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IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of amendments to)
RPC 7.2, RPC 7.2A, RPC 7.3)
_____)

ADKT No. 445

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ERRATA TO PETITION IN ADKT 445

The Board of Governors of the State Bar of Nevada hereby files its Errata to Exhibit 1 of their Petition for ADKT 445, attached here to as Exhibit A. The original Exhibit 1 omitted one sentence of proposed additional language to Rule of Professional Conduct 7.3(c). Attached as Exhibit B is a copy of the original Exhibit 1 to Petition for ADKT 445.

DATED this 7th day of June 2010.

Respectfully submitted,
BOARD OF GOVERNORS
STATE BAR OF NEVADA

By: *[Signature]*

DAVID A. CLARK,
Deputy Bar Counsel / General Counsel
Nevada Bar Number 4443
600 East Charleston Boulevard
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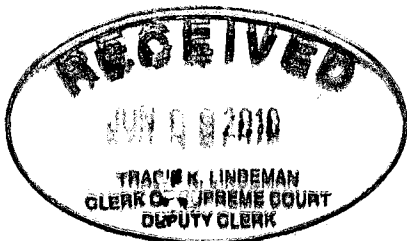


Exhibit A

EXHIBIT 1

Rule 7.2. Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through the public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number, or through written or electronic communication not involving solicitation as prohibited by Rule 7.3.

These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.

~~(b) Advertisements on the electronic media such as the Internet, television and radio may contain the same factual information and illustrations as permitted in advertisements in the print media. If a person appears as a lawyer in an advertisement for legal services, or under such circumstances as may give the impression that the person is a lawyer, such person must be a member of the State Bar of Nevada, admitted to practice and in good standing before the Supreme Court of Nevada, and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm that is advertising. If a person appears in an advertisement as an employee of a lawyer or law firm, such person must be an actual employee of the lawyer or law firm whose services are advertised unless the advertisement discloses that such person is an actor. If an actor appears in any other role not prohibited by these Rules, the advertisement must disclose that such person is an actor.~~

If the advertisement uses any actors to portray a lawyer, members of the law firm, clients, or utilizes depictions of fictionalized events or scenes, the same must be disclosed. In the event 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 in which the actor(s) appear in the advertisement.

(c) All advertisements and written communications disseminated pursuant to these Rules shall ~~include~~ identify the name of at least one lawyer or law firm responsible for their content.

(d) Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 7.4.

(e) Every advertisement and written communication indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of

1 the recovery shall contain the following disclaimer if the client may be liable for
2 the opposing parties fees and costs: "You may have to pay the opposing party's
attorney fees and costs in the event of a loss."

3 (f) A lawyer who advertises a specific fee or range of fees shall include all
4 possible terms and fees, and the duration said fees are in effect and any other
5 limiting conditions to the availability of the fee(s). Such disclosures shall be
6 presented with equal prominence. For advertisements in the yellow pages of
7 telephone directories or other media not published more frequently than annually,
8 the advertised fee or range of fees shall be honored for no less than one year
9 following publication.

7 (g) A lawyer may make statements describing or characterizing the quality of
8 the lawyer's services in advertisements and written communications. However,
9 such statements are subject to proof of verification, to be provided at the request
10 of the state bar or a client or prospective client.

10 (h) Any statement or disclaimer required by these rules shall be made in each
11 language used in the advertisement or writing with respect to which such
12 required statement or disclaimer relates; provided however, the mere statement
13 that a particular language is spoken or understood shall not alone result in the
14 need for a statement or disclaimer in that language.

13 (i) Statements Regarding Past Results. If the advertisement contains any
14 reference to past successes or results obtained, the communicating lawyer or
15 member of the law firm must have served as lead counsel in the matter giving
16 rise to the recovery, or was primarily responsible for the settlement or verdict.
17 The advertisement shall also contain a disclaimer that past results do no
18 guarantee, warrant or predict future cases.

16 If the past success or results obtained includes a monetary sum, the
17 amount involved must have been actually received by the client, and the
18 reference must be accompanied by adequate information regarding the nature of
19 the case or matter and the damages or injuries sustained by the client, and if the
20 gross amount received is stated, the attorney's fees and litigation expenses
21 withheld from the amount must be stated as well.

20 (i) Disclaimers. In addition to any specific requirements under these rules,
21 any disclosures or disclaimers required by these Rules to appear in an
22 advertisement or unsolicited written communication must be of sufficient size to
23 be clearly legible and prominently placed so to be conspicuous to the intended
24 viewer. If the disclosure or disclaimer is televised or broadcast in an electronic
25 medium, it shall be displayed for a sufficient time to enable the viewer to see and
26 read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud,
27 it shall be plainly audible to the intended listener. If the statement is made on a
28 web site, the required words or statements shall appear on the same page as the
29 statement requiring the disclosure or disclaimer.

Exhibit B

1 (hk) The following information in advertisements and written communications
shall be presumed not to violate the provisions of Rule 7.1:

2 (1) Subject to the requirements of this Rule and Rule 7.5, the name of
the lawyer or law firm, a listing of lawyers associated with the firm, office
3 addresses and telephone numbers, office and telephone service hours, and a
designation such as "attorney" or "law firm."

4 (2) Date of admission to the State Bar of Nevada and any other bars and
a listing of federal courts and jurisdictions other than Nevada where the lawyer is
5 licensed to practice.

6 (3) Technical and professional licenses granted by the state or other
recognized licensing authorities.

7 (4) Foreign language ability.

8 (5) Fields of law in which the lawyer is certified or designated, subject to
the requirements of Rule 7.4.

9 (6) Prepaid or group legal service plans in which the lawyer participates.

10 (7) Acceptance of credit cards.

11 (8) Fee for initial consultation and fee schedule, subject to the
requirements of paragraphs (e) and (f) of this Rule.

12 (9) A listing of the name and geographic location of a lawyer or law firm
as a sponsor of a public service announcement or charitable, civic or community
13 program or event.

14 (ii) Nothing in this Rule prohibits a lawyer or law firm from permitting the
inclusion in law lists and law directories intended primarily for the use of the legal
15 profession of such information as has traditionally been included in these
publications.

16 (jm) A copy or recording of an advertisement or written or recorded
communication shall be submitted to the State Bar in accordance with Rule 7.2A
and shall be retained by the lawyer or law firm which advertises for 4 years after
17 its last dissemination along with a record of when and where it was used.

18 (kn) A lawyer shall not give anything of value to a person for recommending
the lawyer's services, except that a lawyer may pay the reasonable cost of
19 advertising or written or recorded communication permitted by these Rules and
may pay the usual charges of a lawyer referral service or other legal service
organization.

