

## STATEWIDE GRIEVANCE COMMITTEE



### **Advisory Opinion #09-00658-A Solicitation of Small Claims Matters**

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 January 16, 2009. The proposed print advertisement would be mailed to local small businesses and inserted in trade publications. The advertisement would offer to prepare small claims writs and supporting documents for potential business clients who prefer to represent themselves pro se. The reviewing committee concluded that the advertisement does not comply with the Rules of Professional Conduct.

The advertisement provides the following information: a letter sized advertisement in the form of a flyer that provides the name, address, phone and fax numbers and website address of the law firm at the top of the page. Pursuant to Rule 7.2(i) of the Rules of Professional Conduct, all of the above referenced information is presumed not to violate the provisions of Rule 7.1 of the Rules of Professional Conduct and therefore is not false or misleading.

Underneath the law firm letterhead is the phrase "Advertising Material." The body of the flyer consists of several paragraphs discussing the problem of collecting bad debts and the expense of collection litigation for businesses. The letter offers that small claims court is a potentially cost effective method that businesses may use without legal representation. The letter asserts that "with a little help your business can handle its own collections in small claims court and do it

successfully." The law firm then indicates that it will "prepare the paperwork" necessary to commence the small claims suit and obtain from the business evidence and exhibits necessary to support the claim. The law firm will charge a one time fee for that preparation. The client will pay the entry fee to file the suit and handle the case from that point forward. The closing sentence of the flyer invites the reader of the advertisement to phone the law firm if interested.

The proposed advertisement does not comply with Rule 7.2(d) of the Rules of Professional Conduct which governs attorney advertising. This rule states: "Any advertisement or communication made pursuant to this Rule shall include the name of at least one lawyer admitted in Connecticut responsible for its content." This advertisement fails to list any lawyers responsible for the content.

Rule 7.3 of the Rules of Professional Conduct regulates communications with prospective clients and provides the parameters of that contact. Subsection (c) of Rule 7.3 regulates written communications to prospective clients for the purpose of obtaining professional employment. Rule 7.3(c) provides:

Every written communication, as well as any communication by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from a prospective client known to be in need of legal services in a particular matter, must be clearly and prominently labeled "Advertising Material" in red ink on the first page of any written communication and the lower left corner of the outside envelope or container, if any, ...If the written communication is in the form of a self-mailing brochure or pamphlet, the label "Advertising Material" in red ink shall appear on the address panel of the brochure or pamphlet. (emphasis added)

Nothing in the information provided by the requesting attorney indicates that the proposed

advertisement will be delivered to prospective clients "known to be in need of legal services in a particular matter" as discussed in Rule 7.3(c). The fact that the potential clients are small businesses does not necessarily mean they are in need of collection services. This opinion assumes that the potential clients are not known to be in need of legal services and as a result the proposed advertisement does not need to comply with the advertising labeling requirements of Rule 7.3(c).

The proposed advertisement does not need the label "Advertising Material" that is located underneath the letterhead. If the proposed advertisement will be sent to prospective clients that the law firm knows are in need of legal services in a particular matter, the flyer should comply with the requirements of Rule 7.3(c) and Rule 7.3(d). See Advisory Opinion #08-04627-A available at [http://www.jud.ct.gov/sgc/Adv\\_opinions/default.htm](http://www.jud.ct.gov/sgc/Adv_opinions/default.htm) for further discussion of these requirements.

The proposed advertisement is to be mailed to small businesses or inserted in trade publications. 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 §2-28A (b)(5)(ii) provides that "[t]he filing requirements of subsection (a) do not extend to any of the following materials... (5) [a] communication sent only to... (ii) [o]ther attorneys or professionals; business organizations including trade groups; not-for-profit organizations; governmental bodies..." Since the proposed advertisement is a direct mailing for small businesses only or will be placed as an insert in trade publications, the advertisement qualifies for exemption pursuant to Practice Book §2-28A(b)(5)

(ii). The proposed advertisement does not need to be filed with the Statewide Grievance Committee under the mandatory filing requirements of Practice Book §2-28A as long as it is mailed only to small business clients. See Advisory Opinion #08-01297-A available at [http://www.jud.ct.gov/sgc/Adv\\_opinions/default.htm](http://www.jud.ct.gov/sgc/Adv_opinions/default.htm).

