

Proposed Amendments to Rules on Fee-sharing with Lawyer Referral Services

On the Horizon

By Amber Hollister

ments would reconcile potential ethics issues raised for Oregon lawyers participating in online referral services.

The task force proposal was motivated by a desire to bridge Oregon's access-to-justice gap. Despite lawyers' best efforts, Oregonians still struggle to identify legal problems and find a lawyer who can help. Part of this problem stems from the fact that people with a legal issue often do not identify a problem as "legal" in nature.² Services that help consumers identify when they have a legal problem and connect them with an available lawyer have the potential to solve this predicament. However, current ethics rules limit Oregon lawyers' ability to sign up with lawyer referral services that are not 1) nonprofit and 2) sponsored by or operated by a bar.

they are uncertain what it might cost. The task force's proposal seeks to address this opt-out phenomenon by enabling lawyers to utilize innovative online matchmaking and referral services, as long as consumer protection measures are in place.

The Current Rules

With limited exceptions, Oregon's ethics rules prohibit lawyers from sharing legal fees with nonlawyers. One of those exceptions is designed for lawyers who seek to share their legal fees with bar-sponsored or operated not-for-profit lawyer referral services. RPC 5.4(a)(5) provides, "A lawyer or law firm shall not share legal fees with a nonlawyer, except that ... a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including

In today's fast-paced, technology-driven world, Oregon lawyers are exploring new ways to connect with clients searching online for legal services. Web-based referral and "matchmaking" platforms offer to serve as fast, convenient middlemen for potential clients surfing on their mobile devices. Recognizing the strength of this technological advance, many Oregon lawyers have signed up with services designed to match them with potential clients. But participating in such services, under Oregon's present ethics rules, may raise significant issues.

Last month's Bar Counsel column outlined the Oregon State Bar Futures Task Force's recommendation to amend Oregon's in-person and real-time solicitation rules.¹ This month's column focuses on a second proposal to amend the ethics rules to allow expanded fee-sharing with independent lawyer referral services, as long as appropriate consumer protections are in place. This set of proposed amend-

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As noted in last month's column, Oregon's access-to-justice problem has remained unfazed by technological change and market disruption. As of 2016, in Oregon circuit courts, 80 percent of people seeking a divorce were self-represented; in residential evictions, the number rose to 85 percent, with nary a lawyer in sight. While a good number of these self-represented individuals may have trouble affording a lawyer, many middle-income Oregonians are not hiring a lawyer because of other factors — they believe they can handle the problem themselves; the process of hiring a lawyer is daunting; or

fees calculated as a percentage of legal fees received by the lawyer from a referral."

As a result, lawyers who sign up with a bar-sponsored or operated not-for-profit referral service and receive client referrals from those services may pay for the service by sharing a portion of the legal fees earned from referred clients.³

This kind of fee-sharing happens on a routine basis. For instance, lawyers who sign up to participate as panelists in the not-for-profit OSB Lawyer Referral Service may pay a percentage of the fees they earn from cases referred by the service. The percentage fee enables the service to





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be self-sustaining, rather than dependent on bar member dues.

The present ethics 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. RPC 5.4(a)(5). The task force's regulatory committee examined this limitation in light of pressing access-to-justice concerns and developed a proposed modification to allow lawyers greater flexibility.

The Rationale for Fee-sharing Prohibitions

Fee-sharing prohibitions grow out of the concern that allowing lawyers to split fees with nonlawyers could compromise a lawyer's professional judgment or undermine his or her loyalty to the client. See ABA Model Rule Comment [2]. For this reason, Rule 5.4's prohibitions are "directed mainly against entrepreneurial relationship with nonlawyers and primarily are for the purpose of protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers." ABA Formal Ethics Op 01-423 (2001).

Some commentators have criticized Rule 5.4 as underestimating lawyers' sense of loyalty to their clients. As one commentator noted, "If in an earlier day lawyers could be counted on to withstand outside pressure in order to do what they thought was right as a matter of professional duty, the premise of Rule 5.4 is that lawyers need special protection against outside influence."⁴ Others have suggested that Rule 5.4's prohibitions are motivated primarily by lawyers' fear of competition or economic protectionism.⁵

With both the traditional fee-sharing concerns and the modern critique of those concerns in mind, the OSB Futures Task Force recommended a modest change based on its conclusion that the current rule is ill-suited to a changing market. The task force acknowledged that online, independent referral services (whether they be for-profit or nonprofit) may be the means through which many Oregonians are best able to find legal services. As task force member Brad Tellam explains, "Innovative referral-service models that could assist in shrinking Oregon's access-to-justice gap should not

be stifled by a rule that was written for a very different time.”

The Proposed Changes

The task force recommended that the bar amend its current fee-sharing and advertising rules to allow fee-sharing agreements between lawyers and lawyer referral services, as follows:

