

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

**OPINION NO. 00 - 03
MAY 3, 2000**

The Committee has received a request for its opinion on a question involving lawyer advertising. The issue is whether a certain telephone yellow page advertisement conforms to the requirements of North Dakota Rule of Professional Conduct 7.1(a).

FACTS

The full page advertisement lists types of cases handled, license information, minimal fee information, toll free telephone number, email address, and website. In the middle is this statement:

Largest Verdict-
4 Million Dollars (July 1998), &
3.8 Million Dollars In Settlements
In The Past 3 Years

Past performance is no guarantee
of future results, for every case
has a different value.

The lawyer intends to use the advertisement in North Dakota. He asked for recommendations of the Committee.

DISCUSSION

N.D.R. Prof. Conduct 7.1(a), which applies to communications made for advertising purposes, provides:

A lawyer shall not make a false or misleading communication about the lawyer, a person professionally associated with the lawyer, or their services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
- (2) contains an assertion that cannot be substantiated.

The Ethics Committee can provide only limited guidance to lawyers concerned about the content of their advertising. The Committee is not investigatory and cannot verify the veracity of the various statements that could be made in the context of lawyer advertising. It remains the obligation of the lawyer to ensure that a communication is truthful and not misleading. Thus, the Committee will not pre-approve a brochure or other similar document. The Committee has never explicitly determined that an advertisement met the requirement of Rule 7.1. Rather, the Committee has identified specific concerns about the content of a specific advertisement or solicitation. State Bar Association of North Dakota Ethics Committee Opinion 98-06 (July 14, 1998); State Bar Association of North Dakota Ethics Committee Opinion 97-11 (November 11, 1997).

The specific concern raised by this advertisement is the statement regarding past results and past performance. It is reviewed in the context of whether the communication contains a material misrepresentation or omission, or contains an assertion that cannot be substantiated.

The Committee believes the caveat: "Past performance is no guarantee of future results, for every case has a different value" in the same type set and immediately following the statement regarding past performance is the proper approach to avoid a misleading communication. The Committee, however, still has a concern over part of the statement. While a verdict in dollars is a discernable, verifiable, public record,

the Committee is concerned "Largest Verdict" may be misleading if it does not indicate the jurisdiction of the verdict or that it was received by the lawyer's client. A statement of "Dollars in Settlements" also poses risks for misinterpretation. Settlements are often confidential so the amounts cannot be substantiated. We do not know if the \$3.8 million in settlements was for three or three thousand claims. We do not know when in the course of disputes were the settlements achieved. The Committee suggests the statement "Largest Verdict" should indicate the jurisdiction and that it was the lawyer's client who received it. The Committee also suggests the reference to "3.8 Million Dollars in Past Settlements" be deleted. The lawyer has the responsibility to ensure that a statement does not contain a material misrepresentation or omission regarding the verdict.

This opinion is provided pursuant to North Dakota Rules of Lawyer Discipline 1.2(B), which states:

A lawyer who acts in good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Paul K. Sandness and was approved by the majority of the Ethics Committee on May 3, 2000.

Mark Hanson, Chair