

January 18, 2018


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VIA FIRST CLASS MAIL

Elizabeth Brown
Clerk of the Supreme Court
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FILED

JAN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Re: ADKT 0527 and Proposed Changes to NRPC 7.1 and 7.2

Dear Ms. Brown:

I write concerning ADKT 0527 and the proposed changes to NRPC 7.1 and 7.2. I am unable to attend the public comment hearing on February 6, 2018, but wish to submit my comments via this letter.

I was first appointed to the southern Nevada Standing Lawyer Advertising Advisory Committee in 2008. I eventually became its chair, I believe in 2010. I have continued with the committee for nearly 10 years, with many of the same familiar faces as members, because it has been a good group of people and I have actually enjoyed the work, most of the time. For better or worse, people share comedic lawyer advertisements to me from other jurisdictions. I used several of these to present a CLE for the State Bar on December 8, 2016 that explained although these advertisements may have been distasteful, had they been disseminated in Nevada the advertisements would have complied with Nevada rules.

I was happy to participate in the Bar's review of NRPC 7.1, 7.2, 7.2A, and 7.2B in early 2017. The proposed amendments were the product of that review and several meetings. I believe the proposed amendments represent a positive evolution of the rules.

NRPC 7.1

The proposed amended to NRPC 7.1 was the result of several discussions. The proposal initially concerned me because it seemed to reduce the rule's ability to protect the public from potentially misleading advertisements. I was persuaded to support this change once the Bar advised its purpose was to create additional flexibility with the rule. The goal is to protect the public from false or misleading advertisements. My understanding is the Bar intends to provide guidance that will contain much of the same language contained in the current NRPC 7.1. By moving this language to what may be called "interpretative guidance," the Bar is theoretically able to respond more quickly to evolving advertising techniques than the present rule amendment process typically allows.

NRPC 7.2

The proposed changes to NRPC 7.2 reflect the changes in advertising since the rule was first written. Rather than specifying examples of advertising mediums, the idea is to again make the rule flexible to hopefully account for advertising methods that may come into existence in the future.

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The Bar also proposed deleting the current NRPC 7.2(i), and (k)-(m). NRPC 7.2(n) is renumbered. I was persuaded to support this change because it is my understanding the Bar intends to incorporate much, if not all, of this language into interpretative guidance it will provide. Again, the purpose of moving this language from a rule to interpretative guidance is to allow greater flexibility to adapt to a changing advertising environment more quickly than a rule change process typically allows.

NRPC 7.2A

The proposed NRPC 7.2A attempts to clarify if a lawyer's advertisement must be submitted for review. All lawyer advertisements are subject to NRPC 7.1 and 7.2. NRPC 7.2A concerns only if the advertisement is one that must be submitted for review. The change arose because, at present, the Bar had interpreted NRPC 7.2A as exempting online advertising from the submission requirement. Online advertising was still required to comply with NRPC 7.1 and 7.2, however the lawyer was not required to submit it upon first dissemination. The proposed change eliminates that exception.

The amendment does state that "websites are not considered to be advertisements subject to filing requirements." During the review process, my understanding is that this exception is meant to apply to lawyer's websites and blogs. If a website is subject to the submission requirement, a lawyer would need to file a submission each time the website is updated. For larger firms, this is problematic as the websites change frequently as the lawyers conduct business or client alerts are posted. However, if a lawyer's places an advertisement on a website in exchange for something of value, the advertisement would need to be submitted. The difference is between the lawyer's own website and posting an advertisement to someone else's website.

NRPC 7.2B

This is a practical amendment. First, since the rule was drafted, telecommunications have continued to improve. The State Bar's new office space in Las Vegas allows for video conferencing with its office space in Reno. This makes it possible for members to work together in ways not previously possible and effectively eliminates the need for two committees.

A secondary concern is consistent application across the state. During joint meetings we sometimes found that the two committees disagreed about whether certain advertisements were compliant. This created the risk that bar counsel could receive conflicting advice. Although the Advisory Committees' recommendations are non-binding, the recommendations may have some additional value if conflicting viewpoints are considered before the recommendation is made.

The proposed amendment to NRPC 7.2(B)(a)(1)(ii) is practical. We have found that in person meetings are not necessary every month. Instead, the committee members are able to view the relevant advertisements online and provide feedback via email. This flexibility has made it possible for some members to contribute in months when they could not otherwise attend in person meetings.

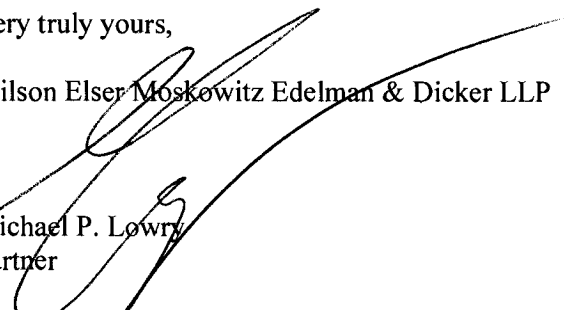
The change that I am most happy to propose is to NRPC 7.2(B)(b). As presently in force, the rule operates as a safe harbor. In practice, if an Advisory Committee concludes an advertisement is non-compliant and bar counsel agrees with that Advisory Committee's recommendations, bar counsel issues a notice "requesting a correction or withdrawal of the advertisement." My understanding has been that if a correction is issued or the advertisement withdrawn, that is the end of bar counsel's ability to pursue potential discipline.

This safe harbor provision has generated much frustration among many Advisory Committee members during my tenure. There have been several meetings where members expressed frustration that this provision effectively rendered the advertising rules moot. A lawyer could conceivably run a non-compliant advertisement. NRPC 7.2A does not require submission for 15 days. The Advisory Committees only meet monthly. If timed correctly, the lawyer could disseminate the advertisement for up to 45 days before an Advisory Committee review. Even then, once the Advisory Committee met and offered its recommendation to bar counsel, there is yet another delay as the recommendation works through the administrative system. Finally, if bar counsel agrees with the recommendation, further time passes until the letter "requesting a correction or withdrawal of the advertisement" is sent. Then the offending lawyer can escape discipline merely by withdrawing the advertisement. However, by this point often 60 days or more have elapsed and the advertisement has completed its run anyway.

Bar counsel is not required to wait for an Advisory Committee review before sending a letter "requesting a correction or withdrawal of the advertisement." However, accelerating the process does not resolve the concern. If bar counsel drove to work, observed a new, non-compliant advertisement on the very first day it is disseminated, arrived at work and sent a letter "requesting a correction or withdrawal of the advertisement" that same day, the offending lawyer could still wait the 30 days provided in the current rule to respond. At the end of the 30 days, the offending lawyer only need to withdraw the advertisement to escape discipline. However, by that point the lawyer has already received the benefit of the non-compliant advertisement.

Very truly yours,

Wilson Elser Moskowitz Edelman & Dicker LLP


Michael P. Lowry
Partner

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