Marketing Professionally and Ethically

Proposed changes to the Minnesota Rules of Professional Conduct regarding marketing and professional communications call for modest adjustments in existing rules while encouraging effective client relations.

BY
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Business development. You keep reading about its importance to your career. You keep hearing about it from other lawyers in your firm and other professional colleagues. So you finally decide to do something about it. Everyone has told you that the key is networking. First stop: your law school alma mater-sponsored cocktail reception. You figure, this shouldn't be too awkward; chances are pretty good you'll run into someone you know and, sure enough, you do. That person, whom you haven't seen in years but was one of your best friends in law school, is now the general counsel of a local medium-sized corporation.

RAINMAKER AT WORK

You reminisce about old times. The conversation then turns to business. You go on the offensive. You tell your friend that you are a commercial litigator for a reputable firm in town. Your friend's company has never been a client. You also remember reading in the local press that this company was sued last week in a complex products liability matter, an area where you have considerable experience. So you finally say, "I know your company got sued last week in the products area. I specialize in products liability. I would welcome your business." Your friend responds, "Send me some stuff about you and your firm. We're considering a few firms. I'll get back to you if we're interested." You reply, "Thanks. It was great seeing you again."

On your drive home, you can't believe the apparent good luck you've just had in surfacing a great business opportunity. You wonder if networking is always this easy.

But then, as you continue to mentally replay the encounter, you begin to second-guess how you handled the situation. Did you come across too aggressively and turn off your friend? You realize that you overtly solicited business and remember that the professional conduct rules generally prohibit soliciting. Did you cross the line? You remember there's something in the rules about specializing. Did you say the wrong thing? You now sheepishly ask yourself, "Was my marketing effort doomed to fail by my conduct? Did I violate the rules?"

Too pushy? Probably, especially when there was no need to be so aggressive. Business development is all about relationships. Here, you were handed a huge opportunity to reestablish your relationship with the general counsel and failed to best take advantage of the situation.

Instead of talking shop and soliciting business at the reception over the course of a ten-minute conversation, how about this alternative? Catch up on personal matters during the encounter and suggest a lunch date in the near future. Then, at some point during your lunch, discuss the nature of your practice and probe about the legal needs of your friend's company. When the recent lawsuit comes up, talk about your successes regarding similar matters. Perhaps even offer to review the pleadings and provide a preliminary analysis at no charge. In short, make it obvious that you are willing and able to handle the litigation. If interested, your friend will ultimately ask you if you want to be considered. If your friend doesn't bite, be patient; there is probably a good reason. But don't give up. Maintain the relationship. Now that your friend knows you're available to do certain types of work, stay in touch; your phone may ring sooner than you think.

Solicitation and Ethics

Let's get back to ethics. As was reported in the July *Bench & Bar*, the MSBA General Assembly recently voted to petition the Minnesota Supreme Court to adopt an amended set of Minnesota Rules of Professional Conduct. This proposed set of rules is based upon the ABA's newly amended Model Rules of Professional Conduct, with modifications recommended by the MSBA task force that studied the ABA's new rules.

So what about the solicitation? Rule 7.3 of the current Minnesota Rules of Professional Conduct states:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Because the general counsel was neither family nor a client, the rule was violated. However, this result is not really consistent with the purpose of the rule. The comment to the rule notes that in-person solicitation has a "potential for abuse" because it "subjects the lay person to the private importuning of a trained advocate" and is "therefore fraught with the possibility of undue influence, intimidation, and overreaching." The potential client here is not a layperson; in-house counsel are presumably capable of protecting themselves without the benefit of the rules.

Newly proposed Rule 7.3(a) states:

> A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client 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.

Thus, under the proposed rule, the solicitation described above is clearly permissible. First, the rule expressly permits solicitation of lawyers. Second, it also allows soliciting a person who has a "close personal" relationship with you. Whether someone you see for the first time in several years but who was one of your best friends in law school has a "close personal" relationship with you is debatable, but here there is no need to debate because you are both lawyers.

Remember, though, the solicitation here was probably not the most effective marketing technique in any event. Although the accepted practice in sales is that in order to "close" a deal, one must specifically ask for the business, sometimes the better approach is to simply seek and provide enough information to make it clear to the prospective client that you can and want to do the job. Ask questions and engage in a dialogue that will help the potential client realize the true level of need and the value that your legal services would provide. This softer approach avoids placing the prospective client in the potentially awkward position of having to say no to a direct solicitation. Attorneys sometimes complain that the rules tie their hands in the types of conduct that they would like to do. In this instance, the rule facilitates a sound consultative sales practice.

Claiming Specialization

What about the "I specialize in products liability" part of the conversation? Current Rule 7.4(b) provides:

> A lawyer shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that is approved by the State Board of Legal Certification.