20 Rule 7.2A. Advertising Filing Requirements.

21 (a) **Filing requirements.** A copy or recording of an advertisement or written
22 or recorded communication published after September 1, 2007, shall be
submitted to the state bar in ~~both either physical hard copy and/or~~ electronic
23 digital format within 15 days of first dissemination along with a form supplied by
the state bar. If a published item that was first disseminated prior to September 1,
24 2007, will continue to be published after this date, then it must be submitted to
the state bar on or before September 17, 2007, along with a form supplied by the
25

1 state bar. ~~The form shall include a provision for members to request a waiver of~~
2 ~~the electronic filing requirement for good cause.~~

3 (b) **Failure to file.** A lawyer or law firm's failure to file an advertisement in
4 accordance with paragraph (a) is grounds for disciplinary action. In addition, for
5 purposes of disciplinary review pursuant to Supreme Court Rule 106 (privilege
6 and limitation), when a lawyer or law firm fails to file, the 4-year limitation period
7 begins on the date the advertisement was actually known to bar counsel.

8 **Rule 7.3. Communications With Prospective Clients.**

9 (a) **Direct contact with prospective clients.** Except as permitted pursuant
10 to paragraph (d) of this Rule, a lawyer shall not solicit professional employment
11 from a prospective client with whom the lawyer has no family or prior professional
12 relationship, by mail, in person or otherwise, when a significant motive for the
13 lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes
14 contact in person, by telephone, telegraph or facsimile, by letter or other writing,
15 or by other communication directed to a specific recipient.

16 (b) **Direct or indirect written advertising.** Any direct or indirect written mail
17 communication or advertising circular distributed to persons not known to need
18 legal services of the kind provided by the lawyer in a particular matter, but who
19 are so situated that they might in general find such services useful, shall contain
20 the disclaimers required by Rule 7.2. The disclaimers shall be in a type size and
21 legibility sufficient to cause the disclaimers to be conspicuous, ~~and in a size at~~
22 ~~least as large as the largest of any telephone number appearing in the ad.~~

23 (c) **Additional disclaimer on mailers or written advertisements or**
24 **communications.** Direct or indirect mail envelope, and written mail
25 communications or advertising circulars shall contain, upon the outside of the
envelope and upon the communication side of each page of the communication
or advertisement, in legible type that is at least twice as large as the largest type
used in the body of the communication, in red ink, the following warning:

26 **NOTICE: THIS IS AN ADVERTISEMENT!**

27 If the written communication is in the form of a self-mailing flyer,
28 brochure or pamphlet, the warning shall appear above the address panel of
29 the flyer, brochure or pamphlet. In case of electronic mail, the subject line
30 shall begin with the notation "Attorney Advertising."

31 (d) **Target mail to prospective clients.** In the event of an incident involving
32 potential claims for personal injury or wrongful death, written
33 communication directed to an individual injured in the incident or to a family
34 member or legal representative of such an individual, seeking to represent the
35 injured individual or legal representative thereof in potential litigation or in a

1 proceeding arising out of the incident a specific prospective client who may need
2 legal services due to a particular transaction or occurrence is prohibited in
3 Nevada within 45-30 days of the transaction or occurrence giving rise to the
4 communication date of the incident. After 45-30 days following the transaction or
5 occurrence incident, any such communication must comply with paragraphs (b)
6 and (c) of this Rule and must comply with all other Rules of Professional
7 Conduct.

8 This provision limiting contact with an injured individual or the legal
9 representative thereof applies as well to lawyers or law firms or any associate,
10 agent, employee or other representative of a lawyer or law firm who represent
11 actual or potential defendants or entities that may defend and/or indemnify said
12 defendants.
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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 In the matter of amendments to)
 RPC 7.2, RPC 7.2A, RPC 7.3)

ADKT NO.

4
5 PETITION

6 In accordance with N.R.A.D. 3.2, the Board of Governors of the State Bar of Nevada
7 hereby petitions this Court to amend Nevada Rule of Professional Conduct ("RPC") 7.2
8 (Advertising), RPC 7.2A (Advertising Filing Requirements) and 7.3 (Communications With
9 Prospective Clients) as fully set forth in **Exhibit 1**.

10 **A. Introduction.**

11 On September 1, 2007, the current versions of Nevada's advertising rules went into
12 effect. The revised rules repealed aspects of the prior rules directed at "taste" regulation,
13 which was likely prohibited by the First Amendment of the United States Constitution.
14 Instead, the revised rules focused on curbing misleading advertisements. An advertisement
15 could be misleading if it featured a misleading statement or contained a truthful statement,
16 but omitted certain information.

17 Pursuant to federal case law, a state may outright prohibit false or misleading
18 statements. *See Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 638 (1985); *see also*
19 *Friedman v. Rogers*, 440 U.S. 1, 9 (1979). A state may also require disclosures for truthful
20 statements that would be otherwise misleading due to the omission of certain information,
21 provided that the requirements are not overly burdensome. *See In re R. M. J.*, 455 U.S.
22 191, 203 (1982); *see also Zauderer*, 471 U.S. at 628.

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1 The current version of the rules require disclaimers or disclosures in certain
2 instances, such as when an attorney advertises contingency fees¹, a specific fee², or sends
3 solicitation letters to prospective clients with whom the attorney has no prior relationship³.

4 In enforcing the advertising rules, certain disclosure requirements have raised
5 concerns of being overbroad and, as will be indicated below, could be more narrowly
6 tailored in order to comply with constitutional requirements. The proposed revisions also
7 include a general rule regarding legibility requirements for disclosures and disclaimers, as
8 well as additional disclosures for advertisements regarding past results and e-mail
9 solicitations.

10 **B. RPC 7.2(b) – Use of Actors in Advertisements.**

11 RPC 7.2(b) states, in relevant part:

12 If a person appears as a lawyer in an advertisement for legal
13 services, or under such circumstances as may give the impression
14 that the person is a lawyer, such person must be a member of the
15 State Bar of Nevada, admitted to practice and in good standing
16 before the Supreme Court of Nevada, and must be the lawyer who
17 will actually perform the service advertised or a lawyer associated
18 with the law firm that is advertising. If a person appears in an
19 advertisement as an employee of a lawyer or law firm, such person
20 must be an actual employee of the lawyer or law firm whose
21 services are advertised unless the advertisement discloses that
22 such person is an actor. If an actor appears in any other role not
23 prohibited by these Rules, the advertisement must disclose that
24 such person is an actor.

