fucile & reising | LLP

November 2021 WSBA *Bar News Ethics & the Law* Column

What's Left?
Law Firm Risk Management
After the Marketing Rule Amendments

By Mark J. Fucile
Fucile & Reising LLP

Earlier this year, the Washington Supreme Court adopted a sweeping package of amendments to the lawyer marketing rules in Title 7 of the Rules of Professional Conduct that significantly reduced their regulatory scope in several key respects.[1] At the same time, the economic pressure on law firms large and small to market continues unabated. In this column, we'll look at what's left in the marketing rules and the continuing risks that lawyers and their law firms should consider when marketing.[2]

The Amendments

The amendments adopted by the Supreme Court in January followed several years of study by multiple bar groups and substantial public comment.[3] At their core, the amendments distill most marketing regulation down to two central concepts reflecting the underlying constitutional limits articulated by the seminal cases of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), on advertising, and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), on solicitation.[4]

Reflecting *Bates*, lawyer marketing communications are broadly permitted as long as they are truthful. The amendments, therefore, did not change the text

of RPC 7.1, which prohibits false or misleading lawyer marketing communications. Rather, they reserved RPCs 7.2, 7.4 and 7.5 and folded their concepts tied to truthfulness into comments to RPC 7.1 addressing, respectively, advertising, specialization and law firm names.[5] Comments 5 through 7 to RPC 7.1, for example, tether the breadth of advertising forms permitted to the requirement of truthfulness. Comment 8, in turn, now permits lawyers to specifically state they are "specialists" as long as that is true.[6] Likewise, Comment 10 to RPC 7.1 continues to permit law firms to use trade names as long as they are not misleading.

Reflecting *Ohralik*, solicitation under RPC 7.3 is generally permitted unless the contact is misleading, the lawyer knows or reasonably should know that the physical or mental state of the person contacted impairs their judgment on employing counsel or the solicitation amounts to harassment (including instances where the target informed the lawyer they did not wish to be contacted). Comment 10 to RPC 7.3 provides a non-exclusive list of examples that cross these remaining lines:

> Such circumstances and means could be the harassment of early morning or late-night telephone calls to a potential client to solicit legal work, repeated calls at any time of day, solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress (particularly where a lawyer seeks professional

> employment by in-person or other real-time contact in such circumstances), or solicitation of vulnerable subjects, such as persons facing incarceration, or their family members, in or near a courthouse.

Risk Management

The recent amendments are painted against the backdrop of a legal economy where lawyers in private practice face unrelenting pressure to market. Some regulatory risk remains but the competitive environment has in many respects shifted the principal risks for law firms beyond bar discipline.

Remaining Regulatory Risks. Although the amendments reduced the scope of marketing regulation, it is critical to stress that they did *not* eliminate marketing regulation altogether. Moreover, anecdotal evidence suggests regulatory complaints in this regard are as probable from competitors as consumers. Discipline is reported quickly on web-based lawyer rating platforms.[7] Law firms, therefore, need to carefully assess the remaining regulations when marketing to avoid inadvertently creating their own "bad news."

With advertising, Comment 2 to RPC 7.1 notes that even a facially truthful statement can be misleading if sufficient facts are not included. For example, reporting on a law firm web site that a lawyer obtained a $1 million verdict for a client would likely be misleading if not accompanied by the qualifier that the verdict was reversed on appeal. Similarly, Comment 3 to RPC 7.1 counsels that

disclaimers of results along the line of "past performance is no guarantee of future results" are important in placing results in context. Law firms should periodically review the content of their web sites and other social media platforms to ensure that results reported remain accurate and that disclaimers include appropriate qualifying language.

With solicitation, regional variations remain. Although Oregon's version of RPC 7.3 is substantively similar to the new Washington rule, Idaho has thus far retained an older version that generally restricts in-person solicitation and requires that most written solicitations include the words "advertising material."[8] With both multi-state licensing and interstate practice increasingly common, lawyers need to carefully calibrate their marketing to the rules of the jurisdiction concerned.

Beyond Discipline. Given the economic pressure to market, risks are emerging in many ways lawyers don't necessarily associate with "marketing." In this column, we'll look at three.

"Intake" and "outplacement" can present particularly sharp risks. On "intake," web sites that engage potential clients interactively through mechanisms like chat boxes and pop-up windows should include disclaimers of both an attorney-client relationship and confidentiality[9]—and then proceed consistent with

those disclaimers.[10] Systematic use of conflict checks and engagement agreements remain critical to avoid potentially disqualifying conflicts when taking on new work.[11] On the "outplacement," if a former client isn't happy and writes a negative on-line review, a lawyer is not free to reveal confidential information in responding. The ABA recently issued an ethics opinion—Formal Opinion 496 (2021)—that both addresses the limitations on responding to negative on-line reviews and suggests alternatives.[12]

Under pressure to generate work, lawyers sometimes stray into practice areas in which they are not fully competent. The term of art used in risk management circles for this is "dabbling." Last year, the ABA updated its periodic "profile" of legal malpractice claims reporting statistics from major insurance carriers for the period 2016 to 2019. Nearly 16 percent of all claims for that reporting period involved "failure to know/properly apply [the] law."[13] These sobering statistics underscore that law firms must invest in adequate training so lawyers are competent to move into new areas and have peer review mechanisms in place to dissuade firm lawyers from straying into uncharted waters without the requisite knowledge and resources.

