

March 2019 WSBA NWLawyer Ethics & the Law Column

**Looking Forward:
Proposed Amendments to Lawyer Marketing
Rules Under Review**

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

“There is no suggestion that the respondent advertised his services or solicited the appellant or others to become his client. This is not surprising, since such activities are forbidden to attorneys.”

~*Lightfoot v. MacDonald*, 86 Wn.2d 331, 336 (1976)

The Washington Supreme Court’s observation in *Lightfoot* was a succinct summary of the lawyer marketing rules as they existed in the not-too-distant past. One year after *Lightfoot*, however, the United States Supreme Court opened the door to lawyer advertising—as long as it was truthful—in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). A year after that, the United States Supreme Court allowed continuing limits on in-person solicitation that amounted to harassment in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

Bates, *Ohralik* and subsequent commercial free speech decisions from the United States Supreme Court significantly influenced the evolution of the ABA Model Rules of Professional Conduct on which most jurisdictions—including Washington—pattern their own RPCs. At the same time, technology has in many respects outpaced the existing rule structure while competition from both traditional and non-traditional legal service models has continued to sharpen the need for almost all firms to market aggressively.

Given those changing dynamics, an influential national organization of legal ethics lawyers, the Association of Professional Responsibility Lawyers, issued reports in 2015 and 2016 suggesting a significant simplification of the lawyer marketing rules around the twin concepts reflected in *Bates* and *Ohralik*: that lawyer advertising and similar communications should be permitted as long as they are truthful and that in-person solicitation should be permitted as long as it did not involve harassment. Three WSBA members were on the APRL committee that developed its proposals. In 2016, the WSBA Board of Governors appointed a workgroup to review the APRL proposals. Following a positive review by the workgroup, the BOG tasked the Committee on Professional Ethics with adapting the APRL proposals in draft to reflect Washington law and practice. Last year, the CPE forwarded a report and specific amendments to the BOG—which are available on the WSBA web site. The BOG, in turn, voted to send the amendments on to the Supreme Court. The Supreme Court posted the proposed amendments for public comment on its web site in December, with the comment period closing April 30. A “red-line” version of the amendments is included on the Supreme Court’s website. After the public comment period closes, the Supreme Court will decide whether to adopt the amendments. The Supreme Court also published a parallel set of proposed marketing rule

amendments applicable to LLLTs. The comment period for those proposals also closes on April 30.

Although many RPC amendments originate with the ABA through its Model Rules, that is not always the case. In this instance, the ABA this past August approved its own variant of the APRL proposals, but other states have already moved forward with amendments to their marketing rules based on the APRL recommendations.

In this column, we'll look both the "additions" and the "subtractions" to the existing rules that in the proposals before the Supreme Court.

The Additions

The amendments reduce the heart of the lawyer marketing rules down to two: RPCs 7.1 and 7.3—with RPC 7.6, which deals with political contributions to gain government legal work, remaining the same.

Reflecting *Bates*, no change is recommended to the text of RPC 7.1, which governs all communications regarding a lawyer's services and only prohibits false or misleading communications:

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Instead, the amendments move comments involving fields of specialization and firm names from RPCs 7.4 and 7.5 to the RPC 7.1 comments. Comments from RPC 7.2 on advertising generally are also moved into the comments to RPC 7.1.

Reflecting *Ohralik*, the changes to the text of RPC 7.3, which governs direct solicitation, are reformulated to permit such contacts unless they amount to harassment (or violate RPC 7.1's general injunction against false or misleading communications):

- “(a) A lawyer may solicit professional employment unless:
 - (1) the solicitation is false or misleading;
 - (2) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;
 - (3) the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (4) the solicitation involves coercion, duress, or harassment.”

Beyond these core concepts, the amendments also address two other primary areas with proposed changes to the text of the rules.

First, the referral fee rule is moved with comparatively minor changes from current RPC 7.2(b) to proposed RPC 7.3(b) and would read:

- “(b) A lawyer shall not compensate, or give or promise anything of value to, a person who is not an employee or lawyer in the same law firm for the purpose of recommending or securing the services of the lawyer or law firm, except that a lawyer may:
- (1) pay the reasonable cost of advertisements or communications permitted by Rule 7.1, including online group advertising;
 - (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or LLLT or other nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the agreement.
 - (5) give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.”

The CPE’s report to the BOG concluded that referral fees fit more logically with the solicitation rule. The CPE’s report also notes that the proposals retain the existing approach of only allowing payment of referral fees to not-for-profit

services—while acknowledging that continuing change in the legal market may warrant a fresh look this limitation in the future.

Second, the proposals add a new subparagraph to RPC 5.5 that addresses unauthorized and multijurisdictional practice to make plain that firms may continue to operate offices across state borders. This aspect is a technical adjustment made necessary because RPC 7.5(b) that regulates firm names and implicitly recognizes cross-border offices is being repealed as a part of the overall simplification of the rules governing marketing communications by folding general marketing comments into RPC 7.1.

The Subtractions

RPCs 7.2, 7.4 and 7.5 are proposed for repeal. These deal with, respectively, advertising, specialization and firm names. Comments from these rules are moved selectively to RPC 7.1 because they address various aspects of lawyer marketing communications that are intended to be the focus of RPC 7.1. As noted earlier, the referral fee rule, which is currently found in RPC 7.2(b) is moved to RPC 7.3.

Of note as many lawyers increasingly limit their practices to particular niches, current RPC 7.4(d) generally prohibits Washington lawyers from stating that they are specialists. That black letter rule, however, would be repealed.

Instead and consistent with the practice in many other states, proposed Comment 8 to RPC 7.1 would allow lawyers to describe themselves as specialists as long as that is true: “A lawyer is generally permitted to state that the lawyer is a ‘specialist,’ practices a ‘specialty,’ or ‘specializes in’ particular fields, but such communications are subject to the ‘false and misleading’ standard applied in Rule 7.1 to communications concerning a lawyer’s services.”

Summing Up

When the first set of national professional rules for lawyers—the Canons of Professional Ethics—was adopted by the ABA at its annual meeting in Seattle in 1908, the only form of lawyer advertising permitted under Canon 27 was business cards as long as they were “simple.” Clearly, times have changed. By reducing most lawyer marketing regulations to the Constitutional core expressed by *Bates* and *Ohralik* under RPCs 7.1 and 7.3, the current proposals attempt to provide a stable framework for law firm marketing regulation that will adapt to the inevitable changes in both technology and the marketplace going forward.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also

a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.