Leading the Way: The Future of Referral Fee Sharing and In-Person Advertising

In Cooperation with the Oregon New Lawyers Division

Friday, September 29, 2017
9 a.m.–11 a.m.

2 Ethics credits
LEADING THE WAY: THE FUTURE OF REFERRAL FEE
SHARING AND IN-PERSON ADVERTISING

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   — Ankur Doshi, RB Pamplin Corporation, Portland, Oregon
   — Peter Jarvis, Holland & Knight LLP, Portland, Oregon
SCHEDULE

8:30     Registration

9:00     Why the Legal Ethics Landscape Needs to Change
         John Grant, III, Agile Attorney Network, Portland
         Jennifer Nicholls, Brophy Schmor LLP, Medford

9:30     Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules
         Moderator: Amber Hollister, Oregon State Bar, Tigard
         The Honorable Christopher Garrett, Oregon Court of Appeals, Salem
         Ankur Doshi, RB Pamplin Corporation, Portland
         Peter Jarvis, Holland & Knight LLP, Portland

11:00    Adjourn
Ankur Doshi, *RB Pamplin Corporation, Portland.*

**The Honorable Christopher Garrett, Oregon Court of Appeals, Salem.** Judge Garrett was appointed to the Oregon Court of Appeals by Governor John Kitzhaber and joined the court in February 2014. Prior to his appointment, Judge Garrett was an attorney in private practice in Portland, where he specialized in complex business litigation and employment and election law. In 2008, Judge Garrett was elected to the Oregon House of Representatives, where he served until his appointment to the court. As a legislator, he held several leadership positions, including Speaker Pro Tempore, chair of the House Rules Committee, cochair of the Joint Committee on Public Safety, cochair of the House Redistricting Committee, and vice chair of the House Judiciary Committee. Judge Garrett also served on the Governor’s Commission on Public Safety and the Oregon Law Commission. In addition to his judicial work, Judge Garrett is an adjunct professor at the Willamette University College of Law. He cochairs the Oregon State Bar Futures Task Force and chairs its Regulatory Committee.

**John Grant, III, The Agile Attorney Network, Portland, OR.** Mr. Grant is the founder of the Agile Attorney Network, which consults with lawyers to help them adapt to changes in the legal industry. He has developed a specific methodology for unlocking the potential of a law practice, starting with its foundations and working through six specific domains of activity that are common to all legal operations. He uses these tools to teach legal teams of all sizes how to develop a winning strategy. He also has developed a network of people dedicated to improving the practice of law for legal teams and clients alike. Mr. Grant is cochair of the Oregon State Bar Futures Task Force.

**Amber Hollister, Oregon State Bar, Tigard.** Ms. Hollister is the Oregon State Bar’s general counsel. In her role, she regularly provides prospective ethics guidance to lawyers and serves as in-house counsel for the bar. Prior to working for the Oregon State Bar, Ms. Hollister served as deputy general counsel to Governor Ted Kulongoski and worked at Perkins Coie LLP in Portland. She clerked for U.S. District Court Judge Robert H. Whaley. Ms. Hollister is president-elect of Oregon Women Lawyers.

**Peter Jarvis, Holland & Knight LLP, Portland.** Mr. Jarvis practices primarily in the area of attorney professional responsibility and risk management. Mr. Jarvis advises lawyers, law firms, corporate legal departments, and government legal departments about the law governing lawyers, including matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

**Jennifer Nicholls, Brophy Schmor LLP, Medford.** Ms. Nicholls is president of Rogue Women Lawyers and a member of the Oregon New Lawyers Division Executive Committee, the Campaign for Equal Justice board, Oregon Women Lawyers, the Jackson County Bar Association, and the William V. Deatherage American Inn of Court. She is the author of “A Proportional Response: Amending the Oregon Rules of Civil Procedure to Minimize Abusive Discovery Practices,” which was published in volume 89 of the Oregon Law Review.
Chapter 1

Why the Legal Ethics Landscape Needs to Change

John Grant, III
Agile Attorney Network
Portland, Oregon

Jennifer Nicholls
Brophy Schmor LLP
Medford, Oregon

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FUTURE of Legal Services in Oregon

Why we need to change the RPCs

Roadmap

Why Innovate?
A New Approach
Recommendations & Discussion
Committing to Innovation
Chapter 1—Why the Legal Ethics Landscape Needs to Change

Explainer Video

Oregon State Bar
Futures Task Force
www.osbar.org

Why Innovate?
Because we aren’t meeting the need.
“Despite sustained efforts to expand the public’s access to legal services [over the past century], significant unmet needs persist”

“Most people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.”

— ABA Commission on the Future of Legal Services (2016)
Chapter 1—Why the Legal Ethics Landscape Needs to Change

Percentage of Americans who could not come up with $400 to cover an emergency.

Well over 100 Million Americans, at least 30% of the population, are living with civil justice problems at any moment, most related to shelter, sustenance, safety, health, and child custody.

— ABA 2016 Futures Report

100,000,000

30% of Oregon’s 4.2 Million Population

Approximate number of Oregonians living with civil justice problems at any moment, most related to shelter, sustenance, safety, health, and child custody.
Chapter 1—Why the Legal Ethics Landscape Needs to Change

Self represented Litigants in Oregon Courts

Dissolutions

- Represented: 20%
- Self-Represented: 80%

Residential Evictions

- Represented: 15%
- Self-Representation: 85%

Data from Oregon Judicial Dept. (2016)

Why Innovate?

National Center for State Courts’ Landscape of Litigation in Civil Courts

Leading the Way: The Future of Referral Fee Sharing and In-Person Advertising
“Assertions of rights are Utopian, misleading, and useless if they cannot be enforced.”

—William Twining
General Jurisprudence: Understanding Law from a Global Perspective

Why Innovate?

Because confidence in the legal system is essential to society.
Nearly half of American young adults lack confidence in the nation’s justice system or don’t trust their local police to do the right thing, though that perception is deeply divided by race, according to a national poll of 18- to 29-year-olds released by Harvard’s Institute of Politics at the John F. Kennedy School of Government.

African-American youth had the deepest distrust of the nation’s criminal justice institutions, with 79 percent of those polled expressing little to no trust in their local police department to do the “right” thing.

