

## BAR COUNSEL

### *Proposed Amendments to Ethics Rules on Soliciting Clients* **Changed Focus**

By Amber Hollister



Many factors suggest that the legal market is in the midst of a sea change. Consumer expectations are evolving as technologies such as Lyft, Amazon Now and RedFin offer near-instantaneous service via mobile device for a predetermined price. How will Oregon lawyers adapt to the changes around us?

The free flow of information may tantalize those seeking solutions to basic life problems. A quick Google search on how to obtain a divorce, secure a restraining order, rent out a spare room or fight foreclosure may offer some useful legal information interspersed with bad advice, but “self-navigators” must find a way to distinguish between the two. In this burgeoning and somewhat confusing online environment, many lawyers are eager to capitalize on new web-based tools to connect with and serve Oregonians’ everyday legal needs.

Indeed, a lawyer’s ability to answer questions and point clients to lasting,

workable solutions is as valuable as it ever was. But data shows that Oregon’s access-to-justice gap persists. In Oregon circuit courts, 80 percent of people seeking a divorce are self-represented; in residential evictions, the number spikes to 85 percent.<sup>1</sup> A recent study concluded that low-income Americans receive inadequate or no professional legal help for 86 percent of the civil legal problems they face in a given year; to a large extent, the legal needs of middle-income America are similarly unmet.<sup>2</sup>

Change is afoot. The combination of emerging technologies, an untapped market for low- and middle-income people with legal problems, and consumers’ natural desire for legal answers at a reasonable and predictable price is driving change. All around us the legal market is in the throes of innovation, with millions of dollars in investment pouring into “alternative” legal service industries.

#### The Futures Task Force

How might the bar’s regulatory structure respond to these pressures? The Board of Governors established the OSB Futures Task Force to examine both regulation and innovation. A task force regulatory committee met from November 2016 to June 2017 to discuss how the bar’s regulation of the practice of law should evolve. The committee was composed of judicial and legal scholars, litigators, business attorneys, sole practitioners, legal aid advocates, consumer protection specialists, ethics experts, practice management innovators and members of the public committed to access to justice.

At the end of seven months of hard work, rather than recommending the bar double down on traditional approaches, the regulatory committee proposed a course of modest change to al-

low Oregon lawyers to test the waters of innovation.

Outlined in this column is one of the regulatory committee’s recommendations, to amend the advertising and solicitation rules. A second recommendation, to expand the opportunities for Oregon lawyers to work with lawyer referral services, will be addressed in next month’s bar counsel column. Both proposed amendments seek to grant lawyers greater latitude as they use emerging tools to better serve clients and increase access to justice.<sup>3</sup> The board has voted to place the recommendations on this fall’s House of Delegates agenda.

#### The Proposed Rule

Things happen fast in today’s world. Legal consumers want efficient, timely service, but they may not know how to find the right lawyer or even whether they can afford legal advice. Often, a potential client’s impulse is to reach out online first for help, seeking to learn from neighbors, friends or search engines about the legal landscape and others’ experiences in it. Every lawyer has at one point or another seen a posting on Nextdoor, Facebook, Craigslist or in the comments field of an informational website made by a person who appears to need legal advice, but seems a little bit lost.

Given the pervasiveness of these requests for assistance, lawyers may feel their hands are tied by the limitations on lawyer advertising. As presently written, Rule 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 unless the potential client is also a lawyer. These limitations were originally intended to prevent lawyers from unduly pressuring clients with

**M** The Law Office of  
**JEFFREY S. MUTNICK & waterskrauspaul**

## Pioneers In Asbestos Litigation.

**Jeffrey S. Mutnick** has spent over 30 years representing the Insulators and Asbestos Workers of Local 36 in the Pacific Northwest. He has represented over 1,000 asbestos exposure victims and is the most experienced trial lawyer in Northwest asbestos litigation. ■

