
**7. Amendment to ORPC 5.4(a)(5) and 7.2(b)(2) re: Professional Independence of a Lawyer, and Advertising
(Board of Governors Resolution No. 3)**

Whereas, the Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1); and

Whereas, the Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rules of Professional Conduct 5.4(a)(5) and 7.2(b)(2) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a ~~bar-sponsored or operated not-for-profit lawyer-referral service~~, **including sharing legal fees with the service, only if:**

(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation; and

(ii) the total fee for legal services rendered to the client combined with the amount of the charge would not be a clearly excessive fee pursuant to Rule 1.5 if it were solely a fee for legal services, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a lawyer-referral service **in accordance with Rule 5.4**; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and contact information of at least one lawyer or law firm responsible for its content.

Background

With limited exceptions, Oregon Rule of Professional Conduct 5.4 prohibits lawyers from sharing legal fees with nonlawyers. One current exception allows lawyers to share their legal fees with bar-sponsored or operated not-for-profit lawyer referral services. ORPC 5.4(a)(5). As a result, lawyers who sign up with bar-sponsored or operated not-for-profit referral services and receive client referrals from those services may pay for the services by sharing a portion of the legal fees earned from referred clients.

The present rules, however, do not allow fee sharing with for-profit referral services or not-for-profit referral services that are not sponsored by or operated by a bar. The Oregon State Bar's Futures Task Force examined this limitation in light of pressing access to justice concerns and concluded that the current rule is ill-suited to a changing market in which online referral services

(whether they be for-profit or not-for-profit) may be the only means through which many consumers are finding legal services. The task force proposed a modification to the rules to allow greater flexibility for Oregon attorneys and to enable consumers to access lawyers through online lawyer referral services.

The proposed amendments to ORPC 5.4(a)(5) and 7.2(b)(2) would enable Oregon lawyers to share fees with for-profit lawyer referral services or independent non-profit referral services, but would also retain important client protections. First, the proposed amendment to ORPC 5.4 would require written disclosure of the fact of a fee split with a lawyer referral service and the manner of its calculation. (This disclosure could be made by a lawyer, or caused to be made by a lawyer through a third-party.) Second, the proposed rule would prohibit charging clients referral and legal fees that, when combined, are clearly excessive as defined in ORPC 1.5.

Third, the amendment would not change a lawyer's obligation to exercise independent professional judgment when representing a client. Present-day fee-sharing prohibitions grew out of the concern that allowing lawyers to split fees with nonlawyers could compromise lawyers' professional judgment. Oregon RPC 2.1 requires "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Further, ORPC 5.4(c) provides that "[a] lawyer shall not permit a person who recommends ... the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." If participating in a lawyer referral service would run afoul of these protections, participation would remain prohibited under the proposed amendments.

Finally, these proposed rule changes would not alter existing statutory restrictions on sharing fees with nonlawyers in personal injury matters. ORS 9.505.

Some jurisdictions have determined that several popular online attorney-client matchmaking services are prohibited by ethics rules on fee-sharing that are similar to those in Oregon. There are many lawyers in Oregon who participate in such services and have expressed concerns about whether doing so makes them at risk of discipline under the current rules of professional conduct. As yet, the bar has neither received a complaint nor issued a formal ethics opinion on the issue. The proposed amendments to ORPC 5.4(a)(5) and 7.2(b)(2), however, would resolve that uncertainty.

Financial Impact

None stated.

*Presenter: Amber Hollister
OSB General Counsel*

8. Amendment to ORPC 7.3 re: Solicitation of Clients (Board of Governors Resolution No. 4)

Whereas, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1);

Whereas, The Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rule of Professional Conduct 7.3 as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 7.3 SOLICITATION OF CLIENTS

~~(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment **by any means if** when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:~~

~~(1) is a lawyer; or~~

~~(2) has a family, close personal, or prior professional relationship with the lawyer.~~

~~(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:~~

~~(a) (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person who is the **target-subject** of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;~~

~~(b) (2) the **person who is the subject** target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or~~

~~(c) (3) the solicitation involves coercion, duress or harassment.~~

~~(c) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.~~

Background

As presently written, Oregon Rule of Professional Conduct 7.3 requires lawyers to avoid any “in-person, live telephone or real-time electronic” solicitation of a potential client unless the lawyer has an existing close personal or business relationship with the potential client, or the potential client is also a lawyer. The OSB Futures Task Force examined this prohibition in light of Oregon’s pressing access to justice gap, and concluded it was overly restrictive. In fact, the task force questioned whether the regulation of attorney speech has once again, in part because of advances in technology, run up against the constitutional barrier of Oregon’s free speech protections. The proposed amendment eases the restrictions of ORPC 7.3, allowing lawyers to more freely engage with Oregonians, while retaining protections designed to protect consumers from overreaching and abuse.

The task force found that individuals often do not recognize when they have a legal need and, even when they do, do not know who to ask for help or do not think a lawyer will make any difference. At a time when low- and middle-income Oregonians are struggling to find meaningful access to lawyers, the task force reasoned that any barrier to communication should be firmly rooted in the principles of consumer protection. In-person advertising limitations were originally intended to prevent lawyers from unduly pressuring clients with their persuasive sales pitches. In the modern context, however, the limitations in ORPC 7.3 act as unnecessary barriers to effective communication between consumers and lawyers in popular online mediums and in traditional social settings.

The proposed change to ORPC 7.3 is designed to provide lawyers with greater flexibility to help consumers understand their legal needs and offer legal assistance, while still protecting Oregonians. Under the proposed ORPC 7.3, lawyers who identify a prospective client with a legal need will be able to offer proactive help, as long as one of the well-tailored exceptions in *Amended* ORPC 7.3(a) through (c) does not apply. Lawyers would still be prohibited from engaging in solicitation when the lawyer knows or reasonably should know that a prospective client is in a physical, emotional or mental state that prevents the person from exercising reasonable judgment about hiring a lawyer. Coercive and harassing solicitations would remain banned, as would soliciting a prospective client who has expressed a wish not to be contacted by the lawyer.

With these changes, lawyers who engage in conversations at social events, in online chats, or on social media will be empowered to offer their services to prospective clients, as long as the offer complies with the other ethics rules – most importantly, by not being misleading, as is separately prohibited by ORPC 7.1.

This proposal would not alter the statutory restrictions on nonlawyer solicitation in personal injury cases, or on lawyers soliciting personal injury cases at certain sensitive locations including hospitals. ORS 9.500, 9.510.

Financial Impact

None stated.

*Presenter: Amber Hollister
OSB General Counsel*

9. Amendments to ORPC 8.3 re: Reporting Professional Misconduct (Board of Governors Resolution No. 5)

Whereas, The Board of Governors has formulated the following amendment to the Oregon Rules of Professional Conduct pursuant to ORS 9.490(1);

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