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NEW JERSEY STATE BAR ASSOCIATION

JOHN E. KEEFE JR., PRESIDENT
Keefe Law Firm
125 Halt Mile Road
Floor I, Suite 100
Red Bank, NJ 07701
732-224-9400 • FAX: 732-224-9494
jkeefe@keefe-lawfirm.com

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Proposed Amendments to RPCs 7.2 and 1.6

Dear Judge Grant:

Thank you for providing the New Jersey State Bar Association (NJSBA) with additional time to submit its views to the Court on proposed amendments to RPCs 7.2 and 1.6. After surveying its members and receiving a wide range of comments on the proposal, the NJSBA respectfully urges the Court to reject the proposed amendments to RPC 7.2 and urges clarification of RPC 1.6.

The NJSBA believes that the proposed modification to RPC 7.2(b) will place onerous and expensive burdens on attorneys, especially solo and small-firm attorneys, without a meaningful result. While the rule is meant to allow the Committee on Attorney Advertising to adequately review allegations of fraudulent advertising, the NJSBA notes that such allegations are few in number when compared to the number of attorneys to whom this backup requirement would apply. The NJSBA submits that a better way to address the issue is to require the individual alleging the fraudulent conduct to capture an image of the offending page or pages so it can be reviewed by the Committee.

While RPC 7.2(a) now mentions "internet and other electronic media" as vehicles for attorney advertising, it does *not* say that entire websites are considered advertisements, even though an advertisement can easily be posted *within* an attorney's website. Similarly, the term "*an* advertisement or written communication" within RPC 7.2(b) (emphasis supplied) is singular. Even though *In re Hyderally*, 208 N.J. 452, 461 (2011) confirms that "[a]ttorneys are responsible

for monitoring the content of all their communications with the public, including websites designed by others,” the case does not impose any additional recordkeeping requirements on attorneys.

Attorneys create and maintain websites in many different ways. Some small firms employ the services of large companies like Thomson Reuters (Findlaw) or Martindale. Many firms use one of the hundreds or thousands of small website designers. Some attorneys create do-it-yourself websites in platforms like Wix or WordPress. Those technically proficient attorneys may design and publish websites by themselves, using open-source content management systems such as Joomla. The vast majority of New Jersey law firms do not have full-time IT departments.

Requiring monthly backups and the maintenance of archives for three years is cost-prohibitive for most attorneys, who rarely maintain their own on-site web-hosting hardware and software. Maintaining 36 monthly backups may not even be *possible* for some of the platforms and website providers identified above. Even more, relying on outside assistance or standardized websites for backups is uncertain.

To the extent that some web-hosting platforms allow full electronic backups to be taken, the backups’ purpose is to guard against website destruction from outside invaders, or hackers. Industry standards provide that only the most recent clean backup is usually kept, not the last 36 months. In addition, even with 36 months’ worth of backups, all that will be retained is a snapshot of a moment. Dynamic websites may change several times a day and capturing every single change may not even be possible.

Current technology allows an individual who claims that an attorney’s advertisement is fraudulent or violates the rules in any way, to instantly and electronically capture the offending webpage in a PDF or JPG file. Therefore, even if an attorney’s website is dynamic, it is significantly less onerous for the claimant to collect and preserve the webpage complained of than for the attorney to maintain 36 monthly backups.

The NJSBA also notes the particular hardship that the proposed modification will pose to providers of qualifying pro bono service providers and other entities that provide free legal services. If the Court adopts the proposal, the NJSBA respectfully requests that such pro bono providers be exempted from the Rule, or at least only be required to capture the material directed at potential clients, such as the Get Help section of a website.

With regard to the proposed modification to RPC 1.6, the NJSBA notes that, while attorneys should be free to talk about information that is in the public domain, the Rule should clarify that unless a client’s representation by a lawyer is itself “generally known,” client identity should remain confidential.

This is because, in some instances, the association of a client’s name with a particular lawyer, law offices, or legal services organizations would amount to the disclosure of information that should remain confidential. Consider the following possibilities:

Disclosure of the name of a client seeking advice from a criminal lawyer may connect that client to a suspected crime;

Disclosure of the name of a client seeking assistance from a means-tested legal services program would reveal the client's income qualification or that the client faced eviction, bankruptcy, loss of benefits, or other private matters;

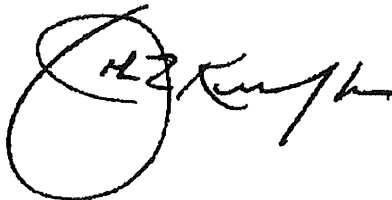
Disclosure of the name of a client seeking services from organizations practicing health law could reveal or suggest a diagnosis; and

Disclosure of client names by organizations assisting survivors of intimate partner violence could place both the clients and their lawyers at risk.

For these reasons, the NJSBA urges the Court to include the suggested clarification to keep client identities confidential unless the lawyer's representation of a client is "generally known."

Once again, thank you for considering the NJSBA's views on these important proposals.

Very truly yours,

A handwritten signature in black ink, appearing to read "John E. Keefe Jr.", written over a large, circular scribble.

John E. Keefe Jr.
President

/sab

cc: Evelyn Padin, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director