Hispanic youth weren’t far behind, with 62 percent of those polled expressing little or no trust in their local police force. In stark contrast, just 31 percent of the white youth polled expressed little or no trust.
In a 2015 survey about state courts, 55% of respondents (registered voters) who had first-hand experience with the courts agree with the following statement:

“"The court system is inefficient, intimidating, and expensive. While some disputes can only be solved by a court, the court system should only be used as a last resort."

—National Center for State Courts, National Survey 2015
“Regulation is a public intervention in otherwise private transactions and free markets. It must therefore stem from a political judgment that we should not have complete trust and confidence, and must instead rely on the intervention in the market.”

— Stephen Mayson
Keynote to Solicitors Regulation Authority conference on ‘Trust and the Market’ London, 22 June 2017

“If the fundamental purpose of regulation is to promote and support the public interest, then public confidence in legal services regulation is a paramount test. So too is the ability of consumers to navigate effectively through their experience of seeking legal advice and representation and, if things go wrong, to benefit from the protections they were promised.”

— Stephen Mayson
The Oregon Bar is a body of lawyers whose mission is to protect the public and which is granted self-regulation by the state (by tradition) in order to pursue that mission.

The RPCs are regulations written (designed) by lawyers, to apply to lawyers and non-lawyers, with the goal of protecting the public.

How does the general public have their say?
“For regulators, it seems to me that the biggest danger here is the self-belief that ‘we know best.’
This is not to deny the importance of leadership, but to caution against getting too far ahead of those who are regulated.”

— Stephen Mayson

“If we truly believe in the need for high-quality, ethical and independent practitioners and judges, then we owe it to ourselves and to future generations to act now to secure ... confidence in modern, proportionate, cost-effective and accountable regulation of legal services.”

— Stephen Mayson
We need to consider the possibility that Oregon’s lawyers are simultaneously doing excellent work for the clients they serve but are failing to serve large swaths of society as a whole.

Why Innovate?

Because it is needed to support the Mission of the Bar.
Chapter 1—Why the Legal Ethics Landscape Needs to Change

Oregon State Bar Mission

The mission of the Oregon State Bar is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice.
• By what measure?
• How do we know if we’re on the right track?

Oregon State Bar Values

**Integrity**
Integrity is the measure of the bar’s values through its actions. The bar adheres to the highest ethical and professional standards in all of its dealings.

**Fairness**
The bar works to eliminate bias in the justice system and to ensure access to justice for all.

**Leadership**
The bar actively pursues its mission and promotes and encourages leadership among its members both to the legal profession and the community.

**Diversity**
The bar is committed to serving and valuing its diverse community, to advancing equality in the justice system, and to removing barriers to that system.

**Justice**
The bar promotes the rule of law as the best means to achieve justice and resolve conflict in a democratic society.

**Accountability**
The bar is accountable for its decisions and actions and will be transparent and open in communication with its various constituencies.

**Excellence**
Excellence is a fundamental goal in the delivery of bar programs and services. Since excellence has no boundary, the bar strives for continuous improvement.

**Sustainability**
The bar encourages education and dialogue on how law impacts the needs and interests of future generations relative to the advancement of the science of jurisprudence and improvement of the administration of justice.
Closing Thought:

Innovation is a process, not an event.

It is a learnable skill, but it takes strong executive commitment to trying new things, measuring their outcome, and accepting that we learn as much from shortcomings as from successes.

Questions?
The relentless growth of technology and the effects of globalization are upending the legal services market, feeding innovation, exposing inefficiencies, and presenting opportunities for growth.

Consumers are voting with their wallets. The alternative legal services market has quickly become a multibillion dollar industry.

Oregon’s access-to-justice gap disproportionately affects the most vulnerable among us.

Lawyers and nonlawyer entrepreneurs see the legal market as ripe for innovation.

OSB Futures Task Force, 2017
Chapter 1—Why the Legal Ethics Landscape Needs to Change

“"It will not do for Bar members to stand still or to rage against the tide as the world around us evolves.”

OSB Advertising Task Force Report, 2009

I. Background

The legal services market has entered a period of intense disruption. Technological advances are transforming how we deliver legal services, resolve legal disputes, and engage in legal learning. Consumers of legal services—including sophisticated corporations as well as individual clients—are demanding more for less and are apt to employ self-help rather than to hire a professional.

Many lawyers are so accustomed to thinking of the law as a “full service” profession—where a client with an incipient legal issue engages a lawyer or law firm to provide a full complement of legal services until the “matter” is concluded—that it is difficult to imagine legal services being provided any other way. But they are. The future is here. Oregonians are using websites not merely to gather information about lawyers, but to actually obtain legal advice. Services traditionally provided in person-to-person interactions between lawyers and clients are now being offered by online providers such as LegalZoom and Avvo.2 Customized legal forms, short telephonic consultations, and advice via chat are all available at the touch of a button. Consumers are bypassing the traditional full-service lawyer-client relationship in favor of “unbundled” legal services—limited-scope legal services that enable consumers to pick and choose the services or tasks for which they are willing to pay. Or, they are bypassing the lawyer-client relationship altogether and using “intelligent” online software to create their own wills, trusts, and other “routine” legal documents that they believe are sufficient to meet their needs.

Consumers are voting with their wallets. The alternative legal services market has quickly become a multibillion dollar industry. And why not? Consumers naturally want to resolve their legal issues efficiently and cost-effectively, as they do any other problem. Commoditization of services and the instant availability of information at the click of a mouse now set their expectations; they demand easy access to qualified lawyers and legal resources as well as

Reasons for Not Seeking Assistance with Civil Justice Matter

- Too stressful 4%
- Costs too much 17%
- Wouldn’t make any difference 24%
- No need for advice 46%
- Don’t know who to ask 9%

transparent, competitive pricing. And it is more tempting to simply not hire a lawyer, because the Internet’s infinite amount of knowledge on any subject makes a do-it-yourself approach seem feasible for many legal matters.

