuses and serve a substantial state interest because the dissemination of truthful, informative communications is of utmost importance to the public. The proposed Rules constitute such reasonable restrictions, satisfying the second prong of the Hudson test.

The previous petitions and this one filed with this Court have expounded five main principles: (1) attorneys in Tennessee must have a bona fide office in Tennessee; (2) actors cannot portray clients in advertisements; (3) previous case results and ease of results should not be referenced or used in advertisements; (4) deceptive visuals or sounds should not be allowed in advertisements, and (5) advertisements with some exceptions must be submitted to the Board of Professional Responsibility for review.

These principles and the corresponding proposed Rules protect the public from advertising abuses in Tennessee and directly advance the state interest of the dissemination of truthful, informative communications. The changes to the ethical rules will provide the public with more accurate and uncluttered information, allowing them to make informed decisions in choosing an attorney. This satisfies the third prong of the Hudson test because the regulations directly advance these state interests. Further, the principles and proposed language are reasonable. Consequently, these regulations satisfy the fourth prong of the Hudson test because they are not more restrictive than necessary. Rather, they are reasonable, rational regulations concerning attorney advertising necessary to prevent advertising abuses in Tennessee.

The first Supplement to Petition to Tennessee Supreme Court to Adopt Changes to Rules of Professional Conduct on Lawyer Advertising presented a modified version of Rule 7.8

concerning the review of advertisements. The proposed rule in the original petition required prior approval for advertisements, but upon further consideration, the petitioner filed a supplemental petition with an altered rule 7.8, explained herein, which only requires a filing with the Board of Professional Responsibility. No states currently require prior approval, and in accordance, the petitioner respectfully suggests that this Court follow the approach implemented by Florida after its process for attorney advertisements was challenged.

In Harrell v. The Florida Bar, the United States Court of Appeals for the Eleventh Circuit held that Florida's regulations of attorney advertising were constitutional after an attorney challenged the constitutionality of the bar regulations, arguing that the rules constituted a prior restraint. Harrell v. The Florida Bar, 608 F.3d 1241 (11th Cir. 2010). The Court implied that if approval was required, it would constitute prior restraint. However, the court noted:

Harrell argued in the district court that the rule was an unconstitutional prior restraint under the First Amendment. The district court considered the claim justiciable, and in defending the rule on the merits, the Bar urged a construction of the rule under which a lawyer may disseminate a proposed advertisement upon receipt of any opinion by the Bar, rather than, as the text of the rule might suggest, only upon receipt of a favorable opinion. The district court accepted this narrowing construction, and, having thus construed the rule as a "pre-filing" rather than a "pre-clearance" requirement, it rejected Harrell's challenge to the rule as a prior restraint." 608 F.3d at 1268.

Consequently, the United States Court of Appeals for the Eleventh Circuit held that Florida's advertising regulations did not constitute prior restraint.

By amending Proposed Rule 7.8 in the supplemental petition, the petitioner seeks to avoid any prior restraint concerns. The proposed Rule explained in this petition is the amended rule offered in the first supplemental petition and is modeled after the rules in Florida. It does not require *prior* approval, but rather requires that the advertisement be *filed* with the Board of

Professional Responsibility for review. As illustrated by Harrell, this filing requirement does not constitute a prior restraint. The rule passes constitutional muster.

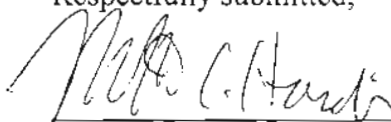
Those who submit to this Court that these principles violate the First Amendment in light of the decisions of the United States Supreme Court in Virginia Board of Pharmacy, Bates, Hudson, and Harrell are simply incorrect. These reasonable restrictions on attorney advertising are not only constitutional, but necessary to prevent advertising abuses that mislead Tennesseans and have contributed to the negative perception of attorneys by the public.

