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Law Firm Marketing, Part 2: Practice

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In our last column, we looked at the “theory” underlying law firm marketing in the form of the United States Supreme Court decisions over the past 30 years that shaped the right to advertise that lawyers have today. As those decisions evolved, so did the lawyer marketing regulations—both at the national level and here in Washington. The ABA substantially rewrote its law firm marketing regulations in 1983 when it adopted its influential Model Rules of Professional Conduct and modified them further in 2002 when it updated its Model Rules. Washington followed suit in 1985 when we moved to the Rules of Professional Conduct and then modified them further in 2006 when we updated our RPCs and adopted accompanying official comments.¹

Broadly put, today’s law firm marketing rules address three general areas: (1) “advertising,” which includes print, media and other electronic marketing such as law firm web sites, together with specialized subsets such as law firm names; (2) “solicitation,” which includes direct in-person, telephone, electronic and mail communications; and (3) referrals, which include lawyer-to-lawyer referrals, referrals from nonlawyers and other referral mechanisms such as “networking” organizations. We’ll look at each in turn.

Advertising

Print, media and electronic advertising are covered primarily in RPCs 7.1 and 7.2. The former sets out the basic rule that all advertising must be truthful. Comments 2 and 3 to RPC 7.1 also generally limit comparative advertising and require that advertising results or testimonials be true and suggest that they be accompanied by a disclaimer. The latter allows lawyers to pay for both the direct cost of placing ads and associated expenses for creating them. It also permits payment for marketing consultants who are advising on broader business development strategy. RPC 7.4, in turn, generally allows lawyers to communicate their fields of practice but generally limits the use of the term “specialist” in describing the lawyer’s practice focus. RPC 7.5 deals specifically with law firm names and, among its provisions, allows trade names (as long as they are not misleading or imply a connection with a government agency or a legal services organization) but prohibits lawyers from suggesting that they practice together as an entity when they do not.²

There are two fundamental characteristics of the advertising regulations as they exist today.

The first is that they broadly encompass all forms of media communication. Echoing the terms of the rule itself, Comment 3 to RPC 7.2 notes specifically that electronic advertising is both permitted and falls within its regulatory scope:

“Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public . . . Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communications by electronic mail is permitted by this Rule.”

The second is that all law firm advertising must be truthful. From the point the United States Supreme Court opened the door to law firm marketing in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), it made very clear that commercial free speech rights under the First Amendment do not extend to false advertising. Although there have not been many Washington Supreme Court decisions on marketing after *Bates*, those that have been issued (see, e.g., *In re Romero*, 152 Wn.2d 124, 129, 94 P.3d 939 (2004)), make that same point, as does Comment 1 to RPC 7.1: “Whatever means are used to make known a lawyer’s services, statements about them must be truthful.”

Solicitation

As we discussed in the first installment in this two-part series, at the same time the U.S. Supreme Court liberalized the advertising rules in cases like *Bates*, it retained regulations on solicitation in potentially coercive situations like those it found in *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), and has applied restrictions even to analogous situations involving targeted direct mail like *Florida Bar v. Went for It, Inc.*, 515 U.S. 618,

115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding a restriction on targeted direct mailings to accident victims for 30 days following the accident concerned). Those restrictions carried through here in Washington as we updated our marketing rules since the mid-1970s to reflect both the developments coming from the U.S. Supreme Court and the ABA.

Washington's principal regulation on solicitation is RPC 7.3. RPC 7.3(a) generally prohibits in-person solicitation (along with "live telephone, or real-time electronic contact") unless the recipient is another lawyer (such as an in-house counsel), a family member, a close personal acquaintance, a former client or has consented to direct contact as a part of a non-profit lawyer referral service. Even in this circumstance, RPC 7.3(b) prohibits contact if either the solicitation involves "coercion, duress or harassment" or the recipient has "made known" to the lawyer that he or she does not wish to be contacted. By contrast, RPC 7.3 generally permits written (paper or electronic) communication with prospective clients (again unless the restrictions just noted apply). Comment 5 to RPC 7.3 and *In re Romero*, 152 Wn.2d 124, both emphasize that solicitations are also subject to the same truthfulness requirement that govern print, media and electronic advertising. Similarly, RPC 7.3(a) and accompanying Comment 8 make the point that a lawyer cannot use a nonlawyer or an associated business owned by the lawyer to engage in solicitations that the lawyer would not be able to make on the lawyer's own.

Referrals

Referrals from other lawyers have long been permitted and that generally remains the case under RPC 1.5(e) (fee splits between lawyers with client consent) and RPC 7.2 as amended in 2006. Referrals from nonlawyers have also long been permitted and that generally remains the case under RPC 7.2. But, what was long prohibited (*see Danzig v. Danzig*, 79 Wn. App. 612, 617-19, 904 P.2d 312 (1995) (discussing “runners” under former RCW 9.12.010) and generally remains prohibited under the 2006 amendments (*see* RPC 7.2(a)) is paying for referrals.

Comment 9 to RPC 7.2 notes that Washington did not adopt the portion of ABA Model Rule 7.2 that allows lawyers to enter into reciprocal referral agreements (*i.e.*, those with a specific “quid pro quo”) with nonlawyers. Therefore, reciprocal referral agreements (again those with a specific “quid pro quo”) remain limited to lawyers and are subject to the limitations imposed by RPC 7.2(b)(4) and accompanying Comment 8, which include the requirements that they not be exclusive and that the clients involved be informed of the nature of the agreement. By contrast, RPC 1.5(e), which governs fee-splitting among lawyers working on a matter for the same client, remains applicable to the more common situation where lawyers refer cases to other lawyers on an ad hoc basis. In that situation, RPC 1.5(e) requires lawyers who are splitting a fee to do so in proportion to their relative work on a case or otherwise assumes joint

responsibility for the representation, to obtain client consent and to charge an overall fee that is reasonable.

In interpreting RPC 7.2 as amended in 2006 and its similar predecessor, the WSBA's Rules of Professional Conduct Committee has generally taken the position (in Informal Ethics Opinions 1975 (2002) and 2123 (2006) (available on the WSBA's web site at www.wsba.org)) that "networking" associations that require reciprocal referrals to nonlawyers violate RPC 7.2(b). Similarly, the RPC Committee has generally taken the position (in Informal Ethics Opinions 2106 (2006), 2116 (2006) and 2146 (2007)) that participation in for-profit "matching" services are prohibited under RPC 7.2(b)(2) because Washington, unlike some other states, limits participation in referral services to non-profit ones.

RPC 7.6 is new with the 2006 amendments and generally prohibits lawyers or their firms from accepting "a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment."

ABOUT THE AUTHOR

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¹ The Washington Consumer Protection Act, RCW Ch. 19.86, prohibits deceptive advertising in "trade or commerce." The CPA has been held to apply to the business aspects of law practice. See *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984).

² RPC 5.8(b)(3) as amended in 2006 now deals with the use of a suspended or disbarred lawyer's name formerly found in RPC 5.5.