

January 2009 OSB *Bar Bulletin Managing Your Practice* Column

## **Avoiding Bad News: Risk Management in Law Firm Marketing**

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

Since the United States Supreme Court opened the door to lawyer advertising in 1977 with its decision in *Bates v. State Bar of Arizona*, 433 US 350, 97 SCt 2691, 53 LEd2d 810 (1977), marketing has become a necessary element of business plans for law firms big and small. With the advent of the Internet, it has also become common place for law firms big and small to market via the Web. The imperatives brought by the business environment and the marketing efficiencies brought by the Web have also combined to present new challenges for law firm risk management. Although some remain tethered to traditional regulatory concerns in terms of bar discipline, several new ones focus instead on the potential civil liability. In this column, we'll look at three: (1) a new variant of an old regulatory concern; (2) a new rule that has particular application to law firm web sites; and (3) a new application of what was always good advice. With each, we'll examine both the risks and strategies to reduce them.

### ***New Variations on Old Regulatory Themes***

Along with the right to market and the need to market, law firms today increasingly market across state lines. This ability weaves together two increasing trends, one regulatory and one technological. On the regulatory side, lawyers today often practice in more than one jurisdiction. Large firms and even

many mid-size firms in the Northwest, for example, often have offices in Oregon, Washington and beyond. With the expansion of reciprocal admission over the last 10 years, it is also now common for many small firms and sole practitioners to routinely practice in more than one state. On the technological side, web sites allow us to project ourselves into more than one market with ease.

Because the law firm marketing regulations in all states have been influenced heavily by the evolving First Amendment law coming from the United States Supreme Court and the corresponding attempts to keep regulatory pace coming from the American Bar Association through its Model Rules of Professional Conduct, there is now a high degree of commonality in the law firm marketing rules across the country. But, “commonality” does not equal “uniformity.”

To take three very common examples from here in the Northwest:

- Oregon under its RPC 7.1(a)(4) allows lawyers to market themselves as specialists (as long as that is true), but Washington under its RPC 7.4(d) generally does not.
- Oregon under its RPC 7.2(c) allows lawyers to participate in “for profit” lawyer referral services that are becoming increasingly common on the Internet, but Washington under its RPC 7.2(b)(2) does not (limiting participation to non-profit referral services).

- Oregon under its RPC 1.5(d) allows a fee-split with a referring lawyer without regard to the work the referring lawyer puts into the case, but Washington under its RPC 1.5(e) limits fee split payments in this situation to those in proportion to the services the referring lawyer provides on the case.

All of the states in the Northwest recently adopted similar choice-of-law rules for assessing which state's professional rules apply to multi-state conduct. Under the versions of RPC 8.5(b) in Oregon, Washington and Idaho, the regulations which apply are either those applicable to the court involved if the matter is in litigation or where the conduct or its predominant effect occurred. The choice-of-law rules, however, envision more traditional "static" conduct than the very fluid nature of law firm marketing across state lines. Moreover, for both large firms with in-house marketing departments and small firms using outside marketing consultants or web designers, lawyers should not expect that their marketing personnel are necessarily going to know the nuances of the Rules of Professional Conduct for either advertising generally or the regulatory choice-of-law rules. At the same time, the versions of RPC 5.3 in all three Northwest states put the burden of knowing and applying the rules on the supervising lawyers rather than directly on in-house or outside consultants.

Lawyers marketing across state lines need to be aware of the marketing rules in each jurisdiction in which they practice. In some instances involving

marketing that flows uniformly across boundaries such as law firm web sites, they will need to apply a blanket rule based on the most restrictive jurisdiction in which they practice. For example, lawyers who practice and market in both Oregon and Washington should not refer to themselves on their web sites as “specialists” in violation of the Washington rule but, rather, can describe themselves in both states as “experienced in” (or the like) to get to the same practical end. By contrast, where marketing activities are targeted to a particular jurisdiction, then the law of that state should apply. For example, if an Oregon-based lawyer licensed in Washington received a referral from a Washington lawyer for a case to be litigated in a Washington court, then Washington’s fee-split rule should apply under either state’s version of the choice-of-law rule.