**Waters, Kraus & Paul** is a nationally recognized mid-sized plaintiff's firm that brings a wealth of experience in trying mesothelioma and other asbestos cancer cases to verdict. They were trial counsel in recent multi-million dollar Multnomah County verdicts. ■

Our combined national efforts broaden our reach, strengthen our trial talent, and deepen our commitment to excellence in legal representation of insulators and allied workers who have been injured by asbestos exposure. **Referrals Oregon and Washington.**

**mutnicklaw.com**

The Law Office of Jeffrey S. Mutnick in  
Portland, Oregon. 503.595.1033

**waterkrauspaul.com**

Waters, Kraus & Paul in Dallas, Baltimore,  
Los Angeles and San Francisco. 1.800.226.9880

**H** | **HOLMES & COMPANY** LLP  
CERTIFIED PUBLIC ACCOUNTANTS  
AND CONSULTANTS

is pleased to announce successful completion of litigation support re

**THE BASEBALL CLUB OF TACOMA, LLC**

v.

**SDL BASEBALL PARTNERS, LLC**

*Engagement for SDL Baseball Partners related to the sale of the Major League Baseball AAA franchise Tacoma Rainiers. Plaintiff alleged it relied upon financial statements of the baseball club that were materially misstated causing Plaintiff to pay a significantly inflated purchase price for the franchise. Prepared analysis to rebut all financial statement allegations, discovered financial "offsets" to claims asserted, reviewed and analyzed multiple valuation reports and assumptions, assisted law firm with "motion to compel" for production of all audit workpapers of Plaintiff's international auditing firm, reviewed audit workpapers to obtain valuable evidence supporting defense counsel theories, preparation of mediation and trial exhibits in anticipation of settlement or trial. Work performed for the law firm Ater Wynne, LLP (Dan Larson – trial lawyer)*

**William N. Holmes, CPA / CFE**

Forensic Accounting • Economic Damages  
Commercial Litigation • Full Service Public Accounting  
Accounting and Tax Malpractice Litigation (Plaintiff / Defense)

7128 SW Gonzaga Street, Suite 100 • Portland, OR 97223  
503.270.5400 • [www.pdxcpas.com](http://www.pdxcpas.com)

their persuasive sales pitches, but in the modern context, it can fairly be asked whether they are also acting as unnecessary barriers to effective communication with the public.<sup>4</sup>

Relatedly, a question arises whether court 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. In making its recommendation to amend Rule 7.3, the task force concluded that given the constitutional implications, "legitimate consumer-protection concerns can be protected by a more narrowly tailored rule that reflects the reality of the current market and that does not implicate free-speech protections under Article I, section 8."

Lawyers understandably want to interact with potential clients in web-based "live" chats and in social settings. A lawyer may frequently recognize that a person has a legal need before that person does. To enable lawyers to more freely engage with Oregonians who have legal needs, the regulatory committee proposed easing some of the restrictions on in-person solicitation, while retaining protections in place designed to protect consumers from overreaching and abuse. As proposed, Rule 7.3 would be amended as follows:

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



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

(c) 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.

This proposal is similar to a revision adopted by the Virginia State Bar earlier this year, in that it refocuses Rule 7.3's in-person solicitation prohibition on protecting the consumer.<sup>5</sup> The policy rationale behind the rule is to provide attorneys with greater flexibility to offer help. In a world where low- and middle-income Oregonians are struggling to find meaningful access to lawyers, any barrier to communication should be firmly rooted in the principles of consumer protection. Under the new set of rules, lawyers who identify a prospective client with a legal need will be able to offer to help, as long as one of the well-tailored exceptions does not apply. Lawyers who engage in conversations at social events or in online chats will be empowered to offer their

### The Evolution of Oregon's Advertising Rules

The present proposal builds upon the changes to Rules 7.2 and 7.3, approved by the House of Delegates in November 2016 and enacted in January 2017, which were designed to empower lawyers to modernize their advertising.

