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Presentation at APPA Legal and Regulatory Conference

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October 22, 2019

Topics covered in this presentation

- Recently approved changes to ethical rules governing lawyers' marketing, especially solicitation
- Proposed changes to ethical rules governing nonlawyers' involvement in practice of law and ownership of law firms
- Proposed changes to ethical rules in order to establish duties of environmental protection

First topic: solicitation

- What is solicitation?
- What are the two broad categories of solicitation? (One is subject to heightened scrutiny.)
- What rules govern solicitation?
- Who benefits from strict regulation of solicitation? Who opposes such regulation?
- Why should this topic be of interest to APPA members?

First tier of regulation for solicitation

- Applies to live person-to-person contact, including a face-to-face approach or live telephonic contact.
- Under ABA Model Rule 7.3(a), these means can't be used to solicit professional employment from a prospective client when a significant motive for the lawyer's solicitation is pecuniary gain.
- Consider what motivations are distinct from pecuniary gain.
- Exceptions to the ban on for-profit solicitation include solicitations of 1) another lawyer, 2) a family member, 3) a close personal friend, or 4) another person with whom the lawyer or the lawyer's firm has a prior professional relationship, or 5) "a person who routinely uses for business purposes the type of legal services offered by the lawyer."
- Another exception is solicitation sanctioned by law or court order.

Second tier of regulation

- Applies to any other sort of solicitation, including written communication, recorded verbal communication, and electronic communication such as email.
- These categories of solicitation are less intrusive. It's easier for a prospective client to throw away a letter or delete an email than it is to decline a live person-to-person solicitation by an overbearing lawyer.
- Solicitation in the second tier is not subject to the blanket ban in Rule 7.3(a).
- They are still subject to the content requirements of Rule 7.1, and the advertising requirements in Rule 7.2 (where the solicitating attorney distributes material taking the form of an advertisement).

Rules that apply to both tiers

- Rule 7.3(c) forbids solicitation involving harassment, coercion, duress.
- Rule 7.3(c) also prohibits unwanted solicitation (i.e., "the prospective client has made known to the lawyer a desire not to be solicited by the lawyer").
- Lawyer's agents are subject to the same solicitation rules when they act on behalf of lawyers (see Rule 8.4(a), which we'll study later).
- Under Rule 7.3(e), "a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer," and that organization may use all types of solicitation to obtain memberships or subscriptions, so long as the organization does not target people who are known to need legal services.

Some states are going further than the ABA in liberalizing solicitation rules

Consider Oregon's new revision of Rule 7.3:

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

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of 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.

Second topic: limits on nonlawyers

- What are the arguments for allowing nonlawyers to share legal fees and own law practices? What are the opposing arguments?
- What are the arguments for allowing nonlawyers to play a greater role in the provision of services that have been the exclusive province of lawyers? What are the opposing arguments?
- Why should these topics be of interest to APPA members?

Rule 5.4: Professional independence of lawyers

(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, partner or associate 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; and

(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.

(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 ; or

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

Rule 5.5: Unauthorized practice of law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Growing interest in “alternative business structures"

- Nonlawyers can be at least partial owners of law firms in Australia, New Zealand, England, Singapore, Italy, Spain, Denmark and some Canadian provinces
- Some U.S. jurisdictions (e.g., Washington, D.C.) have experimented with rules allowing minority ownership of law firms by nonlawyers
- ABA has convened several working groups to study changes to Rule 5.4, but there was strong opposition
- California Bar is now asking for public comment on proposal to allow nonlawyer ownership if nonlawyers do not control professional judgment of lawyers.
- Another proposal under consideration in California would allow fee sharing with nonlawyers if clients consent.
- Similar proposals have drawn interest in AZ, MA, MD, NY & UT.

Trend toward increasing opportunities for nontraditional practitioners

- Washington allowed “Limited License Legal Technicians” to practice in certain areas while under supervision of lawyers
- Other states are considering similar reforms, including CA, IL, NM & OR.
- State bars are considering whether to liberalize rules for legal technology companies.
- California does not require graduation from law school as a condition for bar membership, as long as an applicant has passed the bar exam and is otherwise fit; ME, NY, WA, VA & VT do not require three-year degrees, and OR announced this month that it will explore such a reform.
- Could nontraditional practitioners bring value to clients who are APPA members?

Third topic: environmental duties

- Does the inclusion of environmental duties make sense as an extension of the trend toward increased third-party duties?
- What does environmental protection have in common with protection of other extrinsic interests (i.e., those separate from the client's interest) currently mentioned in the ABA Model Rules?
- What would are potential disadvantages of establishing ethical duties relating to environmental protection?
- How much momentum have the environmental proposals gained so far?
- Why should this topic be of interest to APPA members?

Ethical duty of confidentiality

- Here's the basic rule in 1.6(a): "A lawyer may not reveal information relating the representation of the client . . ."
- First element: Has the lawyer acquired information in the course of representing the client?
- Second element: Does the information relate to the representation of the client?
- The scope of this duty is very expansive, at least in theory.
- What are the advantages of strict confidentiality rules?
- What are the disadvantages?
- How do these rules interrelate with evidentiary privileges?

ABA's current exceptions to ethical duty of confidentiality (some states differ)

- First exception: client gives informed consent for disclosure (Rule 1.6(a)(1)).
- Second exception: disclosure is "impliedly authorized" in order to carry out representation (Rule 1.6(a)(2)).
- Third exception: disclosure is necessary to avert death or substantial bodily harm (Rule 1.6(b)(1)).
- Fourth exception: disclosure is necessary to prevent future fraud or crime that is reasonably certain to result in substantial financial or proprietary harm, if the client has used the attorney's services to further this crime or fraud (Rule 1.6(b)(2), added in 2003).
- Fifth exception: disclosure is necessary to mitigate effect of such a fraud or crime that has already occurred (Rule 1.6(b)(3), added in 2003).
- Sixth exception: disclosure is necessary for lawyer to obtain legal advice about ethical duties (Rule 1.6(b)(4)).
- Seventh exception: lawyer's services are at issue (Rule 1.6(b)(5)).
- Eighth exception: disclosure is required by a court or by law (Rule 1.6(b)(6)).
- Ninth exception: disclosure is necessary to screen for conflicts incidental to firm switching (Rule 1.6(b)(7), added in 2012)

Should state bars add an exception for imminent environmental harm?

- Prof. Victor Flatt believes that the current language in Rule 1.6(b)(1) could extend to harm to humans resulting from climate change.
- Others have advocated for new exception to Rule 1.6 (e.g., for “imminent, substantial and irremediable harm to the environment”)
- Some environmentalists are urging that all states adopt this exception that many states approved, but the ABA rejected: ”[a lawyer may] disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime.”
- What problems might result from adopting such proposals?