Rule 5.4 Professional Independence of a Lawyer

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

(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:**

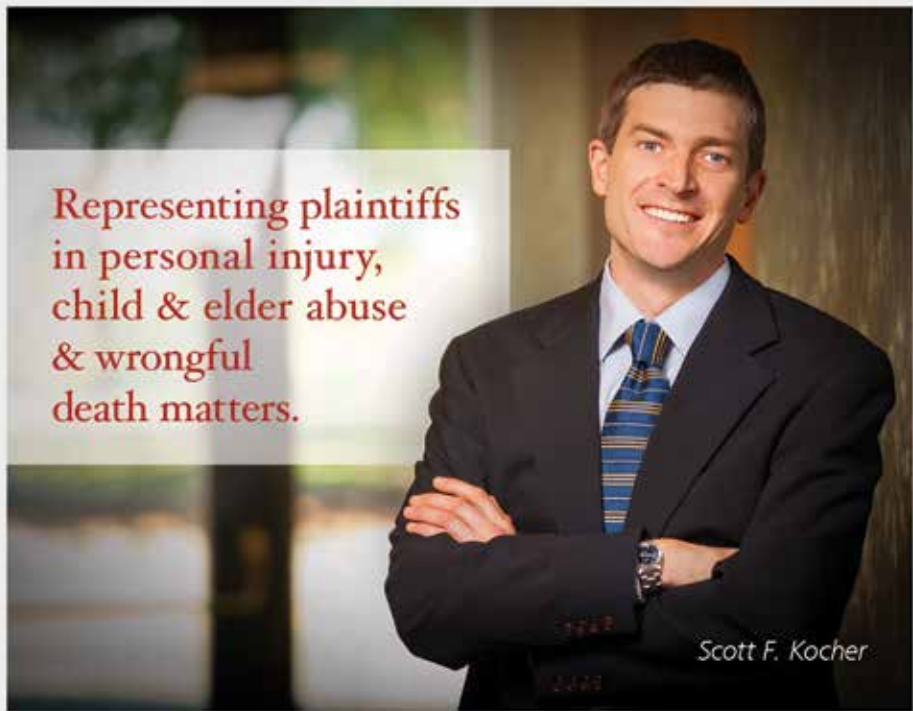
(i) the lawyer communicates to the client in writing at the outset of the representation the amount of the charge and the manner of its calculation, and

(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.

In addition, to ensure that fee-sharing and advertising rules are read consistently, the task force recommended that Rule 7.2(b)(2) be amended to provide: A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may ... pay the usual charges of a legal service plan or a lawyer-referral service **in accordance with Rule 5.4.**”

These changes would enable Oregon lawyers to share fees with for-profit lawyer referral services or independent nonprofit referral services, with appropriate client disclosures.

Borrowing from the approach taken for attorney fee splits in Rule 1.5(d), the task force proposed a revision that seeks to protect prospective legal clients by requiring written disclosure of the fact of a fee split with a lawyer referral service and the manner of its calculation. Further, the proposal would prevent an overall fee shared by a lawyer and a referral service



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from being clearly excessive as defined in RPC 1.5.

Perhaps most importantly, the proposed amendments to Rules 5.4 and 7.2 would not alter a lawyer's obligation to exercise independent professional judgment. Rule 2.1 still requires, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Further, Rule 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 principles, participation would remain prohibited under the proposed amended rules. Finally, these proposed rule changes do not alter the existing statutory restrictions of ORS 9.505 on sharing fees in personal injury matters with nonlawyers.

A National Conversation

The question of when to allow fee-sharing with lawyer referral services is part of a heated national conversation. In fact, in its report, the regulatory committee of the OSB Futures Task Force noted that many Oregon lawyers are currently participating in at least one online attorney-client "matchmaking" service that has been found by other bars to be referral services that engage in the improper sharing of fees. To date, five states — New Jersey, New York, Pennsylvania, Ohio and South Carolina — have formally opined that fee-sharing with certain online lawyer referral services runs afoul of their rules.⁶ But this approach has not been uniform. To date, two other states — Washington and North Carolina — have formed groups to consider amending their rules to allow fee-sharing with lawyer referral services under limited circumstances.

As yet, the Oregon State Bar has not issued any formal guidance on this issue, and no bar complaints have been filed arising from participation in an online independent referral service. But it is very possible that the OSB Client Assistance Office could receive a complaint that requires it to consider whether lawyers who participate in such services are engaged in unethical conduct. This likelihood is yet another reason to weigh the continuing utility of the prohibition on sharing legal

fees with non-bar-sponsored or operated lawyer referral services.

Comments Welcome

The Board of Governors has adopted the OSB Futures Task Force's recommendation to amend Rules 5.4 and 7.2 and has placed the matter on the OSB House of Delegates agenda for Nov. 7. The board invites comments regarding any and all of the task force's recommendations. Comments should be directed to futures@osbar.org.

Endnotes

1. The OSB Futures Task Force Report was issued in June 2017. An executive summary and full report are available at www.osbar.org/leadership/bog/bog_taskforces.html.
2. Sandefur, Rebecca L., "Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study," Aug. 8, 2014.
3. The rules also generally prohibit giving anything of value in return for a recommendation to use one's services, but there is a general exception for lawyer referral services. See RPC 7.2(b)(2) ("A lawyer shall not provide anything of value to a person for recommending the lawyer's services except that a lawyer may ... pay the usual charges of a ... lawyer referral service.").
4. Bruce A. Green, "Lawyers' Professional Independence: Overrated or Undervalued?," 46 *Akron Law Review* 599, 617 (2013).
5. See e.g., Gillian K. Hadfield and Deborah L. Rhode, "How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering," 67 *Hastings Law Journal* 1191, 1194-95 (2016), and Gerard J. Clark, "Monopoly Power in Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession," 45 *Suffolk Law Review* 1009, 1031 (2012).
6. See New Jersey Advisory Commission on Professional Ethics Formal Op. 2017-732; New York State Bar Assoc. Formal Op. 1132; Pennsylvania Bar Association Commission on Legal Ethics & Professional Responsibility Formal Op. 2016-200, 9/16; Ohio Board of Professional Conduct Op. 2016-3; South Carolina Ethics Op. 16-06 (2016).

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