Finally, law firms should closely review broad statements on their web sites about their experience and capabilities to ensure they are completely

accurate. Under *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), the Washington Consumer Protection Act, RCW Chapter 19.86, applies to the business aspects of law practice—including "the way a law firm obtains, retains, and dismisses clients."[14] The CPA creates a private right of action that includes (with limitations) treble damages and attorney fees for "unfair or deceptive" acts or practices. Although there is a "public interest" requirement in a CPA claim, RCW 19.86.093(3)(a) permits this element to be met if the act or practice involved "had the capacity to injure other persons[.]"[15] Advertising on a web site or analogous electronic platforms may meet this standard depending on the facts of a given case.[16]

Summing Up

By aligning the marketing rules with the constitutional limits first articulated in *Bates* and *Ohralik*, the recent RPC Title 7 amendments make the remaining marketing regulations simpler and more straightforward. At the same time, economic pressures will likely continue to nudge risk management in this area toward the practical consequences—and associated safeguards—of that broad ability to market.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and 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 *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.

---

[1] The Supreme Court also adopted a parallel set of amendments to the LLLT RPCs.

[2] Two elements of Title 7 did not change substantively. The prohibition on paying for referrals moved from former RPC 7.2(b) to RPC 7.3(b). At the same time, a new provision—RPC 7.3(b)(5)—was added to permit nominal "thank you" gifts that "are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services." RPC 7.6, which addresses political contributions to obtain government legal work, remained unchanged.

[3] The Supreme Court's order adopting the amendments is SCO 25700-A-1333 (January 8, 2021). The "legislative history" of the amendments recounted in the WSBA's GR 9 cover sheet and public comments on the proposals are both available in the "rules" section of the Washington Courts' web site at: https://www.courts.wa.gov/court_rules/. For additional history of the amendments available on the WSBA web site, *see* Mark J. Fucile, *Looking Forward: Proposed Amendments to Lawyer Marketing Rules Under Review*, March 2019 WSBA NWLawyer 12, and Mark J. Fucile, *Washington Supreme Court Approves Major Changes to Lawyer Marketing Rules*, WSBA NWSidebar (Jan. 19, 2021).

[4] The Washington amendments followed a similar, but not completely identical, path as their ABA Model Rule counterparts. As a result, some elements of the Washington amendments, such as RPC 7.3 on solicitation, differ from the corresponding ABA Model Rule. The history of the Model Rule amendments is recounted on the ABA web site at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/.

[5] An accompanying technical amendment to RPC 5.5 makes clear that law firms can continue to practice across state lines despite the deletion of former RPC 7.5(b), which formerly regulated the names of multi-state law firms and implicitly recognized multi-state practice. *See* RPC 5.5(f) and cmt. 22; *see also* RPC 7.1, cmt. 14 (cross-referencing RPCs 7.1 and 5.5 in this regard).

[6] Comment 8 goes on to qualify this regarding certifications: "A lawyer may state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists."

[7] *See generally* Mark J. Fucile, *Public Discipline Is More "Public" than Ever: The Impact of Web-Based Lawyer Rating Services on Discipline*, 24, No. 1 ABA Prof. Lawyer 42 (2016).

[8] *See* Oregon RPC 7.3, Idaho RPC 7.3.

[9] *See, e.g., Barton v. U.S. Dist. Court for Central Dist. of Cal.*, 410 F.3d 1104 (9th Cir. 2005) (discussing both kinds of disclaimers in the context of internet marketing).

[10] Under *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), whether an attorney-client relationship exists turns on the subjective belief of the putative client and whether that subjective belief is objectively reasonable under the circumstances. Disclaimers can be undermined if, notwithstanding their terms, a law firm leads a web site inquirer to believe that the firm is representing that person by, for example, providing detailed individualized legal advice.

[11] *See, e.g., Jones v. Rabanco, Ltd*., No. C03-3195P, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006) (unpublished) (failure to run conflict check); *Atlantic Specialty Insurance Company v. Premera Blue Cross*, No. C15-1927-TSZ, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished) (failure to send engagement agreement).

[12] *See also* Mark J. Fucile, *The Delicate Art of Responding to Negative Online Reviews*, Apr.-May 2018 WSBA NWLawyer 10.

[13] *See also* RPC 1.1 (competency).

[14] 103 Wn.2d at 61.

[15] *See Bertelsen v. Harris*, 459 F. Supp.2d 1055, 1063 (E.D. Wash. 2006) (dismissing CPA claim for failure to meet the "public interest" requirement where the court found a fee agreement was a purely private transaction).

[16] *See, e.g., Rhodes v. Rains*, 195 Wn. App. 235, 238-43, 381 P.3d 58 (2016) (CPA claim against accounting/law firm over advertising); *see also Crowe v. Tull*, 126 P.3d 196 (Colo. 2006) (discussing lawyer advertising under the Colorado CPA).