Against this backdrop, one might think that the public is finding it easier than ever to access legal services. It is startling, therefore, to learn that the increased availability of information about the law and legal services has done nothing to reduce the access-to-justice gap. The American Bar Association Commission on the Future of Legal Services recently found that “[d]espite sustained efforts to expand the public’s access to legal services [over the past century], significant unmet needs persist” and that “[m]ost people living in poverty, and the majority of moderate-income individuals, do not receive the legal help they need.” Specific findings from the Commission include:

- As of the last census, 63 million people, or one-fifth of the population, met the financial requirements for legal aid, yet funding for the Legal Services Corporation (the primary vehicle for federal legal aid funding) is inadequate. “[I]n some jurisdictions, more than eighty percent of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.”
- Access to justice is not just a problem for the poor. One study showed that “well over 100 million Americans [are] living with civil justice problems, many involving what the American Bar Association has termed ‘basic human needs,’” including matters related to shelter, sustenance, safety, health, and child custody.
- Although financial cost is the most often cited reason for not seeking legal services, awareness may play an even larger role. The study found that “[i]ndividuals of all income levels often do not recognize when they have a legal need, and even when they do, they frequently do not seek legal assistance.” And when financial cost is an issue, it is not only direct costs “but also indirect economic costs, such as time away from work or the difficulty of making special arrangements for childcare.”
- Pro bono and “low bono” efforts are insufficient to meet the needs of low- and moderate-income Americans. “U.S. lawyers would have to increase their pro bono efforts ... to over nine hundred hours each to provide some measure of assistance to all households with legal needs.” Nor have other programs across the country designed to offer assistance to this population significantly narrowed the access-to-justice gap.

Within this context, new lawyers remain underemployed. Total student debt burdens now average in excess of $140,000—challenging new lawyers’ ability to sustain traditional law practices that might address some of the unmet legal need—while legal education remains essentially unchanged.

The effect of the access-to-justice gap on the court system is staggering. A 2015 study by the National Center for State Courts found that more than 75 percent of civil cases featured at least one self-represented party. According to Oregon Judicial Department data from 2016, approximately 80 percent of family court cases involved at least one self-represented litigant. In
residential eviction proceedings, it is rare to see a lawyer anywhere—only about 15 percent of residential eviction proceedings involve lawyers. Instead, landlords are commonly represented by property managers, and tenants represent themselves.

Moreover, data shows that Oregon’s access-to-justice gap disproportionately affects the most vulnerable among us. As reported at the 2016 Oregon Access to Justice Forum, people of color, homeless people, domestic violence survivors, physically disabled people, and the elderly have greater-than-average civil legal needs but are still woefully underserved. The Campaign for Equal Justice estimates the combined legal aid providers in Oregon can meet only 15 percent of the total civil legal needs of Oregon’s poor. According to a survey, the biggest reason (17 percent) why low-income Oregonians did not seek legal aid was the belief that nothing could be done about their legal problems. And, given the limited resources available, that may not be wrong.

In short, three powerful forces are converging to disrupt the legal services market. First, more people than ever need legal services and are not getting them. Second, people believe that their legal needs should be capable of being served in ways different, and more cost-effective, than the traditional model. Oregonians’ expectations are changing. Third, new providers are stepping in to fill that void.

Lawyers and nonlawyer entrepreneurs see the legal market as ripe for innovation. Lawyers are reaching out to solicit business through websites, blogs, and social media; increasingly relying on online advertising and referral services to connect them with prospective clients; and using web-based platforms to offer limited-scope consultations or services to clients who have been referred to them by third parties. All the while, tech businesses, awash in venture capital, have developed online service delivery models ranging from the most basic form providers to sophisticated referral networks. Online services offer to draft a pleading,\(^{14}\) write a will,\(^{15}\) or apply for an immigration visa,\(^{16}\) all from the comfort of a consumer’s living room or mobile device.

Indeed, innovation is necessary both to meet the consumer need and for lawyers to stay competitive. The ABA Commission Report decried members of the legal profession for clinging to outdated business models and resisting change. Specifically, the Commission found that
“[t]he traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.”\textsuperscript{17} For example, the Commission recognized the conflict of interest inherent in hourly billing, where efficiency in delivering legal services can be rightfully seen as adverse to short-term revenue.\textsuperscript{18} In the long term, however, firms that have taken a proactive approach to alternative fee arrangements have retained their profitability.\textsuperscript{19}

The relentless growth of technology and the effects of globalization are upending the legal services market, feeding innovation, exposing inefficiencies, and presenting opportunities for growth. While market disruption and rapid change do not spell the end of lawyering, they do demand an evolution in the manner and methods by which lawyers provide legal services, and the way in which those services are regulated.

II. Creation of Oregon State Bar Futures Task Force

The legal profession is nothing if not conservative. Lawyers are schooled in precedent, consistency, and risk avoidance. Yet, as noted in the ABA Futures Commission Report on the Future of Legal Services, “The justice system is overdue for fresh thinking about formidable challenges. The legal profession’s efforts to address those challenges have been hindered by resistance to technological changes and other innovations.”\textsuperscript{20}

In April 2016, the OSB Board of Governors convened a Futures Task Force with the following charge:

“Examine how the Oregon State Bar can best protect the public and support lawyers’ professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered. Such changes have been spurred by the blurring of traditional jurisdictional borders, the introduction of new models for regulating legal services and educating legal professionals, dynamic public expectations about how to seek and obtain affordable legal services, and technological innovations that expand the ability to offer legal services in dramatically different and financially viable ways.”

The Board split the Futures Task Force into two committees: a Legal Innovations Committee, focused on the tools and models required for a modern legal practice, and a Regulatory Committee, focused on how to best regulate and protect the public in light of the changing legal services market. The charges, findings, and recommendations of the two committees follows.

III. The Regulatory Committee

A. The Regulatory Committee Charge

The Regulatory Committee was charged to examine new models for the delivery of legal services (e.g., online delivery of legal services, online referral sources, paraprofessionals, and alternative business structures) and make recommendations to the Board regarding the role the Bar should play, if any, in regulating such delivery models. The Board requested a report containing the following information:
• A summary of what exists at present, both in terms of existing legal service delivery models and regulatory structures for those models;

• A discussion of the consumer-protection and access-to-justice implications presented by these models and regulatory structures;

• An analysis of the stakeholders involved, including (1) the vendors that have an interest in exploring innovative ways to deliver legal services to consumers, (2) the lawyers who are interested in utilizing these innovative service delivery models, and (3) the regulatory entities that are responsible for ensuring adequate protection for consumers in this quickly evolving legal services market;

• Specific recommendations for proactive steps OSB should take to address these new models (e.g., should OSB propose amendments to the Oregon Rules of Professional Conduct, the OSB Rules of Procedure, or state law); and

• A proposed strategic response in the face of unexpected action at the legislature or elsewhere.

