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Advertising, Part 2: Practice

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Last month, 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 Oregon. 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. Oregon followed a different path but arrived at essentially the same place. Following several changes in our Disciplinary Rules in the 1970s and 1980s to keep pace with the U.S. Supreme Court decisions, the Oregon State Bar appointed an Advertising Task Force in the early 1990s that issued a comprehensive report on law firm marketing in 1992. The Oregon Supreme Court generally adopted its recommendations as amendments to our DRs in 1993. Those amendments largely put us in alignment with both the federal constitutional law that had developed and the ABA. When we then moved to our own variant of the ABA Model Rules in 2005, the wording of most of Oregon's law firm marketing rules was retained as a result of the earlier and comparatively recent update. In both

general content and practical effect, however, they are very similar to the current ABA Model Rules.

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 in-person, telephone, electronic and mail communications; and (3) referrals, which includes 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. It also generally limits comparative advertising and requires that advertising results or testimonials be true and that testimonials 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 7.5, in turn, deals specifically with law firm names and, among its provisions, allows trade names.

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. Although Oregon did not adopt the comments to the ABA Model Rules that specifically embrace electronic advertising in the form of television or web sites (*see* ABA Model Rule 7.2, cmt 3), the wide scope of Oregon's advertising rule covering all forms of communications concerning lawyer services essentially reaches the same end.

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 US 350, 97 SCt 2691, 53 LEd2d 810 (1977), it made very clear that commercial free speech rights under the First Amendment do not extend to false advertising. Although there were not many Oregon Supreme Court decisions on advertising under the former Disciplinary Rules after *Bates*, those that were issued (*see, e.g., In re Yacob*, 318 Or 10, 860 P2d 811 (1993)), made that same point. Given the clear ties between the current and former advertising rules and the prominent place that RPC 7.1 occupies as the first rule in the advertising section of the RPCs, there is no reason to believe that the emphasis on truthfulness will be any less rigorous under the new rules than the old.

Solicitation

As we discussed last month, 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 US 447, 98 SCt 1912, 56 LEd2d 444 (1978), and has applied restrictions even to analogous situations involving targeted direct mail like *Florida Bar v. Went for It, Inc.*, 515 US 618, 115 SCt 2371, 132 LEd2d 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 Oregon 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 (although Oregon does not have a direct mail limit like the one in *Went for It*).

Oregon'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, a family member, a close personal acquaintance or a former client. Even in this circumstance, RPC 7.3(b) prohibits contact if either the recipient's physical or emotional state "is such that the person could not exercise reasonable judgment in employing a lawyer," the recipient has "made known" to the lawyer that he or she does not wish to be contacted, or "the solicitation involves coercion, duress or harassment." By contrast, RPC 7.3 generally permits written (paper or electronic) communication with prospective clients not otherwise falling within RPC 7.3(a). Targeted mailings of this kind generally need to be labeled as being an "advertisement" under RPC 7.3(c). OSB Formal Ethics Opinion 2005-127

(available on the OSB's web site at www.osbar.org) discusses solicitation in detail. It also emphasizes that solicitations are also subject to the same truthfulness requirement that govern print, media and electronic advertising. Similarly, OSB Formal Ethics Opinions 2005-106 and 2005-168, relying on RPC 8.4(a)(1) (which generally prohibits a lawyer from violating the RPCs "through the acts of another"), 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(d) (fee splits between lawyers with client consent) and RPC 7.2. Referrals from nonlawyers have also long been permitted and that generally remains the case under RPC 7.2 (*see* OSB Formal Ethics Op 2005-73). But, what was long prohibited (*see* ORS 9.505, prohibiting the use of paid "runners" to refer personal injury claimants) and generally remains prohibited under the new rules (*see* RPC 7.2(a); *see also* RPC 5.4(e)) is paying for referrals, either directly in the form of money or indirectly in the form of reciprocal referral arrangements or other items of value.

OSB Formal Ethics Opinion 2005-175 discusses cross-referrals extensively, as does OSB Formal Ethics Opinion 2005-2. The former (at 493) notes in this regard that "[a] business referral is a thing of value." Therefore,

these ethics opinions prohibit direct reciprocal referral arrangements with nonlawyers (2005-2) and indirect arrangements with nonlawyers (2005-175) in the form of "networking" entities that require cross-referrals as a condition of membership. By contrast, lawyers are generally permitted under RPC 7.2(c) to participate in prepaid legal service plans and lawyer referral services, including "for profit" referral services.

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