### **XI. Conclusion**

The preceding Second Supplement to the Petition the Tennessee Supreme Court to adopt changes to the Rules of Professional Conduct on Lawyer Advertising along with the previously filed Petition and Supplement seeks to help attorneys effect a rise back to the exalted post attorneys one held in the public's eye and to help our clients receive fair consideration from a jury. Some outrageous attorney advertising in Tennessee has led to the public's poor perception of attorneys and in turn the public's biased participation as jurors in the court process. Misleading and deceptive advertising poses many threats to the legal profession, such as the public's negative perception of lawyers, the poisoning of jury pools, and false promises of easy results. The Petitioner respectfully proposes that the Court adopt the proposed Rules attached as Exhibit 1 as part of Tennessee's Rules for Professional Conduct. The adoption of these Rules will more effectively regulate attorney advertising in Tennessee and will take an important first step back to the respectability for our honorable profession. Perception is very important and by adopting rules to help prevent excesses in advertising, the sincere hope of the Petitioner is that the public and our clients' interests will again come first. For most attorneys, this has always

been true. The goal of the Petition and Supplements is to effect change in order to ensure the integrity of the legal profession and the justice system itself.

Respectfully submitted,



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Petitioner

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## Exhibit 1

### Proposed Rule 7.0 General

(a) **Permissible Forms of Advertising.** Subject to all the requirements set forth in this subchapter 7, including the filing requirements of Rule 7.8, a lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with Rule 7.3.

(b) **Advertisements Disseminated in Tennessee.** Subchapter 7 shall apply to lawyers admitted to practice law in Tennessee who solicit or advertise for legal employment in Tennessee or who target solicitations or advertisements to Tennessee residents for legal employment.

(c) **Advertisements by Out-of-State Lawyers.** Subchapter 7 shall apply to lawyers admitted to practice law in jurisdictions other than Tennessee:

- (1) who have established a regular and/or permanent physical presence in Tennessee for the practice of law as authorized by other law; and
- (2) who solicit or advertise for legal employment in Tennessee or who target solicitations or advertisements to Tennessee residents for legal employment.

(d) **Advertisements Not Disseminated in Tennessee.** Subchapter 7 shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is not intended for broadcast or dissemination within the state of Tennessee.

(e) **Communications Between Lawyers.** Subchapter 7 shall not apply to communications between lawyers.

(f) **Communications With Family Members.** Subchapter 7 shall not apply to communications between a lawyer and that lawyer's own family members.

(g) **Communications With Current and Former Clients.** Subchapter 7 shall not apply to communications between a lawyer and that lawyer's own current and former clients. However, a lawyer shall not provide advertising materials to the lawyer's own current or former clients that the lawyer received from other attorneys--a lawyer shall not serve as a conduit for other attorneys' advertising. Further, as used in this rule, the term "former clients" does not include the clients or former clients of a public entity.

(h) **Communications at a Prospective Client's Request.** Subchapter 7 shall not apply to communications between a lawyer and a prospective client if made at the request of that prospective client.

(i) **Application of General Misconduct Rule.** The general rule prohibiting a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation applies to all communications by a lawyer, whether or not subchapter 7 applies to that communication.

### **Proposed Rule 7.1 Advertising Communications Concerning a Lawyer's Services**

#### **(a) Required Content of Advertisements and Unsolicited Written Communications.**

(1) *Name of Lawyer or Lawyer Referral Service.* All advertisements and written communications pursuant to these rules shall include the name of at least one (1) lawyer or the lawyer referral service responsible for their content.

(2) *Location of Practice.* All advertisements and written communications provided for under these rules shall disclose, by city or town, one (1) or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis.

#### **(b) Permissible Content of Advertisements and Unsolicited Written Communications.**

If the content of an advertisement in any public media or unsolicited written communication is limited to the following information, the advertisement or unsolicited written communication, if true and not prohibited by law, shall be presumed to be permissible and not to be misleading or deceptive under these rules. Further restrictions on Unsolicited Written Communications to potential clients are addressed in RPC Rule 7.3. This rule is intended to regulate communications made for the purpose of obtaining professional employment. The rule is not intended to affect other forms of speech by lawyers such as political advertisements and political commentary except insofar as a lawyer's efforts to gain employment is linked to a matter of current public debate.

