

## STATEWIDE GRIEVANCE COMMITTEE



### **Advisory Opinion #08-01500-A Brochure Mailed to Other Attorneys Practice Book Section 2-28B (b) (5) (ii) Exemption**

Pursuant to Practice Book §2-28B, the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee, reviewed a request for an advisory opinion filed on February 29, 2008. Pursuant to Practice Book §2-28B (d), the committee requested additional information on March 4, 2008. The attorney partially replied on March 7, 2008 and the committee asked for clarification on March 7, 2008. On March 11, 2008 the attorney complied and supplied the additional information. The proposed print advertisement is a brochure designed for mailing to other attorneys by the requesting attorney seeking referral cases for litigation. The brochure will be folded in half and mailed in booklet form. The reviewing committee concluded that the advertisement does not comply with the Rules of Professional Conduct.

The advertisement provides the following information on a total of four pages when the brochure is folded as described by the requesting attorney. The cover page states the following:

"Power with Partnership"

[Name of the attorney]

[Phone number]

"Hourly Case Referral Fee"

"Contingent Fee Cases-

"1/3 Referral Fee or More"

"Involvement Negotiable"

The second interior page of the folded brochure states the following:

[Name of the law firm listed as a LLP and scripted initials]

"We work hard to maximize cases."

"We try cases."

"We get results."

"Let's work together™"

The top of the third folded page states the following:

"Attorneys and Counsellors at Law"

"Examples of our results\*"

The asterisk refers to a disclaimer on the bottom of the page which states: \*"Each case has unique facts and circumstances, similar or better results cannot be guaranteed."

Underneath, "Examples of our results\*", is a two column list of dollar amounts on one side and a description of case types on the other side. The first listed case type "Class Action" has a double asterisk. The double asterisk refers to a qualifying statement located at the bottom of page three which states: \*\*"Cash/non-cash settlement values, includes \$7 + million settlement pending court approval."

Twelve examples of results are listed in the two columns. The sentence, "[e]xperienced also in multi-million dollar business, tort, divorce, and estate negotiations/litigation." is underneath the columns of results. A phone number, a website address, and a listing of jurisdictions and courts of admission are listed underneath this phrase.

The fourth and last page of the brochure contains the name of the firm again with scripted initials, the firm's jurisdictional limitations, website and address. To the right of this is a photograph of the attorney and underneath is the attorney's individual name listed as a P.C., his board certification, his e-mail address and a phone number. Beneath this information is a two paragraph biography of the requesting attorney and information about the firm. The first paragraph discusses two multi-million dollar amounts of recovery and assets protected for clients by the attorney. An asterisk accompanies this statement and references qualifying language at the bottom of the page that the reported recovery figure "[i]ncludes \$45 + million divorce and multi-million dollar aircraft disasters. Similar results cannot be guaranteed."

The second paragraph reiterates the attorney's board certification, states he has 30 years of experience and was voted a *Connecticut Super Lawyer*® by his peers in *Connecticut Magazine* in 2006 and 2007 in two listed practice areas. This statement is accompanied by a double asterisk which references the link for Connecticut statistics from the *Super Lawyer*® website at the bottom of page four. The last sentence in the second paragraph states that the law firm has "experienced attorneys, with engineering and MBA degrees, paralegal/MBA and IT staff, who strive for excellence to maximize the value of your client's cases."

Practice Book § 2-28A mandates the filing of certain types of attorney advertising with the Statewide Grievance Committee. There are several exceptions to the mandatory filing requirements. Practice Book § 2-28A (b) lists the types of advertisements and Rule 7.2(i) of the Rules of Professional Conduct lists the types of information that are exempt from the mandatory filing requirements of Practice Book § 2-28A. Practice Book § 2-28B (b) (5) (ii) provides that the

filing requirements of Practice Book § 2-28A (a) do not apply to "a communication sent only to [o]ther attorneys or professionals." Therefore, if this brochure is sent exclusively to other attorneys, this advertisement does not need to be filed with the Statewide Grievance Committee.

Since the attorney has requested an advisory opinion regarding the contents of the brochure as attorney advertising, we reviewed several Rules of Professional Conduct that are implicated in the brochure even though it is not subject to the mandatory filing rules.

We note that the above referenced information that consists of the name, address, phone number, website and email address, and jurisdictional limitations of the attorney and/or law firm is presumptively compliant under the provisions of Rule 7.2(i).

Attorney advertising is subject to the requirements of Rule 7.1 of the Rules of Professional Conduct. Rule 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The commentary to Rule 7.1 elaborates on the types of statements that are potentially misleading:

An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. ...The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

As detailed above, the proposed advertisement contains statements about past results and recovery amounts for other clients and language implying future results. On page two, the statement is made that they "get results." On page three, twelve different results in monetary awards are listed. The column of twelve results appears in some of the case types to be an aggregate of awards rather than one award in one case. Particularly, the category Class Actions appears to be an aggregate of the total of several cases. On page four, two multi-million dollar amounts for recovery or asset protection for clients are stated. The qualifying statement attached by asterisk, however, clarifies that the figures include a \$45+million divorce and multi million dollar aircraft disaster cases.

