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Practice Tips

GLENN MACHADO, ASSISTANT BAR COUNSEL

NEW YEAR, NEW (ADVERTISING) RULES

This past December, amendments to Nevada’s advertising rules went into effect.¹ The revisions affect Rule of Professional Conduct (RPC) 7.2 (Advertising), RPC 7.2A (Advertising Filing Requirements) and RPC 7.3 (Communications With Prospective Clients).

In 2007, Nevada’s attorney advertising rules were amended to ensure that lawyer advertisements were not false or misleading. The “taste” aspects of the regulation were removed, as those rules were likely unenforceable.

The December 2012 revisions to the rules mostly streamline certain provisions of the previous advertising rules. However, there is now a specific provision concerning legibility requirements for disclaimers. *See* RPC 7.2(j). In 2013, the state bar will prepare an attorney advertising handbook including examples of presumptively compliant disclaimers and disclaimers that fail, and the reasoning behind the findings.

Other substantial changes include a requirement that advertisements identify at least one attorney responsible for the advertisement. *See* RPC 7.2(c). Also, when advertising past monetary results, advertisers are required to state the amount actually received by the client. *See* RPC 7.2(i). Further, the 45-day no-contact rule in RPC 7.3(d) (for solicitations targeted at specific potential clients) has been reduced to 30 days and applies only in cases of personal injury or wrongful death.

Use of Actors in Advertisements

The prior version of RPC 7.2(b) existed as part of former Supreme Court Rule 196(2) (which also prohibited the use of celebrity voices, along with any background sounds except for instrumental music). The former RPC 7.2(b) prohibited non-Nevada licensed attorneys from appearing in advertisements and made no exceptions for areas in which a non-Nevada attorney could properly practice law, such as immigration or patent law.

The amended RPC 7.2(b) now removes the prohibition preventing non-Nevada attorneys from advertising, and clarifies the instances in which actors need to be notated. If the advertisement uses any actors to portray lawyers, members

of the law firm or clients, or utilizes depictions of fictionalized events or scenes, the same must be disclosed. In the event that actors are used, the disclosure must be sufficiently specific to identify which persons in the advertisement are actors, and the disclosure must appear for the duration of the actors’ appearance in the advertisement.

Attorney Identification in Advertisements

The amended version of RPC 7.2(c) states that “all advertisements and written communications pursuant to these Rules shall identify the name of at least one lawyer responsible for their content.”

The prior version of the rule allowed for a law firm name to be used, and since trade names are permissible, it was difficult at times to identify the attorney(s) behind an advertisement, particularly those who failed to file the advertisements as required, pursuant to RPC 7.2A (Advertising Filing Requirements).

Contingency Fee Disclaimers

RPC 7.2(e) concerns advertisements that indicate the “charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery.” The revised version requires the use of a disclaimer *only* if the client may be liable for the opposing party’s fees and costs.

The prior version of the rule did not have any such exceptions. However, there are some areas of law, such as workers’ compensation and social security disability hearings, in which the client is not generally liable for the opposing side’s fees and costs in the event they lose; thus the revision.

Advertising a Fee or Range of Fees

The amended version of RPC 7.2(f) states that a lawyer who “advertises a specific fee or range of fees shall include the duration said fees are in effect and any other limiting conditions to the availability of the fees.” Essentially, if conditions apply to



your fee, whether it's for a limited time or applies only to certain types of cases (e.g., a first-time DUI or Chapter 7 bankruptcies), then the limitations must be indicated in the advertisement.

This rule is intended to prevent a bait-and-switch scenario by the advertising attorney. The prior version of the rule required that if an attorney advertised a specific fee or range of fees, then all possible terms and fees would have to be listed. However, it was determined that the language of the prior version was overbroad, and some attorneys had complained to the state bar that the rule, as written, essentially required that the advertisement contain their entire fee agreement.

Also, the size requirement for the disclaimer was removed given the enactment of RPC 7.2(j).

Foreign Language Advertisements

RPC 7.2(h) is a new rule concerning the use of disclaimers in foreign language advertisements. It states that if a disclaimer is needed, the disclaimer must be in the same language as the statement which triggered the need for the disclaimer. However, the mere statement that a particular language is spoken or understood shall not, alone, result in the need for a statement or disclaimer in that language.

