



October 5, 2017

Dear Helen, Amber, Susan, President Levelle and members of the Oregon State Bar Board of Governors,

First, I would like to thank Helen, Amber and Susan for continuing the discussions with members of the Oregon Trial Lawyers Association regarding our serious concerns with the proposed changes to RPC 5.4.

We appreciate the work the Futures Task Force has put into the study of legal services and the way technological advances are altering lawyers' delivery of legal services to Oregon consumers. We know a lot of time has been put into this by many OSB members. From your perspective we are cognizant that OTLA's concerns are coming quite late in this process. As part of our longstanding concern about access to justice, OTLA leadership has been laser focused on undoing the damage from the Oregon Supreme Court decision in *Horton v OHSU*.

As we discussed over the past several weeks, members of OTLA and our Board have significant concerns about the proposed changes to RPC 5.4. When OTLA initially reviewed the amendment, we were immediately concerned about the lack of definitions for the terms "lawyer referral service" and "usual fees" in the context of fee sharing. Further, there is no mechanism to regulate such referral services and as Amber and Helen made clear, the OSB has no authority over such operations.

After further review, we identified several additional problems such as the proposed amendment does not address the prohibitions contained in ORS 9.500 and 9.505, which relate to the solicitation of personal injury cases and fee splitting with non-lawyers. OTLA has reached out to our national organization and all state trial lawyer associations, and we understand no other State Bar in the country has proposed and enacted rules similar to what is being proposed in Oregon. It appears Oregon will be the test case.

OTLA leadership discussed the proposed changes with OTLA members who practice in a variety of legal areas; many have raised concerns of unintended consequences too numerous to list here and have suggested this amendment needs further study. On our Wednesday phone call with Amber, Susan and Helen, OTLA Board members and longtime practitioners David Sugerman (representing consumers in class actions) and Steve Berman (representing consumers in securities litigation) discussed several problems this amendment would raise in their practice areas and the negative impact it could potentially have on consumers.

As we mentioned, we are concerned about the lack of regulation to protect consumers. At a minimum, the rules should be crafted so that lawyers cannot participate in such arrangements if the referring organization lacks insurance, does not ensure confidentiality, and does not screen to ensure that referring lawyers are diligent and competent to handle the particular type of case.

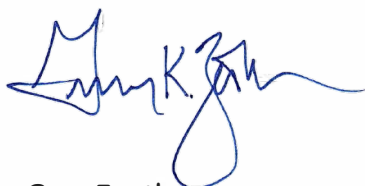
OTLA is wholeheartedly committed to providing all Oregonians access to justice. Our members spend countless pro bono hours in Salem advocating for consumers. We worked with the OSB to pass the legal aid cy pres funding bill that may well provide tens of millions of dollars in legal aid funding. In short, access to justice is part of our core mission. OTLA is willing to work with the OSB and other stakeholders in crafting rules that address the concerns raised in the Futures Task Force report, while at the same time minimizing the risk of unintended consequences through any rule change.

What OTLA is asking is for the OSB BOG to pull this matter from the House of Delegate agenda in November and appoint a task force that includes a wide range of practice areas, including lawyers who practice in criminal, consumer, personal injury, civil rights, employment, class action, domestic relations, landlord/tenant law to name a few. The OSB may also want to include representatives from consumer and legal advocate groups for their perspective.

We hope to continue engaging with the OSB on these issues to produce something that improves Oregonians' access to justice, while fully protecting Oregon consumers. That said, the current proposal does neither of those things, and consistent with another of our core missions--protection of Oregon consumers--we respectfully oppose the proposal in its current form.

Thank you in advance for your consideration.

Sincerely,



Greg Zeuthen  
President  
Oregon Trial Lawyers Association

---

**Amendment to ORPC 5.4(a)(5) and 7.2(b)(2)**  
**(Board of Governors Resolution No. \_\_)**

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

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

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

**RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **RULE 7.2 ADVERTISING**

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

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

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

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

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

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