B. Findings of the Regulatory Committee

The Regulatory Committee recommendations are based on the following findings:

1. Oregonians need legal advice and legal services to successfully resolve problems and to access the courts.

2. Consumers are increasingly unwilling or unable to engage traditional full-service legal representation.

3. A significant number of self-represented litigants choose not to hire lawyers, even though they could afford to do so.

4. Self-help resources are crucial and must be improved, even as we take steps to make professional legal services more accessible.

5. Subsidized and free legal services, including legal aid and pro-bono representation, are a key part of solving the access-to-justice gap, but they remain inadequate to meet all of the civil legal needs of low-income Oregonians.

6. Despite the existence of numerous under- and unemployed lawyers, the supply of legal talent is not being matched with the need.

7. Oregonians’ lack of access to legal advice and services leads to unfair outcomes, enlarges the access-to-justice gap, and generates public distrust in the justice system.

8. For-profit online service providers are rapidly developing new models for delivering legal services to meet consumer demand.

9. To fully serve the Bar’s mission of promoting respect for the rule of law, improving the quality of legal services, and increasing access to justice, we must allow and encourage the development of alternate models of legal service delivery to better meet the needs of Oregonians.
Chapter 1—Why the Legal Ethics Landscape Needs to Change

C. Recommendations of the Regulatory Committee

Based on its findings, the Regulatory Committee makes three broad recommendations, each with several subparts. The purpose of this summary is to identify and briefly describe each recommendation. For a more complete explanation of the recommendations, readers should refer to the accompanying workgroup reports, which have been approved by and reflect the views of the Committee as a whole.

RECOMMENDATION 1:

IMPLEMENT LEGAL PARAPROFESSIONAL LICENSURE

Oregon should establish a program for licensure of paraprofessionals who would be authorized to provide limited legal services, without attorney supervision, to self-represented litigants in (1) family law and (2) landlord-tenant proceedings.

The accompanying report reviews and analyzes developments in other jurisdictions, particularly Arizona, California, Colorado, Nevada, New York, Utah, Washington, and Ontario, Canada. We reviewed a wide variety of materials on paralegal regulation and the problem of self-represented litigants, considered arguments for and against licensing paraprofessionals, and discussed the elements of a licensing program that would be appropriate for Oregon.

The most compelling argument for licensing paraprofessionals is that the Bar’s other efforts to close the access-to-justice gap have continued to fall short. We must broaden the options available for persons seeking to obtain legal services, while continuing to strive for full funding of legal aid and championing pro bono representation by lawyers. By adopting a form of paraprofessional licensing, Oregon will not be assuming the risk of being ahead of the pack. Instead, the workgroup report shows that Oregon is well-placed to benefit from the experience, trial, and error of six distinct paraprofessional programs.

Our proposal would allow limited practice by paraprofessionals in two of the highest-need areas—family law and landlord-tenant—and only in limited types of proceedings where clients are by and large unrepresented. Clients who need other kinds of legal help, have complex cases, or desire representation in court for any reason will still need lawyers.

Contrary to the commonly held belief, we are convinced that licensing paraprofessionals in the manner proposed would not undermine the employment of lawyers. First, the need for routine, relatively straightforward family law and landlord-tenant representation is vast, and lawyers are electing not to perform this high-volume, low-pay work. Second, data from existing programs demonstrates that lawyers and licensed paraprofessionals may choose to work together because they can provide tiered and complementary services based on the complexity of a client matter. Given the significant underutilization of legal services, paraprofessionals may actually create on-ramps to lawyer representation for consumers who do not realize they need legal services. Finally, there is simply no evidence that when paraprofessionals are introduced into the legal market, lawyers are harmed. For all of these reasons, the legal profession need not fear innovative service delivery models.

Given the inherent complexity of launching a paraprofessional licensing program, we recommend the Board appoint an implementation committee to formulate a detailed implementation plan for licensing paraprofessionals consistent with the recommendations in this report.
1.1 An applicant should be at least 18 years old and of good moral character. Attorneys who are suspended, resign Form B, or are disbarred from practicing law should not be eligible for a paraprofessional license.

1.2 An applicant should have an associate’s degree or higher and should graduate from an ABA-approved or institutionally accredited paralegal studies program, including approved coursework in the subject matter of the license. Highly experienced paralegals and applicants with a J.D. degree should be exempt from the requirement to graduate from a paralegal studies program.

1.3 Measures should be enacted to protect consumers who rely on newly licensed paraprofessionals. The measures should require that applicants be 18 years old and of good moral character and meet minimum education and experience requirements. The measures should also require that licensees carry malpractice insurance, meet continuing legal education requirements, and comply with professional rules of conduct like those applicable to lawyers.

1.4 Applicants should have at least one year (1,500 hours) of substantive law-related experience under the supervision of an attorney.

1.5 Licensees should be required to comply with professional rules of conduct modeled after the rules for attorneys.

1.6 Licensees should be required to meet continuing legal education requirements.

1.7 To protect the public from confusion about a licensee’s limited scope of practice, licensees should be required to use written agreements with mandatory disclosures. Licensees also should be required to advise clients to seek legal advice from an attorney if a licensee knows or reasonably should know that a client requires services outside of the limited scope of practice.

1.8 Initially, licensees should be permitted to provide limited legal services to self-represented litigants in family law and landlord-tenant cases. Inherently complex proceedings in those subject areas should be excluded from the permissible scope of practice.

1.9 Licensees should be able to select, prepare, file, and serve forms and other documents in an approved proceeding; provide information and advice relating to the proceeding; communicate and negotiate with another party; and provide emotional and administrative support to the client in court. Licensees should be prohibited from representing clients in depositions, in court, and in appeals.