(1) *Lawyers and Law Firms.* A lawyer or law firm may include the following information in advertisements and unsolicited written communications:

(A) the name of the lawyer or law firm subject to the requirements of this rule and RPC 7.5 a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, website addresses, and electronic mail addresses, office and telephone service hours, and a designation such as "attorney" or "law firm";

(B) date of admission to the Board of Professional Responsibility and any other bars, current membership or positions held in the Board of Professional Responsibility or its sections or committees, former membership or positions held in the Board of Professional Responsibility or its sections or committees with dates of membership, former positions of employment held in the legal profession with dates the positions were held, years of experience practicing law, number of lawyers in the advertising law firm, and a listing of federal courts and jurisdictions other than Tennessee where the lawyer is licensed to practice;

(C) technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions;

(D) military service, including branch and dates of service;

(E) foreign language ability;

(F) fields of law in which the lawyer practices, including official certification logos, subject to the requirements of subdivision (c)(6) of this rule regarding use of terms such as certified, specialist, and expert;

(G) prepaid or group legal service plans in which the lawyer participates;

(H) acceptance of credit cards;

(I) fee for initial consultation and fee schedule, subject to the requirements of subdivisions (c)(7) and (c)(8) of this rule regarding cost disclosures and honoring advertised fees;

(J) common salutary language such as “best wishes,” “good luck,” “happy holidays,” or “pleased to announce”;

(K) punctuation marks and common typographical marks;

(L) an illustration of the scales of justice not deceptively similar to official certification logos or the Board of Professional Responsibility logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Tennessee flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books;

(M) public service; and



(N) role in changing/establishing law/law rules of state via case law or otherwise.

(2) *Lawyer Referral Services.* A lawyer referral service may advertise its name, location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the lawyers practice to whom those responding to the advertisement will be referred, and, if applicable, its nonprofit status, its status as a lawyer referral service approved by the Board of Professional Responsibility, and the logo of its sponsoring bar association.

(3) *Public Service Announcements.* A lawyer or law firm may be listed as a sponsor of a public service announcement or charitable, civic, or community program or event as long as the information about the lawyer or law firm is limited to the permissible content set forth in subdivision (b)(1) of this rule.

**(c) Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.**

(1) *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it:

(A) contains a material misrepresentation of fact or law;

(B) is false or misleading;

(C) fails to disclose material information necessary to prevent the information supplied from being false or misleading;

(D) is unsubstantiated in fact;

(E) is deceptive;

(F) contains any reference to past successes or results obtained;

(G) promises results and/or ease of results;

(H) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(I) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(J) contains a fictional testimonial; or

(K) an actor and/or model plays a client/

(2) *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and unsolicited written communications.

(3) *Prohibited Visual and Verbal Portrayals and Illustrations.* A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.

(4) *Advertising Areas of Practice.* A lawyer or law firm shall not advertise for legal employment in an area of practice in which the advertising lawyer or law firm does not currently practice law.

(5) *Stating or Implying Tennessee Bar Approval.* A lawyer or law firm shall not make any statement that directly or impliedly indicates that the communication has received any kind of approval from the Board of Professional Responsibility.

(6) *Communication of Fields of Practice.* A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is "certified," "board certified," a "specialist," or an "expert" except as follows:

(A) *Certified Lawyers.* A lawyer who complies with the Tennessee certification plan as set forth in RPC 7.4, may inform the public and other lawyers of the lawyer's certified areas of legal practice. Such communications should identify the certifying organization and may state that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification)."

(7) *Disclosure of Liability For Expenses Other Than Fees.* Every advertisement and unsolicited written communication that contains information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.

(8) *Period for Which Advertised Fee Must Be Honored.* A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one (1) year following publication. For advertisements that are in on-line directories, the 90 day period shall apply as indicated above.

(9) *Firm Name.* A lawyer shall not advertise services under a name that violates the provisions of RPC 7.5.

(10) *Language of Required Statements.* Any words or statements required by this subchapter to appear in an advertisement or direct mail communication must appear in the same language in which the advertisement appears. If more than one (1) language is used in an advertisement or direct mail communication, any words or statements required by this subchapter must appear in each language used in the advertisement or direct mail communication.

(11) *Appearance of Required Statements.* Any words or statements required by this subchapter to appear in an advertisement or direct mail communication must be clearly legible if written or intelligible if spoken aloud.

(12) *Payment by Nonadvertising Lawyer.* No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm. Rule 1.5 regarding division of contingency fees is not affected by this provision even though the lawyer covered advertises.

(13) *Payment for Recommendations; Lawyer Referral Service Fees.* A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 1.17

(14) *Use of Celebrity Prohibited.* A lawyer shall not include in any advertisement or unsolicited written communication any celebrity whose voice or image is recognizable to the public.