Since this brochure is aimed at other attorneys, the aggregating of several cases in one category is less likely to be misleading under Rule 7.1. In the case of advertising aimed at the consumer, it might be necessary to clarify these reported results with a disclaimer similar to the disclaimer on page four. However, under the facts of this case, we find that the advertisement complies with Rule 7.1.

The statements on page three and four are accompanied by disclaimers or qualifying language which follow the statements by the use of asterisks. The disclaimers are readable and appropriate and comply with Rule 7.1.

The statement on page two that they "get results" does not have a separate disclaimer but is more general in nature and is followed by the disclaimer on page three. On page four the statement is made in the second paragraph that the firm and its staff "strive for excellence to maximize the value of your client's case." This statement is not accompanied by its own separate disclaimer;

however on the same page, attached to the statement in the first paragraph described above, is the disclaimer indicating that "similar results cannot be guaranteed." By stating they "strive for excellence" the firm is describing its aspirations rather than making a self-laudatory statement about past and future outcomes. This is distinguishable from statements promising "excellent" results or referring to past work as excellent. Although these statements are not accompanied by disclaimers, they are not likely to create unjustified expectations in violation of Rule 7.1 because the brochure is only being sent to attorneys.

The proposed advertisement also provides for the splitting of fees for referrals to the advertising attorney from the attorneys who are the targeted audience of the brochure. Rule 1.5(e) of the Rules of Professional Conduct governs the splitting of legal fees. Rule 1.5(e) provides:

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and
- (2) The total fee is reasonable.

The commentary elaborates on the considerations that go into entering into such an arrangement:

A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. ...A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

This opinion assumes that any referral made to the attorney soliciting the referral from the referring attorney will comply with the provisions of Rule 1.5(e) in regards to client disclosure and

reasonable amount of fee.

In the proposed advertisement, the requesting attorney advertises his certification as a "Nationally Board Certified Trial Lawyer." Rules 7.4 and 7.4A of the Rules of Professional Conduct control a lawyer's ability to discuss practice areas and specialization. See also *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed.2d 83 (1990). Rule 7.4 prohibits an attorney from stating or implying that he is a specialist unless the attorney is certified as a specialist in accordance with Rule 7.4A. Rule 7.4A allows the lawyer to state he or she is a specialist in a field if he or she has received a certification in that area of the law and the certification is recognized by the Rules Committee of the Connecticut Superior Court. On January 30, 2008 the Legal Specialization Screening Committee recommended the recertification of the National Board of Trial Advocacy to certify lawyers as specialists in the fields of Civil Trial Practice and Criminal Law. The Screening Committee also recommended to the Rules Committee that if approved the certification should be for a period of five years retroactive to February 22, 2004, since the previous certification had expired on that date. Accordingly the certification listed in the proposed advertisement is in compliance with Rule 7.4A.

The attorney advertises his selection to the *Super Lawyers*® insert in *Connecticut Magazine* and provides a link to the Connecticut selection statistics information on the publisher's website in compliance with recently issued Advisory Opinions. Please see Advisory Opinions #'s 07-01008-A, 07-00776-A and 07-00188-A available at [http://www.jud.ct.gov/sgc/Adv\\_opinions/default.htm](http://www.jud.ct.gov/sgc/Adv_opinions/default.htm). The attorney lists two practice areas for his selection to *Super Lawyers*® and two years of selection.

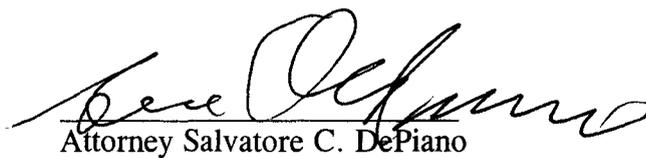
In response to the committee's request for additional information the attorney supplied the following additional facts. He was selected for inclusion by his peers to the *Super Lawyers*® insert for the practice area Business Litigation in 2006 and 2007 *Connecticut Magazine*. After selection he was asked by the publishers for any additional practice areas and he listed Class Action/Mass Torts. This self selected practice area was added to his name on the publisher's website, but is not listed in *Connecticut Magazine*.

The attorney must remove the area of practice for which he was not selected as a *Super Lawyer*® since that reference would be misleading under Rule 7.1. See Advisory Opinion # 07-01008-A at p.10. In response to the committee's request for additional information and clarification on the practice areas, the attorney indicated he would revise the brochure to list only the practice area for which he was actually selected in the *Super Lawyers*® insert in *Connecticut Magazine* and remove the self selected practice area.

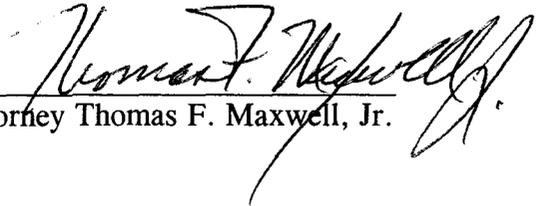
Accordingly, this reviewing committee opines that the original advertisement does not comply with the Rules of Professional Conduct since the information about the attorney's *Super Lawyers*® areas of practice does not comport with previous Advisory Opinions issued by the Statewide Grievance Committee. The proposed revision by the requesting attorney would, however, bring the proposed advertisement into compliance.

(E)

ISSUE DATE: March 24, 2008



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