1.10 Given the likely modest size of a paraprofessional licensing program, the high cost of implementing a bar-like examination, and the sufficiency of the education and experience requirements to ensure minimum competence, we do not recommend requiring applicants to pass a licensing exam. If the Board of Governors thinks that an exam should be required, we recommend requiring applicants to pass a national paralegal certification exam.

1.11 To administer the program cost-effectively, we recommend integrating the licensing program into the existing structure of the Bar, rather than creating a new regulatory body.
**RECOMMENDATION 2:**

**REVISE RULES OF PROFESSIONAL CONDUCT TO REMOVE BARRIERS TO INNOVATION**

Alternative legal service delivery models, which harness technology to offer limited-scope services to consumers in lieu of the traditional model of full-service legal practice, are here to stay.

The regulatory response to this development around the country has been mixed. Some state bar associations have been very resistant to change, electing to double down on traditional regulation methods through restrictive ethics opinions and reactive lawsuits. But these efforts have not stemmed the tide of change. The lesson we draw from those experiences is that resistance from the Bar will not lead Oregonians to passively accept the status quo; the future is here. Leadership from the Bar is essential to ensure that, as the market for legal services evolves, our profession retains its commitment to protecting the consumer. We believe that there are opportunities to embrace new models of practice, leverage technological advances, and begin to close the access-to-justice gap without compromising that historical commitment.

If the Bar is to stay true to its goals of protecting the public and seeking to increase and improve access to justice, the Bar’s regulatory framework must be flexible enough to allow some space for innovation and new ideas to grow. We recommend a short list of modest changes, which will loosen restrictions on lawyer advertising and facilitate innovation by allowing more economic partnership between lawyers and nonlawyers, particularly licensed paraprofessionals.

2.1 **Amend current advertising rules to allow in-person or real-time electronic solicitation, with limited exceptions.** By shifting to an approach that focuses on preventing harm to consumers, the Bar can encourage innovative outreach to Oregonians with legal needs, while promoting increased protection of the most vulnerable. The proposed amendments to the Oregon Rules of Professional Conduct would secure special protections for prospective clients who are incapable of making the decision to hire a lawyer or have told the lawyer they are not interested, or when the solicitation involves duress, harassment, or coercion.

2.2 **Amend current fee-sharing rules to allow fee sharing between lawyers and lawyer referral services, with appropriate disclosure to clients.** Currently, only Bar-sponsored or nonprofit lawyer referral services are allowed to engage in fee-sharing with lawyers. Rather than limit market participation by for-profit vendors, the Bar should amend the Oregon Rules of Professional Conduct to allow fee sharing between all referral services and lawyers, while requiring adequate price disclosure to clients and ensuring that Oregon clients are not charged a clearly excessive legal fee.

2.3 **Amend current fee-sharing and partnership rules to allow participation by licensed paraprofessionals.** If Oregon implements paraprofessional licensing, it should amend the Oregon Rules of Professional Conduct to allow fee sharing and law firm partnership among regulated legal professionals. Any rule should include safeguards to protect lawyers’ professional judgment. The Board should also direct the Legal Ethics Committee to consider whether fee sharing or law firm partnership with other professionals who aid lawyers’ provision of legal services (e.g., accountants, legal project managers, software designers) could increase access to justice and improve service delivery.

2.4 **Clarify that providing access to web-based intelligent software that allows consumers to create custom legal documents is not the practice of law.** Together with this effort, seek opportunities for increased consumer protections for persons utilizing online document creation software.
Chapter 1—Why the Legal Ethics Landscape Needs to Change

RECOMMENDATION 3:

IMPROVE RESOURCES FOR SELF-NAVIGATORS

Numbers do not lie. In Oregon, and nationwide, more and more people in our legal system are self-represented. Some self-represented litigants choose their path because they cannot afford a lawyer; others simply believe a lawyer is not needed or will only make their legal issues unduly complicated. While lawyers have a professional duty to continue to strive to fully fund legal aid and provide pro bono representation to the indigent, some Oregonians will always appear in court without a lawyer. Recognizing this fact, the Bar should seek to improve the experience of self-navigators and should recognize this work as another method to narrow the access-to-justice gap.

3.1 Coordinate and integrate key online resources utilized by self-navigators. Establish a committee with representatives from the three stakeholder groups—the Oregon Judicial Department (OJD), the Bar, and legal aid—to coordinate and collaborate on the information available on their respective websites, including cross-links when appropriate.

3.2 Create self-help centers in every Oregon courthouse. The Oregon State Bar and OJD should consider proposing or supporting the creation of self-help centers to assist self-navigators, including the use of dedicated and trained court staff and volunteers. The goal should be self-help centers in every court in Oregon.

3.3 Continue to make improvements to family law processes to facilitate access by self-navigators. Implement the recommendations of OJD’s State Family Law Advisory Committee regarding family law improvements to assist self-navigators. Seek to improve training and ensure statewide consistency in training to family court facilitators.

3.4 Continue to make improvements to small-claims processes to facilitate access by self-navigators. Implement the recommendations from the 2016 Access to Justice Forum regarding small-claims process. Support changes to provide better courthouse signage, instruction, and education for consumers.

3.5 Promote availability of unbundled legal services for self-navigators. Educate lawyers about the advantages of providing unbundled services, including the existence of new trial court rules. Provide materials on unbundled services to Oregon lawyers (through the OSB website, the Bar Bulletin, local bars, specialty bars, and sections), including ethics opinions, sample representation and fee agreements, and reminders about blank model forms that can be printed from OJD’s website.

3.6 Develop and enhance resources available to self-navigators. While OSB, OJD, and legal aid have made strides in providing information that is useful for self-navigators, we must continue to improve existing resources and develop new tools.
IV. The Innovations Committee

A. The Innovations Committee Charge and Process

The Innovations Committee was charged with the study and evaluation of how OSB might be involved in and contribute to new or existing programs or initiatives that serve the following goals:

- Help lawyers establish, maintain, and grow sustainable practices that respond to demonstrated low- and moderate-income community legal needs;
- Encourage exploration and use of innovative service delivery models that leverage technology, unbundling, and alternative fee structures in order to provide more affordable legal services;
- Develop lawyer business management, technology, and other practice skills; and
- Consider the viability of a legal incubator program.