19 In applying this rule, the Standing Lawyer Advertising Committee and the State Bar
20 have encountered scenarios where "stock" photos or footage were used in the attorney
21 advertisement, and despite the lack of disclaimer, were not found to be misleading as the
22 picture did not reference any attorney, attorney's staff or client, nor did the advertisements
23

24 ¹ See RPC 7.2(e).

25 ² See RPC 7.2(f).

³ See RPC 7.3.

1 dramatize any court case or other scenario that could reasonably be mistaken for an actual
2 event. **See Exhibit 2.** Typically, the use of undisclosed actors was typically found to be
3 misleading when used to portray attorneys, staff and/or clients, and in dramatizations
4 where it was not immediately apparent whether the client testimony was true or fictional.
5 **See Exhibit 3.** The current version of the rule does not specifically reference clients.

6 The rule also requires that any person appearing as a lawyer actually be a Nevada-
7 licensed attorney. However, the requirement is overbroad as certain areas of practice,
8 e.g., immigration, intellectual property, patent law, do not necessarily require the attorney
9 to be licensed in Nevada. As such, the current rule prohibits attorneys not licensed in
10 Nevada but otherwise authorized to practice law in Nevada from appearing in
11 advertisements.

12 **Suggested Rule Change:**

13 ~~Advertisements on the electronic media such as the Internet,~~
14 ~~television and radio may contain the same factual information and~~
15 ~~illustrations as permitted in advertisements in the print media. If a~~
16 ~~person appears as a lawyer in an advertisement for legal services,~~
17 ~~or under such circumstances as may give the impression that the~~
18 ~~person is a lawyer, such person must be a member of the State Bar~~
19 ~~of Nevada, admitted to practice and in good standing before the~~
20 ~~Supreme Court of Nevada, and must be the lawyer who will actually~~
21 ~~perform the service advertised or a lawyer associated with the law~~
22 ~~firm that is advertising. If a person appears in an advertisement as~~
23 ~~an employee of a lawyer or law firm, such person must be an actual~~
24 ~~employee of the lawyer or law firm whose services are advertised~~
25 ~~unless the advertisement discloses that such person is an actor. If~~
~~an actor appears in any other role not prohibited by these Rules, the~~
~~advertisement must disclose that such person is an actor.~~

21 **If the advertisement uses any actors to portray a lawyer,**
22 **members of the law firm, clients, or utilizes depictions of**
23 **fictionalized events or scenes, the same must be disclosed. In**
24 **the event actors are used, the disclosure must be sufficiently**
25 **specific to identify which persons in the advertisement are**
actors and the disclosure must appear for the duration in which
the actor(s) appear in the advertisement.

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1 **C. RPC 7.2(c) – Attorney Identification in Advertisements.**

2 RPC 7.2(c) states:

3 All advertisements and written communication disseminated
4 pursuant to these Rules shall include the name of at least one
lawyer or law firm responsible for their content.

5 In the 2007 amendment to this rule, the Court added language that allows a law firm
6 to advertise without having to include the name of an individual lawyer responsible for the
7 content of the advertisement. While this conforms to the ABA Model Rule⁴ in regard to the
8 addition of "or law firm," some firms use a trade name pursuant to RPC 7.5, which may not
9 identify a named lawyer, making it difficult for the State Bar and the public to readily
10 ascertain information regarding the lawyer or firm in advertising the legal services.

11 For example, attached hereto as **Exhibit 4** is a script from an advertisement filed by
12 The 4 Firm. As "The 4 Firm" is the trade name of the law firm, the advertisement does not
13 violate RPC 7.2(c). However, if a member of the public wanted to find out more information
14 on the firm, based on "The 4 Firm" alone, there is not much information that could be
15 provided if that member were to call the State Bar. Using the State Bar's database, there
16 are no attorneys who identify "The 4 Firm" as his/her company name.

17 Similarly, **Exhibit 5** is an advertisement that was filed by Justice Injury Lawyers.
18 Again, should a member of the public call the State Bar for information on the firm, there
19 would be no records of such a named firm. The use of trade names may obscure the
20 identity of the responsible attorney and impede the consumer from researching references
21 and discipline history.⁵

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23 _____
24 ⁴ The ABA Model Rule also requires that an office address be included in the communication. This is not
present in the Nevada Rule.

25 ⁵ Part of this problem is alleviated by RPC 1.4(c), which requires that attorneys have Biographical Data Forms
available upon request.

1 **Suggested Rule Change:**

2 All advertisements and written communications disseminated
3 pursuant to these Rules shall identify ~~include~~ the name of at least
4 one lawyer or law firm responsible for their content.

5 **D. RPC 7.2(e) – Contingency Fee Disclaimer.**

6 RPC 7.2(e) states:

7 Every advertisement and written communication indicating that the
8 charging of a fee is contingent on outcome or that the fee will be a
9 percentage of the recovery shall contain the following disclaimer:
10 "You may have to pay the opposing party's attorney fees and costs
11 in the event of a loss."

12 The disclaimer required by the RPC 7.2(e), although appropriate in personal injury
13 matters, may be contrary to the law in other areas. Specifically, in worker's compensation
14 and social security law, claimants are not required to pay the opposing party's attorneys
15 fees and costs in the event of a loss. As such, the rule should be revised to only include
16 the disclaimer in instances where the prospective client may actually be obligated to pay
17 the opposing party's fees and costs in the event of a loss.

18 **Suggested Rule Change:**

19 Every advertisement and written communication indicating that the
20 charging of a fee is contingent on outcome or that the fee will be a
21 percentage of the recovery shall contain the following disclaimer if
22 the client may be liable for the opposing parties fees and
23 costs: "You may have to pay the opposing party's attorney fees
24 and costs in the event of a loss."

25 **E. RPC 7.2(f) – Advertising of Fees.**

RPC 7.2(f) states:

A lawyer who advertises a specific fee or range of fees shall include all possible terms and fees, and the duration said fees are in effect. Such disclosures shall be presented with equal prominence. For advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

1 In the 2007 amendment to this rule, this Court added language that required
2 attorneys who advertise a specific fee or range of fee to include all possible terms and fees,
3 and the duration said fees are in effect. Although the purpose of this provision was to
4 notify the prospective client as to any limiting conditions imposed on the advertised fee in
5 order to avoid a "bait and switch" scenario, the actual language is overbroad, requiring all
6 possible terms and fees. Some attorneys who contacted the bar complained that the rule,
7 as written, essentially requires such advertisements to contain their entire fee agreement.

8 The proposed revision requires that, if a specific fee is advertised, any limiting
9 conditions must be disclosed as to the advertised fee(s), but removes the requirement that
10 all possible terms and fees be disclosed.