Proposed Rule 7.4(d) is less restrictive. It states:

> A lawyer shall not state that the lawyer is *certified* as a specialist in a particular field of law unless:
>
> (1) the lawyer is certified as a specialist by an organization that is approved by an appropriate state authority or that is accredited by the American Bar Association; and
>
> (2) the name of the certifying organization is clearly identified in the communication.
>
> *(emphasis added)*

"Attorneys sometimes complain that the rules tie their hands in the types of conduct that they would like to do."

In our scenario, there is no violation under the proposed rule, because you never said anything about being "certified" as a specialist. However, under the existing rule, there would be a violation. There is no certifying organization for products liability that has been approved by the State Board. It would have been better to say, "I have 20 years of experience litigating products liability cases." Overly technical? Perhaps, but those are the rules.

Other changes have been proposed to the solicitation, marketing, and advertising provisions surrounding Rule 7, which is entitled "Information About Legal Services." The more significant ones include the following:

Additional Proposed Changes

Communications in General. The basic rule regarding all communications is contained in Rule 7.1. Essentially it provides that anything communicated cannot be false or misleading. The existing rule also provides guidance in two areas where lawyers frequently run into trouble: creating unjustified expectations about results that can be achieved and comparing one's services to those of another. Current Rule 7.1 specifically defines a communication as "false and misleading" if it:

"...the MSBA task force concluded that prohibiting solicitation by real-time electronic contact was unnecessary and may be subject to 1st Amendment challenge."

- is likely to create an unjustified expectation about results the lawyer can achieve ... or
- compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The proposed rule eliminates the definitions, simply leaving in place the "false and misleading" standard. As a practical matter, however, this change will likely have little impact. Under both rules, the overall standard remains "false and misleading." Furthermore, lawyers accused of creating an unjustified expectation or unfairly comparing services under either rule will likely defend themselves by arguing that the communication either is not likely to create an unjustified expectation or that the comparison can be factually substantiated; in other words, the communication was not "false and misleading."

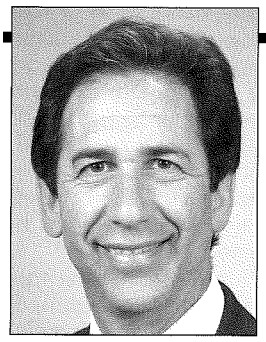
Referrals. Referrals are frequently the bread and butter of an attorney's business. The basic guidelines for most referrals can be found in both current and proposed versions of Rules 1.5(e) (division of fee among lawyers), 5.4(a) (no division of fee with nonlawyer), and 7.2 (restriction upon paying another to recommend one's services). Little has changed in the proposed version, with one exception. The existing rules provide no guidance about the propriety of reciprocal referral agreements, whereas proposed Rule 7.2(b)(4)(i) does. It would specifically permit a lawyer to have a reciprocal referral arrangement with another lawyer or with a nonlawyer professional as long as the reciprocal referral agreement is not exclusive and the client is informed of the existence and nature of the agreement.

Electronic Communications. The proposed rules specifically cover "electronic" communications to make it clear that in general, activities on the Internet are subject to the rules. However, the MSBA's proposed Rule 7.3(a) does not include ABA Model Rule 7.3(a)'s prohibition on solicitation by "real-time electronic" contact, *i.e.*, solicitation in a chatroom. Reasoning that participants willingly enter chatrooms and that real-time electronic contact does not involve the kind of invasion of privacy and potential overreaching inherent in in-person and telephonic contact, the MSBA task force concluded that prohibiting solicitation by real-time electronic contact was unnecessary and may be subject to 1st Amendment challenge.

Keeping Copies. Under existing Rule 7.2, copies and recordings of advertisements and written communications must be kept for two years. The reason for the rule is to ensure that there is an adequate evidentiary record if a complaint is filed. The two-year record requirement is not in the proposed rule because it was thought to be too burdensome and unnecessary.

Contingency Fees and Expenses. Finally, those who practice in the personal injury area should already be aware that advertising communications "indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable." Under proposed Rule 7.2, the caveat is no longer necessary. Minnesota has decided to go along with the ABA recommendation, which contains no such qualification regarding expenses. Keep in mind that communications by attorneys are always subject to the "false and misleading" standard, so the practical effect of this change should be negligible.

As you can see, the proposed rules governing information about legal services have not changed radically. However, it is always a good idea to reread them to refresh your memory about the limitations. But one shouldn't worry about having to memorize them chapter and verse. Although the rules arguably contain a few traps for the unwary (*e.g.*, the existing rule about claiming specialization), the vast majority simply codify what lawyers should be doing to maximize their marketing efforts and avoid the commission of fraud. Rather than handcuffing such efforts, the proposed rules provide practical guidance about how to best develop client relationships. □



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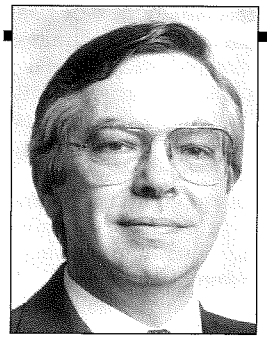

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