(15) *Prohibited Sounds and Visuals.* A lawyer shall not include in any advertisement or unsolicited written communication any sound and/or visual that is deceptive, misleading, manipulative, or that is likely to confuse the listener.

#### **Proposed Rule 7.2 Advertising**

(a) Subject to the requirements of paragraphs (b) through (d) below and RPCs **7.0, 7.1, 7.2, 7.4, 7.5, 7.7, 7.8, 7.9 and 7.10**, a lawyer may advertise services through written, recorded, or electronic communication, including public media. (emphasis added).

The remainder of that rule stays the same.

#### **Proposed Rule 7.4 Communication of Fields of Practice and Specialization**

“Subject to the requirements of RPCs **7.0, 7.1, 7.2, 7.3, 7.7, 7.8, 7.9 and 7.10**,” (emphasis added).

The remainder of the rule stays the same.

**Proposed Rule 7.7 Advertisements in the Electronic Media Other Than Computer-  
Accessed Communications**

(a) **Generally.** With the exception of computer-based advertisements (which are subject to the special requirements set forth in Rule 7.9, all advertisements in the electronic media, including but not limited to television and radio, are subject to the requirements of Rule 7.1.

(b) **Appearance on Television or Radio.** Advertisements on the electronic media such as television and radio shall conform to the requirements of this rule.

(1) *Prohibited Content.* Television and radio advertisement shall not contain:

(A) any feature that is deceptive, misleading, manipulative, or that is likely to confuse the viewer;

(B) any spokesperson's voice or image that is recognizable to the public;

(C) any background sound other than instrumental music; or

(D) any actor/model portraying a client.

(2) *Permissible Content.* Television and radio advertisements may contain:

(A) images that otherwise conform to the requirements of these rules; or

(B) a non-attorney spokesperson speaking on behalf of the lawyer or law firm, as long as the spokesperson is not a celebrity recognizable to the public. If a spokesperson is used, the spokesperson shall provide a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer.

**Proposed Rule 7.8 Evaluation of Advertisements**

(a) **Filing and Advisory Opinion.** Subject to the exemptions stated elsewhere in the rules, any lawyer who advertises services through any public media or through written communications sent on an unsolicited basis to prospective clients shall file a copy of each such advertisement with the Board of Professional Responsibility at its headquarters address in Nashville for evaluation of compliance with these rules.

(1) *Television and Radio Advertisements.* The following shall apply to television and radio advertisements:

(A) **Review of Television and Radio Advertisements.** All television and radio advertisements are required to be filed for review.

(B) **Voluntary Filing.** A lawyer may obtain an advisory opinion concerning the compliance of a contemplated television or radio advertisement before the

production of the advertisement by submitting to the Board of Professional Responsibility at its headquarters address in Nashville a script, a printed copy of any on-screen text, a description of any visual images to be used in a television advertisement, and the fee specified in this rule. The voluntary submission shall not satisfy the filing and evaluation requirements of these rules, but the Board of Professional Responsibility shall charge no additional fee for evaluation of the completed advertisement for which a complete voluntary filing has been made.

(C) Evaluation of Advertisements. The Board of Professional Responsibility shall evaluate all advertisements filed with it pursuant to this rule for compliance with the applicable rules set forth in this subchapter 7. The Board of Professional Responsibility shall complete its evaluation and shall notify the lawyer whether the advertisement is in compliance with subchapter 7 within 15 days of receipt of a complete filing plus 5 days' mailing time. If the Board of Professional Responsibility does not send any communication to the filer within twenty (20) days of receipt of a complete filing, the advertisement will be deemed approved. This approval shall not prohibit the Board of Professional Responsibility from reviewing advertisements for compliance with these Rules after a written complaint is made to the Board of Professional Responsibility by an attorney licensed in Tennessee or member of the public. The attorney, attorneys and/or law firm who submits an advertisement for evaluation may proceed with publishing the advertisement without approval of the Board of Professional Responsibility. However, said attorney, attorneys and/or law firm must adhere to all ethical rules or may face disciplinary action and/or sanctions as allowed under the Rules. In addition to sanctions found elsewhere in the Rules, the Board of Professional Responsibility may find that the appropriate sanction is removal of the offending advertisement.