The committee was asked to develop recommendations for OSB to advance promising initiatives, either alone or in partnership with other entities, and to prioritize those recommendations in light of relative projected costs, benefits, ongoing projects relevant to the issues, and the capacity of OSB and other entities.

B. Findings of the Innovations Committee

The Innovations Committee agrees with the findings of the Regulatory Committee and also finds that:

1. The profession in general, and the Bar in particular, would benefit from a substantially stronger focus on the gathering, dissemination, and use of data-based evidence to support and monitor progress toward its mission, values, and initiatives.

2. The Bar is underutilizing and undermarketing the Lawyer Referral Service, which is one of its most successful programs over the past several years for connecting moderate-means Oregonians with qualified legal help.

3. Law schools, the Bar, and other legal education providers are not doing enough to prepare lawyers for the realities of modern legal practice or to encourage lawyers to learn and adopt needed skills related to technology, project and practice management, and business management.

C. Recommendations of the Innovations Committee

RECOMMENDATION 4:

EMBRACE DATA-DRIVEN DECISIONMAKING

4.1 Adopt an official policy embracing data-driven decision making (DDDM).

As the Bar looks to invest time and resources in various initiatives, including the recommendations of this Task Force, it is important that Bar leadership and the Board of
Governors emphasize the importance of using data to give context to—and measure the effectiveness of—those initiatives. Specifically, we recommend grounding each and every Bar initiative in the Bar’s mission, values, and functions, and establishing what the business world refers to as SMART (Specific, Measurable, Achievable, Realistic, Time-Based) goals around them. Additionally, to the extent that it is not already consistently doing so, we recommend that the Bar establish a DDDM framework for defining all new (and, where feasible, ongoing) initiatives.

4.2 Adopt a formal set of key performance indicators (KPIs) to monitor the Bar’s values. Without measurement, the Bar’s values risk languishing as nice-to-express sentiments instead of concrete commitments. The Board of Governors should consider commissioning a special committee of the BOG to work with Bar leadership in establishing an initial set of KPIs and determining a timeframe for periodically evaluating them.

4.3 Adopt an open-data policy. We recommend that the Bar, and also, ideally, the judiciary, adopt a formal open-data policy. While we do not go so far as to recommend specific language for this policy, we recommend that the Board of Governors convene a working group to propose a specific policy for the Bar, with an implementation target of January 2018.

4.4 Provide a dedicated resource responsible for data collection, design, and dissemination. Many successful businesses now have a chief data officer or chief information officer in addition to, or sometimes as an expansion of, the role of chief technical officer. As the availability of data increases and its potential uses proliferate, and in order to enable the other recommendations of this subcommittee, we believe a dedicated resource will be necessary.

**RECOMMENDATION 5:**

EXPAND THE LAWYER REFERRAL SERVICE AND MODEST MEANS PROGRAM

5.1 Set a goal to increase the number of inquiries to the Lawyer Referral Service (LRS) and Modest Means Program (MMP), adequately fund the Referral and Information Services department (RIS) to achieve the goal. The Oregon State Bar should set a goal of increasing the number of inquiries to the LRS and MMP—and, by extension, the corresponding number of referrals to Oregon lawyers—by 11 percent per year for the next four years, and should adequately fund the RIS to achieve this goal. While we do not offer an opinion on the specific amount of money that would be necessary to reinvest in the programs in order to meet this 11 percent per annum growth target, we recommend that the BOG request a proposal from the program’s managers.

5.2 Develop a blueprint for a “Non-Family Law Facilitation Office” that can become a certified OSB pro bono program housed within the circuit courts of Oregon.
Chapter 1—Why the Legal Ethics Landscape Needs to Change

**RECOMMENDATION 6:**

**ENHANCE PRACTICE MANAGEMENT RESOURCES**

6.1 Develop a comprehensive training curriculum to encourage and enable Oregon lawyers to adopt modern law practice management methods. Specifically, we recommend that the OSB CLE Seminars Department—in cooperation with the PLF, Bar Sections, Specialty Bars, or whomever else they deem appropriate—be tasked with developing a comprehensive Modern Practice Management training curriculum for Oregon lawyers comprised of no less than two hours of education in each of the following areas: automation, outsourcing, and project management.

**RECOMMENDATION 7:**

**REDUCE BARRIERS TO ACCESSIBILITY**

7.1 Promote the provision of limited-scope representation. Specifically, we recommend that the Bar set a target of increasing the number of lawyers providing unbundled legal services in Oregon by 10 percent per year over the next four years. We believe that such a goal will result in improved access to justice for Oregonians.

7.2 Promote the use of technology as a way to increase access to justice in lower income and rural communities. In addition to training lawyers in private practice on the effective use of technology to reach low-income and rural communities, the Bar should encourage and support the courts in their efforts to provide more online, user-friendly, resources for the public and opportunities to participate in court proceedings by video.

7.3 Make legal services more accessible in rural areas. In addition to leveraging technology to create better access to legal services and the courts, we recommend hosting two summits—one in eastern Oregon and one on the coast—to discuss barriers that are germane to rural communities and share what programs, initiatives, or activities have worked to improve access.

7.4 Promote efforts to improve the public perception of lawyers. The Bar should expand public outreach that highlights lawyers as problem-solvers, community volunteers, and integral to the rule of law.

**RECOMMENDATION 8:**

**ESTABLISH A BAR-SPONSORED INCUBATOR/ACCELERATOR PROGRAM**

We recommend that the OSB create a consortium-based incubator/accelerator program that will serve Oregon’s low- and moderate-income populations—specifically, those individuals whose income falls between 150 and 400 percent of the federal poverty level. The program goals would be to provide legal services to those clients, to help new lawyers build sustainable practices to meet client need, and to operate as a center for innovation dedicated to identifying, developing, and testing innovative methods for the delivery of legal services into the future.
In recent years, many different law school and consortium-based incubator and/or accelerator programs have cropped up across the country, all seeking to address the persistent issue of how to bridge the justice gap for underserved lower- and moderate-income individuals who cannot afford traditional legal services but who do not qualify for legal aid. These programs come in different forms—some operating as stand-alone incubators sponsored by a consortium of private stakeholders; others operating solely under the auspices of a law school or state bar association. All, however, accomplish two goals: (1) they create a space—often for newer lawyers—to provide direct legal services to low and moderate-income individuals (the “incubator”), and (2) they create a platform for using, developing, testing, and disseminating innovative methods to making those legal services more accessible and affordable to clients in that target market (the “accelerator”).

