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Free Speech:
Changes to Oregon's Lawyer Marketing Rules

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Since the United States Supreme Court invalidated outright prohibitions on lawyer advertising in *Bates v. State Bar of Arizona*, 433 US 350, 97 S Ct 2691, 53 L Ed2d 810 (1977), the lawyer marketing rules have evolved significantly both nationally and here in Oregon. Developments have been driven by both further commercial free speech decisions on lawyer advertising by the U.S. Supreme Court and changes in technology that have fundamentally altered the ways that lawyer marketing is conducted.

At the same time, two areas of lawyer marketing have not seen as much change as law firm media advertising. First, in a bookend to *Bates*, the U.S. Supreme Court the following year in *Ohralik v. Ohio State Bar*, 436 US 447, 98 S Ct 1912, 56 L Ed2d 444 (1978), upheld at least some restrictions on in-person solicitation. Those restrictions are now reflected in ABA Model Rule 7.3, which generally limits in-person solicitation to a lawyer's family, friends, former clients and other lawyers. Second, statutes in many states—including Oregon—have long prohibited paid "runners" from soliciting personal injury work for lawyers. ORS 9.505, for example, prohibits lawyers from paying "any person . . . for referring to an attorney any claim for damage resulting from personal injury or death." The prohibition on "runners" is reflected in ABA Model Rule 7.2(b), which

prohibits paying for referrals of any kind, and ABA Model Rule 5.4(a), which prohibits sharing legal fees with a nonlawyer.

Late last year, the OSB House of Delegates considered changes to the solicitation and referral fee rules that were products of the OSB "Futures Task Force Report," which, as its name implies, was a comprehensive set of recommendations responding to broad technological and economic developments facing the legal profession and the demand for legal services. The OSB House of Delegates approved the former, but rejected the latter. In this column, we'll look at both.

Solicitation

The amendments to Oregon RPC 7.3 approved by the House of Delegates and later by the Supreme Court essentially permit direct solicitation in any form unless one of three factors is present:

> "(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person who is the subject of the solicitation is such that the person could not exercise reasonable judgment in employing the lawyer;
>
> "(b) the person who is the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> "(c) the solicitation involves coercion, duress or harassment."

The Futures Task Force Report (which is available on the OSB web site) concluded that because solicitation today is more often through electronic means, the concerns that animated the tighter restrictions in the ABA Model Rule have been reduced. At the same time, the remaining restrictions in the amended formulation are consistent with the U.S. Supreme Court's *Ohralik* decision—which involved an attorney who appeared unannounced in an accident victim's hospital room with a fee agreement in hand.

Paying for Referrals

The Futures Task Force Report proposed that RPC 5.4(a)(5) be amended to permit sharing legal fees with for-profit referral services—including internet-based marketing companies—as long as the lawyer disclosed "to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation" (and the overall fee was reasonable under RPC 1.5(a)). It also proposed corresponding amendments to RPC 7.2.

The Futures Task Force Report reasoned that allowing lawyers to share fees with for-profit referral services would recognize the increasing imprint internet-based marketing companies now have on lawyer selection in many consumer-oriented practice areas. The Futures Task Force Report also couched this aspect as potentially addressing access-to-justice issues.

In structuring these proposals, the Futures Task Force Report concluded that client consent was not necessary because the compensation arrangement was instead required to be disclosed before the representation proceeds. The Futures Task Force report cautioned, however, that its recommendations did not include parallel suggests to the Legislature to repeal corresponding provisions in ORS Chapter 9. As noted earlier, ORS 9.505 prohibits paying for referrals of personal injury or wrongful death claims. ORS 9.520, in turn, prohibits lawyers from accepting such referrals and states that "[a]ny agreement between an attorney and such solicitor regarding compensation to be paid to the attorney or solicitor is void." Although the Futures Task Force Report suggested that at least some of the prohibitions on solicitation in ORS Chapter 9 may be constitutionally infirm, lawyers in Oregon have been disciplined in the past for employing paid "runners" (*see, e.g., In re Farris*, 229 Or 209, 367 P2d 387 (1961); *In re Black*, 228 Or 9, 363 P2d 206 (1961)).

As noted earlier, the OSB House of Delegates rejected the proposed expansion of the referral fee rule. Under ORS 9.490(1), the House of Delegates must approve proposed RPCs before they go to the Supreme Court. Therefore, the Supreme Court did not consider the referral fee proposal. Rather, it was returned to the Board of Governors for further study. Given the forces at play in

the legal market, the referral fee rule proposal will likely be revisited in some form in the years ahead.

ABOUT THE AUTHOR

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