

February 2014 *Multnomah Lawyer Ethics Focus*

**“A Word from Our Sponsor . . .”
Oregon’s New Advertising Rules**

**By Mark J. Fucile
Fucile & Reising LLP**

“The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional.”

~Canon 27, ABA Canons of Professional Ethics (1908)

As any occasional viewer of late night TV can attest, lawyer advertising has changed radically in the hundred years since the ABA adopted the original Canons of Professional Ethics. Beginning with the United States Supreme Court’s pathbreaking decision in *Bates v. State Bar of Arizona*, 433 US 350, 97 S Ct 2691, 53 L Ed2d 810 (1977), lawyers have been relatively free to advertise. Over the years, the ABA has updated its influential Model Rules of Professional Conduct to reflect both continuing constitutional developments since *Bates* and the significant influence technology has come to play in law firm marketing.

Oregon’s lawyer advertising rules have followed a somewhat different trajectory. In the wake of the U.S. Supreme Court decisions following *Bates* in the 1970s and 1980s, Oregon comprehensively amended our then-Disciplinary Rules in 1993 to reflect those federal developments. When Oregon moved from the DRs to the RPCs in 2005, we essentially kept the old advertising DRs in the format of the new RPCs. At the same time, the Oregon State Bar continued to

review the advertising rules in light of the Oregon Constitution's own broad commercial free speech rights and further developments at the ABA. This past Fall, the OSB House of Delegates approved and the Oregon Supreme Court adopted a new set of advertising rules that became effective on January 1. In this column, we'll briefly survey what is and isn't in the new rules.

What's In

The new rules are available on the OSB web site at www.osbar.org. The new rules retain the numbering of their immediate predecessors—RPCs 7.1 through 7.5. Although some differences remain from the ABA Model Rules, the new Oregon rules are in much tighter alignment with their ABA counterparts.

One of the principal differences between the new rules and the old set is RPC 7.1. The old rule was framed around the bedrock notion that law firm marketing communications cannot include misrepresentations, but then added a litany of specific applications. The new rule retains the bedrock prohibition on misrepresentations but eliminates the specific applications. The OSB Legal Ethics Committee's notes accompanying the new rules reason that the old laundry list was both over-inclusive by including some conduct that wasn't necessarily misleading while also under-inclusive by not describing every potential instance when advertising might be false. The new formulation mirrors the corresponding ABA Model Rule.

RPC 7.2 continues the twin threads of generally permitting lawyers to pay for *advertising* but generally prohibits paying for *referrals*. The new rule is now generally aligned with its counterpart ABA Model Rule.

RPC 7.3 continues the general prohibition on in-person solicitation (or the electronic equivalent) along with the exceptions found its immediate predecessor when the person contacted is a lawyer, a family member or friend or a former client. The new rule also retains the requirement that written (paper or electronic) solicitations be labeled—with the wording now altered slightly—“Advertising Material.” The new version is now closely aligned with the corresponding ABA Model Rule.

RPC 7.4, which addresses specialization in the ABA Model Rule, was and is “reserved” (blank) in Oregon. This doesn’t mean that you can’t describe your practice specialty—as long as your description is accurate under RPC 7.1’s overarching requirement of truthful advertising.

RPC 7.5 continues to regulate law firm names. The principal difference between the “old” and “new” versions is that new iteration is considerably shorter and more closely aligned with the ABA Model Rule. The new rule—like its predecessor—continues to focus on non-deception in law firm names and also continues to permit trade names. The new version of the Oregon rule now largely mirrors its ABA Model Rule counterpart.

What's Not

One important element that the new rules do not include is accompanying ABA comments. For parochial reasons, Oregon is one of a remaining handful of states that have not adopted comments based on those that accompany the ABA Model Rules. Nonetheless, the Oregon Supreme Court has used the comments as “guidance” (*see, e.g., In re Hostetter*, 348 Or 574, 591, 238 P3d 13 (2010) (“[W]e look to the commentary of the ABA Model Rules for guidance.”)). Oregon lawyers should, too. The comments to the ABA Model Rules offer many useful insights and illustrations on the application of the rules. Comment 3 to ABA Model Rule 7.1, for example, contains a discussion on the use of disclaimers when advertising specific results. Comment 2 to ABA Model Rule 7.2, in turn, includes a helpful overview of permissible information that may be included in advertising, such as fee structures and credit arrangements. The comments to the Model Rules are available on the ABA’s web site at: www.americanbar.org.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar

Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.