11 **Suggested Rule Change:**

12 A lawyer who advertises a specific fee or range of fees shall include
13 ~~all possible terms and fees, and the duration said fees are in effect~~
14 and any other limiting conditions to the availability of the fee(s).
15 Such disclosures shall be presented with equal prominence. For
16 advertisements in the yellow pages of telephone directories or other
media not published more frequently than annually, the advertised
fee or range of fees shall be honored for no less than one year
following publication.

17 **F. New Disclaimer Rule Regarding Foreign Languages.**

18 The rules currently do not specifically mandate that disclaimers appear in the same
19 language as the statement which requires the disclosure. As such, the prospective clients
20 for whom these advertisements are intended may not be able to read or understand the
21 English disclaimers, thereby rendering them ineffective. The proposed rule is taken from
22 Texas' Rule of Professional Conduct 7.02(d) (Communications Concerning a Lawyer's
23 Services).

24 ///

25 ///

1 **Suggested Rule Addition:**

2 (h) Any statement or disclaimer required by these rules shall be
3 made in each language used in the advertisement or writing with
4 respect to which such required statement or disclaimer relates;
5 provided however, the mere statement that a particular language is
6 spoken or understood shall not alone result in the need for a
7 statement or disclaimer in that language.

8 **G. New Disclaimer Rule Regarding Legibility.**

9 Currently, there is no general rule regarding legibility requirements for disclaimers.
10 The proposed rule, based loosely on Louisiana's Rule of Professional Conduct 7.2(c)(10)
11 provides that any necessary disclosures or disclaimers, if written, be large enough and
12 prominently placed so that the intended viewer can easily see and read the disclosure or
13 disclaimer.

14 No specific size or placement requirement is imposed pursuant to the proposed rule.
15 The State Bar's experience in reviewing advertising rules, particularly RPC 7.3, is that an
16 advertisement can meet the goals of being legible and conspicuous without strict
17 adherence to specific size and placement requirements.

18 The requirement that a disclaimer be prominent has been upheld by the federal
19 courts. Further, federal courts, in issuing injunctions, have frequently required the
20 disclaimer to be prominently displayed. See *Better Business Bureau of Metropolitan*
21 *Houston, Inc., v. Medical Directors, Inc.*, 681 F.2d 397, 406 (5th Cir. 1982) (issuing
22 injunction requiring, in part, that the subject advertisements use a disclaimer in a
23 "prominent manner appropriate to the media"); *Commodity Futures Trading Commission v.*
24 *Vartuli*, 228 F.3d 94, 106-07 (2nd Cir. 2000) (upholding injunction against computer
25 software company's advertisements that did not "prominently" place disclaimers in
advertisement, although disclaimer was contained within materials); *Hayes v. Zakia*, 327
F.Supp. 2d 224, 231-32 (W.D.N.Y. 2004) (stating that although 'prominently made'

1 requirement is subjective in its interpretation, the language is sufficiently plain and
2 adequate to put attorneys on notice that the disclaimer cannot be presented in an obscure
3 fashion and "simply informs" the attorney that the disclaimer "must be displayed in a
4 manner that will not render it unreadable and meaningless for the average viewer"); *Nissan*
5 *Motor Co., Ltd., v. Nissan Computer Corp.*, 89 F.Supp.2d 1154, 1165 (C.D.Cal. 2000)
6 (issuing injunction requiring computer company to post a "prominent disclaimer" on upper
7 portion of website); *Quichocho v. Macy's Dept. Stores, Inc.*, 2008 WL 2669301 (Guam
8 Terr.) (stating that "[d]isclaimers may be ineffective if they are inconspicuously located"),
9 citing *Am. Home. Prods. Corp. v. Johnson & Johnson*, 654 F.Supp 568, 590 (S.D.N.Y.
10 1987).

11 As such, the proposed rule is likely to survive any constitutional challenge as to
12 vagueness. Further, if enacted, the State Bar would issue guidelines regarding the size
13 and placement of disclosures or disclaimers that would be presumed to satisfy the rule's
14 requirements, and these guidelines would address the various media used in attorney
15 advertising, e.g., billboards, flyers, post cards, televisions ads.

16 **Suggested Rule Change:**

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

Should the proposed rule be enacted, the size requirements contained in RPC
7.2(f) and RPC 7.3 should also be repealed.

1 **RPC 7.2 (Advertising)**

2
3 (f) A lawyer who advertises a specific fee or range of fees shall
4 include all possible terms and fees, and the duration said fees are in
5 effect. ~~Such disclosures shall be presented with equal prominence.~~
6 For advertisements in the yellow pages of telephone directories or
other media not published more frequently than annually, the
advertised fee or range of fees shall be honored for no less than one
year following publication.

7 **Rule 7.3. Communications With Prospective Clients.**

8
9 (b) Direct or indirect written advertising. Any direct or indirect written
10 mail communication or advertising circular distributed to persons not
11 known to need legal services of the kind provided by the lawyer in a
12 particular matter, but who are so situated that they might in general
13 find such services useful, shall contain the disclaimers required by
Rule 7.2. The disclaimers shall be in a type size and legibility
sufficient to cause the disclaimers to be conspicuous, ~~and in a size
at least as large as the largest of any telephone number appearing
in the ad.~~

14 (c) Additional disclaimer on mailers or written advertisements or
15 communications. Direct or indirect mail envelope, and written mail
16 communications or advertising circulars shall contain, upon the
17 outside of the envelope, and upon the communication side of each
page of the communication or advertisement, ~~in legible type that is
at least twice as large as the largest type used in the body of the
communication,~~ in red ink, the following warning:

18 **NOTICE: THIS IS AN ADVERTISEMENT!**

19 If the written communication is in the form of a self-mailing flyer,
20 brochure or pamphlet, the warning shall appear above the address
panel of the flyer, brochure or pamphlet.

21 **H. Disclaimer Regarding Past Results.**

22
23 RPC 7.1(a) (Communication Concerning a Lawyer's Services) states that a
24 statement regarding past results the attorney has achieved is prohibited if it is likely to
25 create an unjustified or unreasonable expectation. The rules proffered no specific

1 disclaimer for such statements. The State Bar advised attorneys whose advertisements
2 stated past results that a disclaimer was necessary to inform the viewer that past results
3 did not predict, warrant or guarantee the prospective client's case.

4 The proposed rule, based upon Texas Rule of Professional Conduct 7.02(a)(2)
5 (Communication Concerning a Lawyer's Services), would establish the disclaimer in the
6 rules, and further require the attorney to disclose the net amount received by the client, as
7 it would be misleading to advertise an awards that was overturned on appeal or if the
8 parties subsequently settled for a lesser amount.