(D) Substantiating Information. Evaluation of television and radio advertisements conducted under this subdivision is limited to determination of compliance with subchapter 7 and does not extend to substantiation of factual claims or statements contained in the advertisement(s). Notice of compliance with subchapter 7 does not alter the lawyer's responsibility for the accuracy of factual claims or statements.

(E) Effect of Use of Advertisement. A lawyer may disseminate a television or radio advertisement without approval by the Board of Professional Responsibility that the advertisement complies with subchapter 7. A lawyer who disseminates an advertisement not in compliance with subchapter 7, whether the advertisement was filed or not, is subject to discipline and/or sanctions as provided in these Rules.

(F) Reliance on Notice of Compliance. Subject to a written complaint by a licensed Tennessee attorney or member of the public filed with the Board of Professional Responsibility, a written finding of compliance by the Board of Professional Responsibility in television and radio advertisements shall be

binding. Any complaint shall only be reviewed in terms of the applicable Rules on advertising. An attorney's reliance on compliance found by the Board of Professional Responsibility shall be a mitigating factor in application of any discipline. The Board of Professional Responsibility may find that the appropriate sanction is removal of the offending advertisement.

(2) *Other Advertisements.* The following shall apply to advertisements other than television and radio:

(A) *Filing and Review.* All other advertisements required to be filed for review must be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or written communication.

(B) *Voluntary Prior Filing.* A lawyer may obtain an advisory opinion concerning the compliance of a contemplated advertisement or written communication that is not required to be filed prior to its first use in advance of disseminating the advertisement or communication by submitting the material and fee specified in subdivision (b) of this rule to the Board of Professional Responsibility at least 15 days prior to such dissemination. If the Board of Professional Responsibility finds that the advertisement complies with these rules, the lawyer's voluntary submission shall be deemed to satisfy the filing requirement set forth in this rule.

(C) *Evaluation of Advertisements.* The Board of Professional Responsibility shall evaluate all advertisements and written communications filed with it pursuant to this subdivision for compliance with the applicable rules set forth in this subchapter 7. The Board of Professional Responsibility shall complete its evaluation within 15 days of receipt of a complete filing unless the Board of Professional Responsibility determines that there is reasonable doubt that the advertisement or written communication is in compliance with the rules and that further examination is warranted but cannot be completed within the 15-day period, and so advises the filer within the 15-day period. In the latter event, The Board of Professional Responsibility shall complete its review as promptly as the circumstances reasonably allow. If The Board of Professional Responsibility does not send any communication to the filer within 15 days of receipt of a complete filing, the advertisement will be deemed approved. The 15-day evaluation period shall not apply to advertisements that are exempt from the filing requirement as set forth in Rule 7.10, but the Board of Professional Responsibility shall complete its review as promptly as the circumstances reasonably allow. A lawyer may not obtain an advisory opinion concerning communications that are not subject to subchapter 7 as listed in Rule 7.0 (d) through (f).

(D) *Substantiating Information.* If requested to do so by the Board of Professional Responsibility, the filing lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or written communication.

(E) Notice of Noncompliance. When the Board of Professional Responsibility determines that an advertisement or written communication is not in compliance with the applicable rules, the Board of Professional Responsibility shall advise the lawyer that dissemination or continued dissemination of the advertisement or written communication may result in professional discipline and/or sanctions.

(F) Reliance on Notice of Compliance. A finding of compliance by the Board of Professional Responsibility shall be binding on the Board of Professional Responsibility in a grievance proceeding, unless the advertisement contains a misrepresentation that is not apparent from the face of the advertisement.

(G) It is not required to have website and/or internet advertising, telephone directory advertising, search engine optimization, paid and/or unpaid subscription internet listing services, or magazine and newspaper advertising reviewed by the Board of Professional Responsibility. However, these Rules do apply to same. Billboard advertising, public advertising such as advertising in restrooms, and direct mail advertising is required to be reviewed.