In January 2017, the Oregon Supreme Court adopted rule amendments that now require lawyers merely to include only "contact information" in advertisements, rather than a full "office address." RPC 7.3. This enables lawyers to more fully engage in advertising mediums with character limitations, such as Twitter and GoogleAds. At the same time, the court removed the requirement that lawyers who engage in targeted advertising of persons known to be in need of legal services must label their advertising as "Advertising Material." RPC 7.2(c).

## Kent

mediation & arbitration

**Christopher H. Kent**



- Over 100 cases as a neutral
- 32 years trial experience
- Plaintiffs and Defendants
- Areas:
  - Commercial litigation
  - Business dissolutions
  - Torts
  - Employment
  - Construction defect
  - Real estate
  - Insurance
  - Securities and Franchise

phone: 503.220.0717 • email: [ckent@kentadr.com](mailto:ckent@kentadr.com)

[www.kentadr.com](http://www.kentadr.com)

Proud to be an Oregon Law Foundation  
**"Leadership Bank"**  
 Committed to maximizing the return  
 on IOLTA accounts.


Call or visit your neighborhood branch today.



You'll notice the difference.

 **ColumbiaBank**

1-877-272-3678 | [ColumbiaBank.com](http://ColumbiaBank.com)

Member FDIC  Equal Housing Lender

Worried?  
Partner's next move --



**McGAUGHEY & ERICKSON**  
Shareholder Partner LLC Member Disputes

503-223-7555 | 65 SW Yamhill St, Ste 200, Portland 97204 | law7555.com

services, as long as the offer complies with the other rules (most importantly, by not being misleading, RPC 7.1).

Note that this proposal would not alter the statutory restrictions on nonlawyers earning fees for "running" in personal injury cases. ORS 9.500.

### Comments Welcome

The Board of Governors has adopted the OSB Futures Task Force's recommendation to amend Rule 7.3 and has placed it on the House of Delegates agenda for November 2017. The board invites comments regarding any and all of the futures task force's recommendations, including the one discussed in this column; comments should be directed to [futures@osbar.org](mailto:futures@osbar.org).

### Endnotes

1. Oregon Judicial Department, Oregon Circuit Courts Self-Represented Parties (2016).
2. Legal Services Corporation, "The Justice Gap," (2017).
3. In total, the task force report offers eight recommendations. The recommendations seek to empower Oregon lawyers to leverage technological advances, to improve access to justice for Oregonians and to modernize the Oregon State Bar. The executive summary and full report are available at [www.osbar.org/leadership/bog/bog\\_taskforces.html](http://www.osbar.org/leadership/bog/bog_taskforces.html).
4. Comment (2) to ABA Model Rule 7.3 states: "These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation and overreaching."
5. The newly adopted Virginia Rule of Professional Conduct is available in full at [www.vsb.org/docs/SCV\\_order\\_para\\_7\\_1\\_7\\_5.pdf](http://www.vsb.org/docs/SCV_order_para_7_1_7_5.pdf).

Ethics opinions are published and updated on the bar's website at [www.osbar.org/ethics/toc.html](http://www.osbar.org/ethics/toc.html).

An archive of Bar Counsel columns is available online at [www.osbar.org/ethics/bulletinbarcounsel.html](http://www.osbar.org/ethics/bulletinbarcounsel.html).

Amber Hollister is general counsel for the Oregon State Bar. She can be reached at [ahollister@osbar.org](mailto:ahollister@osbar.org) or (503) 431-6312.

**PLF EXCESS COVERAGE IS  
YOUR LAW FIRM'S SAFETY NET**

**PLF primary limits have remained steady for nearly 30 years.**  
Consider protecting your law firm with PLF Excess Coverage. With limits from \$700,000 to \$9.7 million, you can provide a bigger safety net for your law firm and your clients.

Visit us at [www.osbplf.org](http://www.osbplf.org) or call 503.639.6911.



**PLF** Excess Coverage