There are several other Rules of Professional Conduct implicated in the proposed advertisement in addition to those regulating attorney advertising. The arrangement the law firm proposes in the advertisement implicates Rule 1.2(c), which governs the scope of representation between attorney and client, and which in this instance is a proposed limited-scope arrangement. An attorney may limit the scope of the representation if reasonable and the client gives informed consent. The proposed advertisement indicates that the firm will "prepare the paperwork" to begin the small claims suit. The ambiguity of that phrase may mislead a potential client as to the scope of the services that the firm will provide. The commencing of a lawsuit, even in small claims court, involves initial legal decisions such as determining the correct defendant to sue. This opinion assumes that the requesting attorney and firm will comply with Rule 1.2(c), Rule 1.5(b) and Rule 1.16 of the Rules of Professional Conduct by fully informing clients in the fee agreement of the limited scope of the representation in the small claims matters solicited by the proposed advertisement.

The commentary to Rule 5.5 indicates "a lawyer may counsel nonlawyers who wish to proceed pro se." Limited-scope representation raises the concern of ghostwriting if the attorney's services go beyond background advice and counseling to the drafting of pleadings and litigation documents that are then filed in court by pro se parties. Attorney ghostwriting of pro se documents

filed in court may implicate Rule 3.3 Candor toward the Tribunal, Rule 4.1 Truthfulness in Statements to Others and Rule 8.4(3) of the Rules of Professional Conduct. There is no definitive case law in Connecticut regarding the ethics of attorney ghostwriting.

In CBA Informal Opinion 98-5, the Connecticut Bar Association considered the issue of attorney assistance to clients proceeding pro se and concluded that it is a question of fact in the particular matter whether such assistance is extensive enough to involve any misrepresentation if not disclosed to the court or other parties. Opinion 98-5 maintains that when an attorney prepares a final version of a document, which the client ultimately files in court, the court should be informed in some form satisfactory to the court to avoid any misrepresentation. The Connecticut Bar Association relied in part on ABA Informal Opinion 1414, which was later superseded by ABA Formal Opinion 07-446. ABA Formal Opinion 07-446 concludes that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, provided there are no other Rule violations. In contrast, there is significant federal case law condemning the practice of ghostwriting. See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001).

The legal question whether the arrangement offered in the proposed advertisement constitutes ghostwriting and whether it is permissible or needs to be disclosed to the court is outside the scope of this attorney advertising advisory opinion and the authority vested in this reviewing committee and the Statewide Grievance Committee under Practice Book §2-28B. We do note that it would be misleading to offer legal services that violate the Rules of Professional Conduct. See Rule 8.4(5) and commentary to Rule 7.1 (prohibiting the advertisement of an ability

to achieve results by means that violate the Rules of Professional Conduct.)

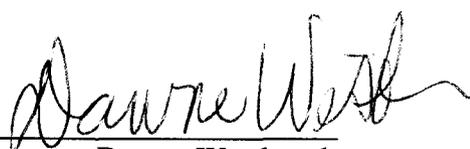
Accordingly, this reviewing committee opines that the advertisement does not comply with the Rules of Professional Conduct because the proposed advertisement fails to list any lawyers responsible for the content as required by Rule 7.2(d) of the Rules of Professional Conduct. This opinion is also limited to the discussion of the rules of attorney advertising as detailed above.

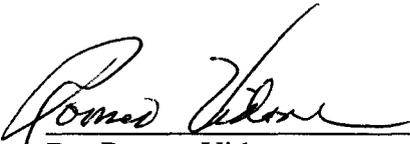
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