As part of our inquiry into determining whether Oregon might benefit from a similar model, we catalogued and reviewed the resources currently available for low and moderate-income Oregonians and for new lawyers seeking to develop their legal practices. Both fall short; based on that review, we have concluded that Oregon does not have sufficient legal resources for low and moderate-income populations and that it remains challenging for lawyers to build practices to meet the needs of that market in a sustainable way.

The accompanying report describes our investigation and reviews examples of existing incubator/accelerator programs in more detail. It also includes a catalogue of the programs we researched and reviewed, a summary of the challenges we identified with other incubator/accelerator programs, and a detailed proposal for how Oregon might create an incubator/accelerator model that is structured to avoid those challenges.

Further to that recommendation, we request that the BOG and the OSB do the following:

8.1 **Dedicate staff resources.** We recommend that the BOG and the OSB commit staff equivalent to one FTE dedicated to managing the incubator/accelerator project. That one FTE might come from existing OSB staff, if available.

8.2 **Form a program development committee.** We recommend that the BOG and the OSB form a program development committee dedicated to implementing the incubator/accelerator program. One committee member should be a full-time OSB staff member. Other members would represent stakeholder organizations, including law schools; legal nonprofits; private law firms; LASO; and the law, business, and technology communities generally.

8.3 **Formulate the incubator/accelerator program details.** OSB staff, together with the planning development committee, should take the following additional steps toward developing Oregon’s operating incubator/accelerator program.

- **Coordinate with stakeholders.** The committee should convene a meeting of program stakeholders, including representatives of private law firms, law schools, members of the bar, nonprofit legal services entities, and LASO, among others.

- **Create a business plan.** The committee should develop a plan for startup and continuing financing of the proposed program. Sources of funding might include community stakeholders (including law, business, and technology companies), vendors, grant programs, and client fees.

- **Create a marketing plan.** The committee should develop a plan for marketing the services of the incubator program. This could include marketing through
existing channels or developing new ways for reaching moderate-income Oregonians and educating the public about the program scope and resources.

**Identify program hosts.** We envision that the for-profit law firms in Portland and across the state will host incubator participants and provide training, mentoring, and other office resources. The program development committee should develop a plan to market, identify, and obtain commitments from those firms.

**Identify options for office space.** This includes office space for both the program staff and incubator participants. This task overlaps with the identification of program hosts, as many law firm hosts should include, as part of their commitment, office space for the participant(s) they host.

**Design a program application process.** The committee should design an application process for the participant/fellows, which will include drafting job descriptions, creating an application and review process, and developing a plan to advertise the program and solicit applications.

**Develop a mechanism for assessment program success.** The committee should identify the best metric for measuring the success of both the incubator and accelerator components of the program. To do so, the Committee might consider metrics such as number of matters addressed by program participants, populations served, financial success of new lawyer participants, and extra-program use of accelerator innovations.

We request that the planning development committee finalize the program, curriculum, and stakeholders by fall of 2017, with applications ready to go out in the spring of 2018. The BOG, the OSB, and the committee should aim to start the incubator/accelerator program in the fall of 2018.

### V. Conclusion

The question is not whether legal services will be provided differently than in decades past. The question is whether it will occur with the active engagement of a Bar that is willing to rethink longstanding assumptions and embrace emerging technology and new legal service delivery models, or whether, as in some other states, the Bar will try to resist the forces of change. Efforts to resist change will likely be unsuccessful. The appointment of this Task Force reflects the Bar’s recognition that adhering to the status quo is not really a choice at all.

We look forward to working with the Board of Governors, the Oregon judiciary, and other stakeholders to implement these recommendations in the months to come.

Respectfully Submitted,

OSB Futures Task Force

The full report and recommendations of the Regulatory and Innovations committees and workgroups are available here: [www.osbar.org/Docs/resources/taskforces/futures/FuturesTF_Reports.pdf](http://www.osbar.org/Docs/resources/taskforces/futures/FuturesTF_Reports.pdf)
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- Robert J. Gratchner, OSB Board of Governors, Public Member
- Sarah M. Petersen, Lewis & Clark Law School
Endnotes


2 In addition to the well-known LegalZoom, more recent entrants into the online self-help legal space include Avvo Answers (in conjunction with its better-known lawyer rating service), Rocket Lawyer, Docracy, and Shake Law, among many others.


6 Id. at 15.

7 Id. at 14.

8 Id. at 15.

9 Id. at 14 (quoting Gillian K. Hadfield, Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets, Daedalus 5 (2014)).

10 Id.

11 The “Great Recession” that began in December 2007 had a particularly striking impact on private law firms. In its 2017 Report on the State of the Legal Market, the Center for the Study of the Legal Profession at the Georgetown University Law Center summarized that “[o]verall, the past decade has been a period of stagnation in demand growth for law firm services, decline in productivity for most categories of lawyers, growing pressure on rates as reflected in declining realization, and declining profit margins.” Thus, private law firms sharply curtailed—and even stopped—hiring. Above The Law reports that 38 percent of 2016 law school graduates were unable to secure a full-time position in the legal profession, available at http://abovethelaw.com/law-school-rankings/top-law-schools/.


14 See https://www.legalpleadingtemplate.com/

15 See https://www.rocketlawyer.com/document/legal-will.html/

16 See https://visabot.co/

17 Commission on the Future of Legal Services, supra note 3, at 16.

18 Id.

19 Altman Weil, Inc., supra note 1, at i.

20 Commission on the Future of Legal Services, supra note 3, at 8–9. A number of states—including California, Florida, Michigan, New York, and Utah—have convened futures commissions, modeled on the ABA’s effort, to examine ways to innovate and respond to emergent change in the legal services market. Our Task Force reviewed these reports and recognizes the significant contributions of the many states that preceded us in approaching these challenges.
The question is not whether legal services will be provided differently than in decades past. The question is whether it will occur with the active engagement of a Bar that is willing to rethink longstanding assumptions and embrace emerging technology and new legal service delivery models, or whether, as in some other states, the Bar will try to resist the forces of change.