9 **Suggested Rule Change:**

10 (i) Statements Regarding Past Results. If the advertisement
11 contains any reference to past successes or results obtained, the
12 communicating lawyer or member of the law firm must have served
13 as lead counsel in the matter giving rise to the recovery, or was
14 primarily responsible for the settlement or verdict. The
15 advertisement shall also contain a disclaimer that past results do no
16 guarantee, warrant or predict future cases.

17 If the referenced past success or results obtained includes a
18 monetary sum, the amount involved must have been actually
19 received by the client, the reference must be accompanied by
20 adequate information regarding the nature of the case or matter and
21 the damages or injuries sustained by the client, and if the gross
22 amount received is stated, the attorney's fees and litigation
23 expenses withheld from the amount must be stated as well.

24 **I. RPC 7.2A(a) –Advertising Filing Requirements.**

25 RPC 7.2A(a) states, in relevant part:

A copy or recording of an advertisement or written or recorded
communication published after September 1, 2007, shall be
submitted in both hard copy and electronic format within 15 days
of the first dissemination along with a form supplied by the state
bar.

The RPC 7.2A filing requirement was established with the 2007 amendments. The
State Bar determined that the intent of the Court was to have an attorney file his

1 advertisement by mailing a copy of the form and advertisement to the State Bar, as well as
2 e-mail the advertisement or provide the advertisement on a CD or DVD-ROM to the State
3 Bar. While it is essential that radio and television advertisements are submitted in an
4 electronic format, the State Bar found that it was overly burdensome on some of the
5 membership to require that they submit print advertisements in both electronic format as
6 well as in hard copy.

7 After the implementation of the rules, it soon became apparent that many sole
8 practitioners and smaller firms who only advertised in the print media did not possess the
9 equipment necessary to convert their advertisement into an electronic format, such as a
10 scanner. Additionally, it requires extra effort by the Advertising Administrator to process
11 advertisements filed by e-mail and then locate the matching hard copy. The State Bar
12 offices have scanning equipment, and the Advertising Administrator can easily scan print
13 advertisements for storage in the electronic database. Removing the requirement that print
14 advertisements be filed in an electronic format would not affect the State Bar's ability to
15 process or review advertisements and, in fact, would liberate State Bar resources.

16 **Suggested Rule Change:**

17 **Filing requirements.** A copy or recording of an advertisement or
18 written or recorded communication published after September 1,
19 2007, shall be submitted to the state bar in either both physical
20 hard copy or and digital electronic format within 15 days of first
21 dissemination along with a form supplied by the state bar. If a
22 published item that was first disseminated prior to September 1,
2007, will continue to be published after this date, then it must be
submitted to the state bar on or before September 17, 2007, along
with a form supplied by the state bar. ~~The form shall include a~~
~~provision for members to request a waiver of the electronic filing~~
~~requirement for good cause.~~

23 ///

24 ///

25 ///

1 J. RPC 7.3(c) – Additional disclaimer on mailers or written advertisements or
2 communications.

3 RPC 7.3 (c) states that:

4 (c) **Additional disclaimer on mailers or written advertisements**
5 **or communications.** Direct or indirect mail envelope, and written
6 mail communications or advertising circulars shall contain, upon the
7 outside of the envelope and upon the communication side of each
8 page of the communication or advertisement, in legible type that is
9 at least twice as large as the largest type used in the body of the
10 communication, in red ink, the following warning:

11 **NOTICE: THIS IS AN ADVERTISEMENT!**

12 This provision, however, is not easily, if at all, applicable to electronic mail
13 solicitations as they do not contain envelopes and are of a different nature than mailed
14 solicitations. As such, the rule should be modified to include a provision that the subject
15 line of any e-mail solicitation sent pursuant to this rule include, in the e-mail's subject line
16 the term "Attorney Advertising." The shorter disclosure takes into account the space
17 limitations of a subject line.

18 **Suggested Rule Change:**

19 (c) **Additional disclaimer on mailers or written advertisements**
20 **or communications.** Direct or indirect mail envelope, and written
21 mail communications or advertising circulars shall contain, upon the
22 outside of the envelope and upon the communication side of each
23 page of the communication or advertisement, in legible type that is
24 at least twice as large as the largest type used in the body of the
25 communication, in red ink, the following warning:

NOTICE: THIS IS AN ADVERTISEMENT!

In case of electronic mail, the subject line shall begin with the
notation "Attorney Advertising."

///
///
///

1 **K. RPC 7.3(d) –Target Mail to Prospective Clients.**

2 RPC 7.3(d) states, in relevant part:

3 Written communication directed to a specific prospective client who
4 may need legal services due to a particular transaction or
5 occurrence is prohibited in Nevada within 45 days of the transaction
6 or occurrence giving rise to the communication.

7 A 30-day period no-contact period has been approved in regard to accident victims
8 and their relatives by the United States Supreme Court in *Florida Bar v. Went For It, Inc.*⁶
9 However, the decision only discussed personal injury/wrongful death in regard to the no-
10 contact rule, and attempts to expand the no contact rule beyond personal injury/wrongful
11 death may be overly broad and prevent potential clients from receiving the legal services
12 they need in a timely matter. See e.g., *Ficker et al v. Curran et al*, 119 F. 3d 1150, 1155-56
13 (4th Cir. 1997) (striking down Maryland's 30-day no-contact rule in regarding to mailed
14 solicitation for criminal matters noting, in part, that a criminal defendant has different
15 privacy concerns and was on a much more accelerated calendar than a plaintiff in a
16 personal injury matter); see also Tex. Atty. Gen. Op. JC-0022, 1999 WL 156298 (Tex. A.G.)
17 (advisory opinion concluding that no-contact rule would likely be found unconstitutional as
18 applied to solicitations concerning criminal matters).

19 The current rule, although prohibiting plaintiff's counsel from contacting the
20 prospective client, does not prohibit contact by counsel for the potential defendants. As
21 such, given that the purpose of the no-contact rule is to preclude a vulnerable person from
22 being exploited, the rule should be modified to preclude contact by either plaintiff or
23 defendant counsel. The proposed revisions are based upon the New York version of the
24 rule, which addresses contact by both plaintiff and defense counsel. The New York rule
25 was found to be constitutional in *Alexander v. Cahill*, 634 F.Supp. 2d 239, 253-54 (N.D.N.Y.

⁶ 515 U.S. 618, 635 (1995).

2007). The *Cahill* decision is currently pending review before the Second Circuit Court of Appeals.