### ***Recruiting Clients Via the Web***

Among the new regulations with particular import to law firm marketing that came to us when the Rules of Professional Conduct replaced the Disciplinary Rules in 2005 was RPC 1.18 on duties owed to prospective clients. Although the Oregon Supreme Court touched on these duties in *In re Spencer*, 335 Or 71, 58 P3d 228 (2002), RPC 1.18 outlines the duties very specifically:

- “(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- “(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

- “(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation on such a matter, except as provided in paragraph (d).
- “(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- “(1) the disqualified lawyer is timely screened from any participation in the matter; and
- “(2) written notice is promptly given to the prospective client.”

Although issues relating to prospective clients certainly arose when telephones were the primary technological vehicle for first contact, “interactive” web sites that allow two-way communication between prospective clients and firm lawyers can sharpen the risks significantly.

Simply listing a lawyer’s contact information on a law firm web site should not either create an attorney-client relationship or trigger the duties under RPC 1.18 if a person contacts a lawyer unilaterally through, for example, an unsolicited email. Oregon under *In re Weidner*, 310 Or 757, 801 P2d 828 (1990), requires “two way” communication as a predicate to the former and Comment 2 to ABA Model Rule 1.18 from which our rule was drawn makes the point on the latter that “[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss

the possibility of forming a client-lawyer relationship, is not a ‘prospective client[.]’”

Many law firm web sites, however, allow prospective clients to interact with firm lawyers directly through two-way email or questionnaires describing their legal problems. Without warnings to prospective clients that such communications do not create an attorney-client relationship and that they should not forward information they regard as confidential until the firm can run a conflict check and determine that further communications can take place, law firms risk at minimum unintentionally triggering duties to prospective clients.

The practical importance of both kinds of disclaimers was illustrated in *Barton v. U.S. District Court for the Central District of California*, 410 F3d 1104 (9th Cir 2005). In *Barton*, a plaintiffs’ personal injury firm invited prospective clients to complete an on-line questionnaire about a prescription drug involved in litigation the firm was handling. The on-line form included a disclaimer that no attorney-client relationship was formed by completing the questionnaire but did not include a disclaimer on confidentiality. The Ninth Circuit held that absent a clear disclaimer, the firm would still have a duty of confidentiality to those who submitted the questionnaires. Although decided under California law, the rationale the Ninth Circuit used in *Barton* was very close to the duties now recognized under Oregon RPC 1.18.

Once created, the duties to prospective clients now recognized by RPC 1.18 may disqualify firms from opposing those prospective clients in the matters involved even if the prospective clients do not become firm clients. Further, because the Oregon Supreme Court cast the duty of loyalty under the professional rules in fiduciary terms in *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992), violation of even the limited duties of loyalty and confidentiality contained in RPC 1.18 raises at least the specter of potential breach of fiduciary duty claims.

***Old Medicine with New Relevance***

Whether increased lawyer advertising helped create today's competitive business environment or is simply a reflection of that environment, marketing has become a practical necessity for most lawyers in private practice. With that practical necessity can come the subtle pressure, again at firms big and small, to take on work that is at the conflict margins. The Oregon Supreme Court reminded us in *In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005), that we need to have conflict systems and we need to use them. That "old medicine" is perhaps even more relevant in today's kinetic business climate. The results of no or poorly run conflict checks (or no waivers when there are conflicts that are otherwise waiveable) can range from regulatory discipline to disqualification to claims for breach of fiduciary duty.

### ***Summing Up***

Lawyers today spend much time, money and energy trying to create “good news” about their firms. A little time also spent on the risk management side of law firm marketing can reduce the chance that those efforts will create more “bad news” than “good.”

### **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 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.