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Posted: August 17, 2016

Court of Appeals Discusses Lawyer Web Advertising Under the Consumer Protection Act

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Since *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), the business aspects of law practice have been subject to the Washington Consumer Protection Act. RCW 19.86.020 prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” RCW 19.86.090, in turn, creates a private right of action for CPA violations and includes both attorney fees and treble damages (to \$25,000 beyond actual damages) remedies for a successful claimant. Historically, most CPA claims involving lawyers touched on fee-related issues (*see, e.g., Cotton v. Kronenberg*, 111 Wn. App. 258, 273-75, 44 P.3d 878 (2002)). Division I of the Court of Appeals, however, recently discussed lawyer web advertising in the CPA context in *Rhodes v. Rains*, 2016 WL 3080727 (Wn. App. May 31, 2016) (published on July 28, 2016).

The plaintiff in *Rhodes* was a small business owner who had located an accountant-lawyer in part through the latter’s web site. The web site featured a “company profile” that, according to the plaintiff, helped convince her to retain the firm to assist with a variety of acute financial issues her business was facing. The client and her accountant-lawyer eventually parted ways and the client sued the accountant-lawyer under a variety of theories, including a CPA claim based,

in relevant part, on the contention that the information on the web site was false. The trial court dismissed the CPA claim on summary judgment and, following trial on other issues, the plaintiff appealed the dismissal of the CPA claim. The Court of Appeals reversed and remanded.

In doing so, the Court of Appeals noted the concept of “deception” under the CPA as developed in other business areas means that the practice involved “has the capacity to deceive a substantial portion of the public.” (2016 WL 3080727 at *3.) The Court of Appeals then went on to observe that although “[i]n her online company profile . . . [the accountant-lawyer] . . . portrayed herself as leading a successful firm with many skilled professional employees . . . [, t]he record contains no evidence of anyone who worked for . . . [the accountant-lawyer] . . . except for her husband, who had no accounting background, her sister, whose background was in cosmetology, and a bookkeeper hired later.” (*Id.*) The Court of Appeals concluded that the divergence between the firm’s web description and its actual staffing created a genuine issue of material fact and the CPA claim should have gone to the jury for resolution instead of being dismissed on summary judgment. Therefore, the Court of Appeals reversed on the CPA claim and remanded it for further proceedings in the trial court.

Lawyer marketing is subject to regulation under Title 7 to the RPCs and RPC 7.1 sets the benchmark prohibiting “false or misleading communication about the lawyer or the lawyer’s services.” *Rhodes* highlights, however, that the CPA not only imposes another avenue of regulation—but one that can be enforced through a civil damage remedy. In an era when lawyer marketing is increasingly “electronic,” *Rhodes* reinforces the importance from the perspective of law firm risk management of carefully reviewing and tending web and similar electronic social media marketing communications.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWL* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.