Suggested Rule Change:

In the event of an incident involving potential claims for personal injury or wrongful death, written Written communication directed to *an individual injured in the incident or to a family member or legal representative of such an individual, a specific prospective client who may need legal services due to a particular transaction or occurrence seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident* is prohibited in Nevada within 30 45 days of the date of the incident, transaction or occurrence giving rise to the communication. After 30 45 days following the incident transaction or occurrence, any such communication must comply with paragraphs (b) and (c) of this Rule and must comply with all other Rules of Professional Conduct.

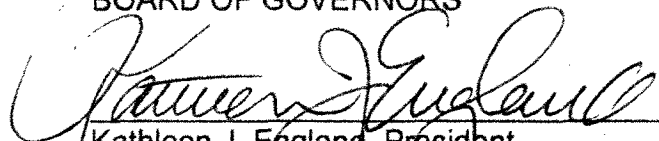
This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

CONCLUSION

Whereas, the Board of Governors respectfully recommends that this honorable Court so amend Nevada Rule of Professional Conduct ("RPC") 7.2 (Advertising), RPC 7.2A (Advertising Filing Requirements) and 7.3 (Communications With Prospective Clients) as fully set forth in **Exhibit 1**.

Respectfully submitted this 10th day of December, 2009.

STATE BAR OF NEVADA
BOARD OF GOVERNORS



Kathleen J. England, President
Nevada Bar No. 206
600 East Charleston Boulevard
Las Vegas, Nevada 89104
(702) 382-2200

1
2 **EXHIBIT 1**

3 **Rule 7.2. Advertising.**

4 (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services
5 through the public media, such as a telephone directory, legal directory,
6 newspaper or other periodical, billboards and other signs, radio, television and
7 recorded messages the public may access by dialing a telephone number, or
8 through written or electronic communication not involving solicitation as
9 prohibited by Rule 7.3.

10 These Rules shall not apply to any advertisement broadcast or disseminated
11 in another jurisdiction in which the advertising lawyer is admitted if such
12 advertisement complies with the rules governing lawyer advertising in that
13 jurisdiction and the advertisement is not intended primarily for broadcast or
14 dissemination within the State of Nevada.

15 (b) ~~Advertisements on the electronic media such as the Internet, television
16 and radio may contain the same factual information and illustrations as permitted
17 in advertisements in the print media. If a person appears as a lawyer in an
18 advertisement for legal services, or under such circumstances as may give the
19 impression that the person is a lawyer, such person must be a member of the
20 State Bar of Nevada, admitted to practice and in good standing before the
21 Supreme Court of Nevada, and must be the lawyer who will actually perform the
22 service advertised or a lawyer associated with the law firm that is advertising. If a
23 person appears in an advertisement as an employee of a lawyer or law firm, such
24 person must be an actual employee of the lawyer or law firm whose services are
25 advertised unless the advertisement discloses that such person is an actor. If an
actor appears in any other role not prohibited by these Rules, the advertisement
must disclose that such person is an actor.~~

If the advertisement uses any actors to portray a lawyer, members of the
law firm, clients, or utilizes depictions of fictionalized events or scenes, the same
must be disclosed. In the event 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 in which the actor(s) appear in the
advertisement.

20 (c) All advertisements and written communications disseminated pursuant to
21 these Rules shall ~~include~~ identify the name of at least one lawyer or law firm
22 responsible for their content.

23 (d) Every advertisement and written communication that indicates one or
24 more areas of law in which the lawyer or law firm practices shall conform to the
25 requirements of Rule 7.4.

(e) Every advertisement and written communication indicating that the
charging of a fee is contingent on outcome or that the fee will be a percentage of

1 the recovery shall contain the following disclaimer if the client may be liable for
2 the opposing parties fees and costs: "You may have to pay the opposing party's
3 attorney fees and costs in the event of a loss."

4 (f) A lawyer who advertises a specific fee or range of fees shall include all
5 possible terms and fees, and the duration said fees are in effect and any other
6 limiting conditions to the availability of the fee(s). Such disclosures shall be
7 presented with equal prominence. For advertisements in the yellow pages of
8 telephone directories or other media not published more frequently than annually,
9 the advertised fee or range of fees shall be honored for no less than one year
10 following publication.

11 (g) A lawyer may make statements describing or characterizing the quality of
12 the lawyer's services in advertisements and written communications. However,
13 such statements are subject to proof of verification, to be provided at the request
14 of the state bar or a client or prospective client.

15 (h) Any statement or disclaimer required by these rules shall be made in each
16 language used in the advertisement or writing with respect to which such
17 required statement or disclaimer relates; provided however, the mere statement
18 that a particular language is spoken or understood shall not alone result in the
19 need for a statement or disclaimer in that language.

20 (i) Statements Regarding Past Results. If the advertisement contains any
21 reference to past successes or results obtained, the communicating lawyer or
22 member of the law firm must have served as lead counsel in the matter giving
23 rise to the recovery, or was primarily responsible for the settlement or verdict.
24 The advertisement shall also contain a disclaimer that past results do no
25 guarantee, warrant or predict future cases.

26 If the past success or results obtained includes a monetary sum, the
27 amount involved must have been actually received by the client, and the
28 reference must be accompanied by adequate information regarding the nature of
29 the case or matter and the damages or injuries sustained by the client, and if the
30 gross amount received is stated, the attorney's fees and litigation expenses
31 withheld from the amount must be stated as well.

32 (i) Disclaimers. In addition to any specific requirements under these rules,
33 any disclosures or disclaimers required by these Rules to appear in an
34 advertisement or unsolicited written communication must be of sufficient size to
35 be clearly legible and prominently placed so to be conspicuous to the intended
36 viewer. If the disclosure or disclaimer is televised or broadcast in an electronic
37 medium, it shall be displayed for a sufficient time to enable the viewer to see and
38 read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud,
39 it shall be plainly audible to the intended listener. If the statement is made on a
40 web site, the required words or statements shall appear on the same page as the
41 statement requiring the disclosure or disclaimer.

1 (hk) The following information in advertisements and written communications
shall be presumed not to violate the provisions of Rule 7.1:

2 (1) Subject to the requirements of this Rule and Rule 7.5, the name of
the lawyer or law firm, a listing of lawyers associated with the firm, office
3 addresses and telephone numbers, office and telephone service hours, and a
designation such as "attorney" or "law firm."

4 (2) Date of admission to the State Bar of Nevada and any other bars and
a listing of federal courts and jurisdictions other than Nevada where the lawyer is
5 licensed to practice.

6 (3) Technical and professional licenses granted by the state or other
recognized licensing authorities.

7 (4) Foreign language ability.

8 (5) Fields of law in which the lawyer is certified or designated, subject to
the requirements of Rule 7.4.

9 (6) Prepaid or group legal service plans in which the lawyer participates.