**(b) Contents of Filing.** A filing with the Board of Professional Responsibility as required or permitted by subdivision (a) shall consist of:

(1) a copy of the advertisement or communication in the form or forms in which it is to be disseminated and is readily capable of duplication by the Board of Professional Responsibility (e.g., videotapes, audiotapes, print media, photographs of outdoor advertising);

(2) a transcript, if the advertisement or communication is on videotape or audiotape;

(3) a printed copy of all text used in the advertisement, including both spoken language and on-screen text;

(4) an accurate English translation, if the advertisement appears in a language other than English;

(5) a sample envelope in which the written communication will be enclosed, if the communication is to be mailed;

(6) a statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear, and the anticipated time period during which the advertisement or communication will be used; and

(7) a fee paid to the Board of Professional Responsibility, in an amount of \$150 for submissions timely filed as provided in subdivision (a) or \$250 for submissions not timely filed. This fee shall be used to offset the cost of evaluation and review of advertisements submitted under these rules and the cost of enforcing these rules. The

amount of the fees above shall be subject to an increase of 3% per annum after these rules are established or as otherwise established by the Tennessee Supreme Court.

(c) **Change of Circumstances; Refiling Requirement.** If a change of circumstances occurring subsequent to the Board of Professional Responsibility's evaluation of an advertisement or written communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly refile the advertisement or a modified advertisement with the Board of Professional Responsibility at its headquarters address in Nashville along with an explanation of the change in circumstances and an additional fee set by the board of governors but not exceeding \$100.

(d) **Maintaining Copies of Advertisements.** A copy or recording of an advertisement or written or recorded communication shall be submitted to the Board of Professional Responsibility in accordance with the requirements of rule 7.8, and the lawyer shall retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical written communications are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical written communications and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the written communication was sent.

#### **Proposed Rule 7.9 Computer-Accessed Communications**

(a) **Definition.** For purposes of this subchapter, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

(b) **Internet Presence.** All World Wide Web sites accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;

(2) shall disclose one (1) or more bona fide office locations of the lawyer or law firm, in accordance with Rule 7.1 and

(3) are considered to be information provided upon request.

(c) **Electronic Mail Communications.** A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication, including social media, directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:



(1) the requirements of Rule 7.3 are met;

(2) the communication discloses one (1) or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised, in accordance with Rule 7.1; and

(3) the subject line of the communication states "legal advertisement."

(d) **Advertisements.** All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of the rule are subject to the requirements of Rule 7.1. However past results may be referenced on computer accessed communications with written permission of the former client and the requirement that the case be described in a manner to accurately reflect the injuries and damages incurred. Further, in the introduction to any advertisement or communications concerning a lawyer's or law firm's services, it must state in bold and capital letters that "PRIOR RESULTS DO NOT GUARANTEE FUTURE RESULTS."

#### **Proposed Rule 7.10. Exemptions From the Filing and Review Requirement**

In addition, to those categories listed in other places in these Rules, the following are exempt from the filing requirements of Rule 7.8.

(a) any advertisement in any of the public and or social media, including the yellow pages of telephone directories, that contains neither illustrations nor information other than permissible content of advertisements listed in Rule 7.1.

(b) a brief announcement in any of the public media that identifies a lawyer or law firm as a contributor to a specified charity or as a sponsor of a public service announcement or a specified charitable, community, or public interest program, activity, or event, provided that the announcement contains no information about the lawyer or law firm other than permissible content of advertisements listed in Rule 7.1 and the fact of the sponsorship or contribution. In determining whether an announcement is a public service announcement for purposes of this rule and the rule setting forth permissible content of advertisements, the following are criteria that may be considered:

(1) whether the content of the announcement appears to serve the particular interests of the lawyer or law firm as much as or more than the interests of the public;

(2) whether the announcement contains information concerning the lawyer's or law firm's area of practice, legal background, or experience;

(3) whether the announcement contains the address or telephone number of the lawyer or law firm;

- (4) whether the announcement concerns a legal subject;
  - (5) whether the announcement contains legal advice; and
  - (6) whether the lawyer or law firm paid to have the announcement published.
- (c) a listing or entry in a law list or bar publication.
- (d) a communication mailed only to existing clients, former clients, or other lawyers.
- (e) professional announcement cards stating new or changed associations, new offices, and similar changes relating to a lawyer or law firm, and that are mailed only to other lawyers, relatives, close personal friends, and existing or former clients.
- (f) computer-accessed communications as described in subdivision (b) of Rule 7.9.
- (g) interviews with print or broadcast media.