Disclaimers Regarding Legibility

Previously, certain provisions in RPC 7.2 and RPC 7.3 contained specific language regarding what was required in a disclaimer (e.g., equal prominence or text twice as large as the largest font used in the ad), while other provisions had no such language. Now there is a general rule concerning disclaimers; it was derived from language utilized by the federal district and federal appellate courts in decisions concerning the use of disclaimers.

Specifically, RPC 7.2(j) states that:

In addition to any specific requirements under these rules, any disclosures or disclaimers required by these rules to appear in an advertisement or unsolicited written communication must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the intended viewer. If the disclosure or disclaimer is televised or broadcast in an electronic medium, it shall be displayed for a sufficient time to enable the viewer to see and read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud it shall be plainly audible to the intended listener. If the statement is made on a website, the required words or statements shall appear on the same page as the statement requiring the disclosure or disclaimer.

Disclaimers Regarding Past Results

Statements regarding past results have been found to be misleading without a disclaimer indicating that the results are not guaranteed.² The state bar previously enforced the disclaimer through RPC 7.1 (Communications Concerning a Lawyer's Services), which generally prohibits false or misleading statements by an attorney.

RPC 7.2(i) now requires that, if there is any claim of past successes or results obtained, the communicating lawyer or member of the law firm must have served as lead counsel in the matter giving rise to the recovery, or have been primarily responsible for the settlement or verdict. Further, the statement must contain a disclaimer that, "past results do not guarantee, warrant or predict future cases."

If a monetary figure is used, the amount must be the sum that the client actually received or, if the gross amount is stated, the attorneys' fees and litigation expenses withheld must be stated as well. In other words, although the attorney may still state the gross amount of a recovery, the amount actually received by the client will need to be indicated.

Advertising Filing Requirements

The prior version of RPC 7.2A, which concerns the advertising filing requirements, required that an advertisement be submitted to the state bar both in a hard copy format and an electronic format. The amended version of RPC 7.2A allows for submission of either a physical copy *or* an electronic copy to the state bar. Dual submissions are no longer required.

Target Mail to Prospective Clients

RPC 7.3 has been modified to remove the specific size requirements contained in subsections (b) and (c) given the enactment of RPC 7.2(j). The most substantial changes are contained in RPC 7.3(d), which concerns mail targeted to specific potential clients.

The prior version of RPC 7.3(d) prohibited written communication to a specific prospective client, who may have needed legal services due to a particular transaction or occurrence, within 45 days of that incident. Although the 45-day period was not problematic with personal injury cases, it was problematic for people facing criminal charges, under which proceedings occur much sooner than 45 days. Also, in regard to Nevada's foreclosure mediation laws, a person facing foreclosure has only 30 days to elect mediation after receiving a notice of default.

Under the new version of RPC 7.3(d) the no-contact period only applies in cases of personal injury or wrongful death, and the 45-day period has been reduced to 30 days. Thus, there is no 30-day period for criminal or foreclosure cases. The no-contact provision has been extended to a potential defendant's attorney as well.

This year the State Bar of Nevada will prepare a handbook on attorney advertising in order to provide guidance regarding the new amendments along with the other Rules of Professional Conduct.

Also, the Standing Northern and Southern Lawyer Advertising Advisory Committees are authorized by RPC 7.2B to issue advisory opinions on proposed advertisements and make findings of compliance. Should the committees determine an advertisement is non-compliant, the attorney will be advised as to how the proposed advertisement can be corrected. The advisory opinion request form can be found at www.nvbar.org/content/library-forms.

In the meantime, if you have any questions on the advertising rules, please feel free to call the Office of Bar Counsel through the state bar's ethics hotline at (800) 254-2797. ■

1. See ADKT No. 445, Order Adopting Amendments to the Rules of Professional Conduct, filed November 13, 2012. The docket (and pleadings) filed in regard to ADKT 445 can be found at: <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=24815>, and the order can also be obtained from <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/9833/>.
2. See, e.g., Comment 3 to Model Rule of Professional Conduct 7.1. RPC 7.1(a) is virtually identical to Model Rule 7.1.