10 (7) Acceptance of credit cards.

11 (8) Fee for initial consultation and fee schedule, subject to the
requirements of paragraphs (e) and (f) of this Rule.

12 (9) A listing of the name and geographic location of a lawyer or law firm
as a sponsor of a public service announcement or charitable, civic or community
13 program or event.

14 (il) Nothing in this Rule prohibits a lawyer or law firm from permitting the
inclusion in law lists and law directories intended primarily for the use of the legal
15 profession of such information as has traditionally been included in these
publications.

16 (jm) A copy or recording of an advertisement or written or recorded
communication shall be submitted to the State Bar in accordance with Rule 7.2A
and shall be retained by the lawyer or law firm which advertises for 4 years after
17 its last dissemination along with a record of when and where it was used.

18 (kn) A lawyer shall not give anything of value to a person for recommending
the lawyer's services, except that a lawyer may pay the reasonable cost of
19 advertising or written or recorded communication permitted by these Rules and
may pay the usual charges of a lawyer referral service or other legal service
organization.

20 Rule 7.2A. Advertising Filing Requirements.

21 (a) **Filing requirements.** A copy or recording of an advertisement or written
22 or recorded communication published after September 1, 2007, shall be
submitted to the state bar in ~~both either physical hard copy and/or~~ electronic
23 digital format within 15 days of first dissemination along with a form supplied by
the state bar. If a published item that was first disseminated prior to September 1,
24 2007, will continue to be published after this date, then it must be submitted to
the state bar on or before September 17, 2007, along with a form supplied by the

1 state bar. The form shall include a provision for members to request a waiver of
2 the electronic filing requirement for good cause.

3 (b) **Failure to file.** A lawyer or law firm's failure to file an advertisement in
4 accordance with paragraph (a) is grounds for disciplinary action. In addition, for
5 purposes of disciplinary review pursuant to Supreme Court Rule 106 (privilege
6 and limitation), when a lawyer or law firm fails to file, the 4-year limitation period
7 begins on the date the advertisement was actually known to bar counsel.

8 **Rule 7.3. Communications With Prospective Clients.**

9 (a) **Direct contact with prospective clients.** Except as permitted pursuant
10 to paragraph (d) of this Rule, a lawyer shall not solicit professional employment
11 from a prospective client with whom the lawyer has no family or prior professional
12 relationship, by mail, in person or otherwise, when a significant motive for the
13 lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes
14 contact in person, by telephone, telegraph or facsimile, by letter or other writing,
15 or by other communication directed to a specific recipient.

16 (b) **Direct or indirect written advertising.** Any direct or indirect written mail
17 communication or advertising circular distributed to persons not known to need
18 legal services of the kind provided by the lawyer in a particular matter, but who
19 are so situated that they might in general find such services useful, shall contain
20 the disclaimers required by Rule 7.2. The disclaimers shall be in a type size and
21 legibility sufficient to cause the disclaimers to be conspicuous, and in a size at
22 least as large as the largest of any telephone number appearing in the ad.

23 (c) **Additional disclaimer on mailers or written advertisements or**
24 **communications.** Direct or indirect mail envelope, and written mail
25 communications or advertising circulars shall contain, upon the outside of the
envelope and upon the communication side of each page of the communication
or advertisement, in legible type that is at least twice as large as the largest type
used in the body of the communication, in red ink, the following warning:

26 **NOTICE: THIS IS AN ADVERTISEMENT!**

27 In case of electronic mail, the subject line shall begin with the
28 notation "Attorney Advertising."

29 (d) **Target mail to prospective clients.** In the event of an incident involving
30 potential claims for personal injury or wrongful death, written
31 communication directed to an individual injured in the incident or to a family
32 member or legal representative of such an individual, seeking to represent the
33 injured individual or legal representative thereof in potential litigation or in a
34 proceeding arising out of the incident a specific prospective client who may need
35 legal services due to a particular transaction or occurrence is prohibited in

1 Nevada within ~~45~~ 30 days of the transaction or occurrence giving rise to the
2 communication ~~date~~ of the incident. After ~~45~~ 30 days following the transaction or
3 occurrence ~~incident~~, any such communication must comply with paragraphs (b)
and (c) of this Rule and must comply with all other Rules of Professional
Conduct.