OSB Futures Task Force, 2017
Chapter 1—Why the Legal Ethics Landscape Needs to Change

Leading the Way: The Future of Referral Fee Sharing and In-Person Advertising

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FUTURES TASK FORCE

Reports and Recommendations of the
REGULATORY COMMITTEE (See page 3) and INNOVATIONS COMMITTEE (see page 61)

June 2017

The Executive Summary is available here:
www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Summary.pdf

Futures Task Force Reports and Recommendations download links:
http://tinyurl.com/ETH17-Report
or
https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf
Chapter 2
Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

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Poll Everywhere

1. Web: Respond at PollEv.com/oregonstatebar
2. Text: oregonstatebar to 22333 to join session
   - Then text Answer (A, B, C)
3. Download App PollEv from Apple or Android store (this is not really necessary)
Poll Everywhere

Web voting
Respond at PollEv.com/OREGONSTATEBAR

Text voting
Text OREGONSTATEBAR to 22333 once to join, then the letter of your response

What's your favorite ice cream?

(a) Chocolate A
(b) Vanilla B
(c) Strawberry C
(d) Anything from Salt & Straw #pdxforever D
“Skate where the puck’s going, not where it’s been.” *Wayne Gretzky*

“The world is changing, and with it the market for legal services, whether or not lawyers acknowledge the changes let alone address them.” *Stephen Gillers*

“Substantial change in the regulatory structure governing U.S. legal practice appears inevitable, compelled by the continuing transformation of the practice environment itself.” *Laurel S. Terry*
Fee Sharing with Online Referral Services

RPC 7.2(a) & RPC 5.4(a)
Referral Service?

Have you ever used an online service to connect with prospective legal clients?

- Yes, I currently participate in a service.
- Yes, I participated in the past.
- No.
Chapter 2—Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

Example

Fee-Sharing Ethics Opinions

- New Jersey
- New York
- Ohio
- Pennsylvania
- South Carolina
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 lawyer-referral service, including sharing legal fees with the service** pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral 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.
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 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.

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

***

(2) pay the usual charges of a legal service plan or a lawyer-referral service in accordance with Rule 5.4;
“No person shall offer or promise payment of money or other consideration, or accept any offer or promise of payment of money or other consideration, nor shall any person pay or accept money or other consideration, for referring to an attorney any claim for damage resulting from personal injury or death.”

ORS 9.505
Have you or a member of your law firm shared fees with a legal referral service that is not bar-operated?

Yes

No

In-Person or Real-Time Electronic Advertising

RPC 7.3
Chapter 2—Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

Leading the Way: The Future of Referral Fee Sharing and In-Person Advertising

Help! Residential Tenancy Matter

Help! Family Law Matter

Can I live next door after a divorce?

Divorce is a possibility, how close can I really live after the split?

...Including same on the same block. Is that too close?

Honestly, that's one to discuss with your wife, if either one of you think it's too close, then yes, it's too close.

Don't live in view of the house, I have no idea how close your divorce might be, but unless either of you start dating, do you really want to know who is moving or going from each other's houses? This happened to a friend of mine. She dated a divorced father who lived across the street from his ex and the kids. The ex went inside any time she saw my friend at house. He eventually had to move.

when I was in high school, I had a very good friend who lived in the neighborhood next to mine (bike distance). Her parents were divorced and she and her younger sister lived with their mother. Her father lived literally across the street. I was fascinated by the situation, but it seemed to work. Sure, their parents would fight occasionally, but it usually was the "Thought you were..."
Chapter 2—Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

Lawyers as “First Responders”

Have you ever answered a potential client's questions online?

Yes

No
RULE 7.3 SOLICITATION OF CLIENTS

A lawyer shall not solicit professional employment by any means if:

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

(b) the person who is the 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.
"No attorney shall solicit business at factories, mills, hospitals or other places, or retain members of a firm or runners or solicitors for the purpose of obtaining business on account of personal injuries to any person, or for the purpose of bringing damage suits on account of personal injuries."
Do you think it is important for lawyers to be able to approach potential clients in person or online about their legal issues?

- Yes, that's what consumers expect
- Yes, because we need to help people
- No, it's unseemly

Key Dates

- October 13, 2017, HOD Agenda Published
- November 3, 2017, HOD Meeting
Chapter 2—Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

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Thank you!

Hon. Chris Garrett, Oregon Court of Appeals
Ankur Doshi, RB Pamplin Corporation
Peter Jarvis, Holland & Knight LLP
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.1 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.2

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 allow 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.3 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 our 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
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.4

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."5

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 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.5 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

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**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 Google Ads. 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).
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.

Endnotes
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.
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.

Ethics opinions are published and updated on the bar’s website at www.osbar.org/ethics/toc.html.

An archive of Bar Counsel columns is available online at www.osbar.org/ethics/bulletinbarcounsel.html.

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**Proposed Amendments to Rules on Fee-Sharing with Lawyer Referral Services**

On the Horizon

By Amber Hollister

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

The futures task force 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. 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.

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 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(b)(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 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. This cost enables the service to be self-sustaining, rather than dependent on 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 futures 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. 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). The traditional concern with fee-sharing has been that if lawyers share their fees with nonlawyers, their loyalty to the client could be undermined.

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.” 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 for-profit 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 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) 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 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.

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, four states — New Jersey, Pennsylvania, Ohio and South Carolina — have formally opined that fee-sharing with certain online lawyer referral services runs afoul of their rules. 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 for-profit and 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 November 7. The board invites comments regarding any and all of the task force’s recommendations, including the one discussed in this column; 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 the full report are available at www.osbar.org/leadership/bog/bog_taskforces.html.


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.”).


Ethics opinions are published and updated on the bar’s website at www.osbar.org/ethics/toc.html. An archive of Bar Counsel columns is available online at www.osbar.org/ethics/bulletinbarcounsel.html.

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Chapter 2—Referral Fee Sharing and In-Person Advertising: Changes to the Oregon Ethics Rules

Leading the Way: The Future of Referral Fee Sharing and In-Person Advertising

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