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Getting Crosswise with Cross-Marketing

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The Oregon Supreme Court recently wrote a cautionary tale on lawyer "cross-marketing" with other service providers. In *In re Phillips*, 338 Or 125, 107 P3d 615 (2005), the Court suspended a lawyer for three years for entering into a marketing joint venture with an insurance group without fully informing the targets of the sales pitch—his clients.

Phillips' practice focused on living trusts and related estate planning for older, high net-worth clients. An insurance group approached Phillips and his partner about entering into a joint venture under which the lawyers would introduce their clients to the insurance group for "trust reviews" and the law firm would get a cut of any insurance sales that resulted.

The law firm's initial letter to clients suggested that the trust review would be conducted by three people that the firm had "'carefully selected and trained'" and that there would be no charge for the review unless the clients needed new or updated estate planning documents. The letter did not reveal the connection between the law firm and the insurance group or that the three people who had been "carefully selected and trained" were employees of the insurance group rather than of the law firm. The letter did not include a conflict waiver.

The law firm sent the initial letter to 200 clients. In a later mailing to another 1,500 clients, the firm modified the letter to mention that if an insurance

sale occurred "'we may receive compensation from the issuing company.'" Even this second round of letters, though, did not disclose the full connection between the law firm and the insurance group, nor did it contain a conflict waiver.

The joint venture was phenomenally successful, generating $810,000 in commissions during a six-month period, of which the law firm netted $270,000. In fact, the "trust review" program was so successful that the law firm worked with the insurance group to market it to other lawyers. The firm developed an 11-point checklist for lawyers to market the program to their clients. Item 11 read: "'[s]it back and wait for the checks to roll in.'"

The Oregon State Bar was not amused and neither was the Oregon Supreme Court. The Bar charged Phillips and his partner (who later resigned his membership under a provision equivalent to disbarment) with misrepresentation, revealing client secrets and conflicts. The Court agreed. Because the case arose before we moved to the new Rules of Professional Conduct this past January, the Supreme Court analyzed the case under the former Oregon Code of Professional Responsibility. Given the tenor of the decision, though, it is likely that the Court would have come out the same way under the RPCs.

The Supreme Court noted that the failure to disclose the financial connection between the law firm and the insurance group was not simply an unwaived financial interest conflict. Although the Court did indeed find a violation of that conflict rule (former DR 5-101(A); current RPC 1.7(a)(2)), it also held that

the failure to disclose the relationship constituted a misrepresentation (former DR 1-102(A)(3); current RPC 8.4(a)(3)). The Court also found that Phillips violated the confidentiality rule (former Oregon DR 4-101(B)(3); current RPC 1.6(a)) because he revealed his clients' identities and addresses for his own financial gain.

The events involved predated Oregon's adoption in 2003 of a strict reciprocal referral rule—former DR 2-105 and current RPC 5.4(e). That rule provides, in relevant part, that "[a] lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral[.]" Even if a cross-marketing agreement passes muster under RPC 5.4(e), *Phillips* is a good illustration of the pitfalls that remain. Conflict issues loom large and the Supreme Court's characterization of the lawyers' failure to disclose the joint venture as a misrepresentation to clients puts such conduct in very serious disciplinary territory. Moreover, the failure to disclose raises the specter of civil liability on a lawyer's part for breach of fiduciary duty—especially if the "cross-marketed" product or service isn't to a client's liking. *See Kidney Association of Oregon v. Ferguson*, 315 Or 135, 142-44, 843 P2d 442 (1992) (noting that violations of the professional rules may also breach corresponding fiduciary duties by lawyers to clients). In short, cross-marketing can be an invitation to get crosswise with many civil and regulatory restrictions.

ABOUT THE AUTHOR

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