4 This provision limiting contact with an injured individual or the legal
5 representative thereof applies as well to lawyers or law firms or any associate,
6 agent, employee or other representative of a lawyer or law firm who represent
7 actual or potential defendants or entities that may defend and/or indemnify said
8 defendants.
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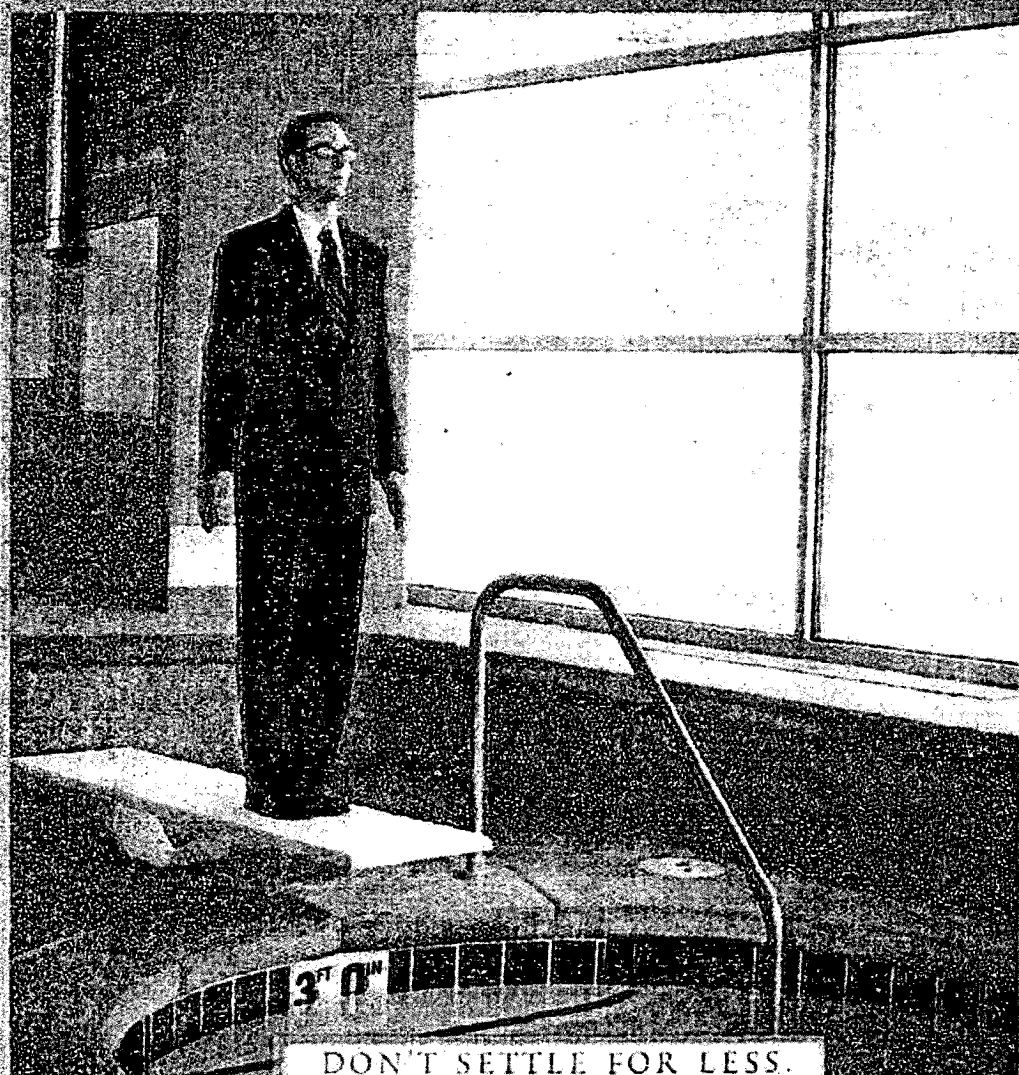
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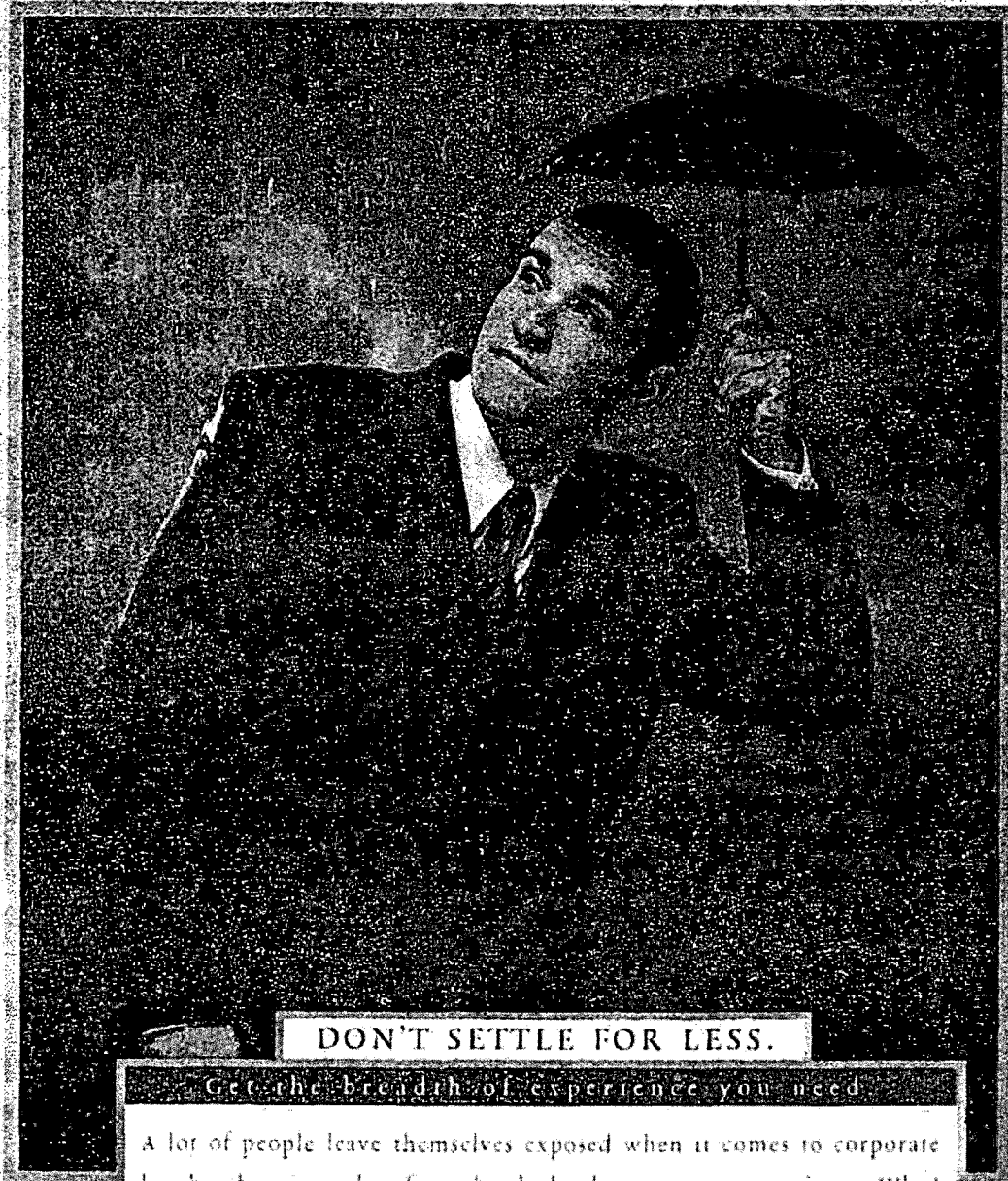
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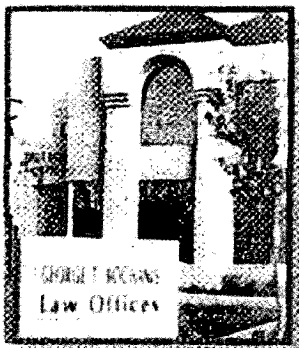


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Comments

☒ New
☐ Revised
☐ Creative

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☐ Unapproved
☒ Approved
☐ Do Not Air

Changed by Matt Nahay

Traffic Status

☐ Active ☐ Archive

Type Auto Accident

#9

Length 10

Master

TFF 0003-BM-1

Code TFF 1010

Status Final

OG ☒

Market Las Vegas

State NV

Producer Matt

Template

Vo

Info

Editor

Bug

Tag Info:

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OTHER PHONE

444-4444

24 / 7

Yes-24/7

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the4firm.com

ADDRESS

OTHER

Disclaimer Info:

No Disclaimers

Audio

Nancy on greenscreen

If you've been injured in a car accident, don't take on the insurance company alone, Think 4. Call The 4 Firm right now.

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Music Used:

Pronunciation Note:

Four--Four--Four--Forty Four--Forty Four

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Slot Machine Copy 15 second TV spot

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