

Opinion # 2007-2

Synopsis:

A lawyer may publicize the fact that he or she is listed in a publication such as *The Best Lawyers in America*, so long as the lawyer makes clear that he or she is not claiming to be one of the best lawyers in America, without violating Rule 7.1.

Facts:

A lawyer asks if the lawyer may publicize the lawyer's inclusion in *The Best Lawyers in America* without violating the Rules of Professional Responsibility.

The publication *The Best Lawyers in America* is a reference work published biennially since 1983. The publisher is Woodward/White, Inc., of Aiken, South Carolina. The book is divided into lists of attorneys for all 50 states and the District of Columbia. Eighty specialty areas of practice are identified, although listings for all 80 practice areas are not included for every jurisdiction. Within each jurisdiction, lawyers are listed alphabetically by practice specialty, city and last name, in that order. Selection of a lawyer for inclusion in the publication *The Best Lawyers in America* is based upon a peer-review process. Nominations for inclusion come from lawyers currently listed in the publication. All lawyers nominated are then subjected to a confidential peer-review process administered and supervised by the editorial staff of the publication. This process includes a ballot for each practice field and jurisdiction containing all lawyers nominated within that field and jurisdiction. Lawyers are not permitted to vote for themselves or other lawyers in their firm. All lawyers within a jurisdiction and practice area cast their ballots on a jurisdiction-wide basis. Although listed within each jurisdiction by city for convenience, votes in small jurisdictions like Vermont are not cast on a city-by-city basis, but rather by all listed lawyers within that statewide jurisdiction and area of practice. The publisher of *The Best Lawyers in America* states on its website: "Listed lawyers are permitted to mention in their advertisements that they are included in *Best Lawyers* or in *The Best Lawyers in America* but not that they are "best lawyers" or to suggest that a listing in *Best Lawyers* guarantees a particular result in a legal case or that they are necessarily more skilled than lawyers who are not listed in the publication."

Discussion:

The relevant Rule of Professional Responsibility is Rule 7.1:

Rule 7.1. Communications Concerning a Lawyer's Services

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:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary [to] make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The subject of attorney advertising has been evolving over the last three decades. The United States Supreme Court held in 1977 that attorney advertising was commercial speech entitled to First Amendment protection. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Since then, the Supreme Court has strengthened protection for attorney advertising in several cases. In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), a four Justice plurality reversed discipline of a lawyer who had stated the following on his letterhead: "Certified Civil Trial Specialist—By the National Board of Trial Advocacy." The plurality held that a state was free to "consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty," but it could not "completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA." *Id.* At 110.

Four years later, the Supreme Court reversed discipline of a lawyer whose letterhead included the fact that she was a certified financial planner (CFP®). Quoting the plurality opinion in *Peel* quoted above, the court held that Florida offered "nothing to support a different conclusion with respect to the CFP designation." *Ibanez v. Florida Dep't of Business and Prof. Reg.*, 512 U.S. 136, 145 (1994). The Court in *Ibanez* held that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* At 142. The state has the burden of demonstrating the need for its restriction, the Court said, and its "burden is not slight." *Id.* At 142-43.

Several state and local ethics panels have examined the issue of whether an attorney can advertise the fact that they are listed in a publication such as *The Best Lawyers in America*, and the extent to which communications containing such information can be utilized by lawyers listed in the publication.

"It is the opinion of the Committee that, although an attorney advertisement may state that an attorney has been designated a "Super Lawyer," it may only do so when the advertisement contains sufficiently detailed information about that process and criteria for the reader to whom the advertisement is directed, to determine the manner and context within which the designation was made. Blanket statements that do not provide accurate and sufficient contextual information concerning ratings or other similar appellations do not comply with the Rules of Professional Conduct, currently and as amended January 1, 2005." Philadelphia Bar Association, Opinion 2004-10 (December 2004).

In an opinion approved by the Virginia Supreme Court, the Standing Committee on Legal Ethics of the Virginia State Bar held that: “Lawyers may advertise the fact that they are listed in a publication such as *The Best Lawyers in America*. A lawyer may include in the advertising additional statements, claims or characterizations based upon the lawyer’s inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1.” LEGAL ADVERTISING OPINION A-0114, approved by the Virginia Supreme Court, August 26, 2005. The Virginia opinion states:

Accordingly, attorneys may ethically communicate to the public information describing legitimate credentials. In fact, the widespread practice by Virginia attorneys of providing such information via resumes, firm brochures, website listings, print advertising, electronic media, or in-person communication is an example of the type of advertising by lawyers that serves the public interest. When furnished with this type of reliable, objective information, consumers of legal services are better able to make informed decisions concerning available legal services.

The Virginia Committee is following the teachings of the United States Supreme Court as expressed in the *Peel* and *Ibanez* decisions. If the commercial speech is not false or misleading, which is prohibited by Rule 7.1, a state would have a heavy burden if it wanted to proscribe such speech.

The Committee on Attorney Advertising appointed by the New Jersey Supreme Court issued Opinion 39 in 2006, but the opinion was stayed by a Justice of the New Jersey Supreme Court in August, 2006. The opinion takes a contrary view to the Philadelphia and Virginia opinions and concludes that advertisements describing lawyers as “*The Best Lawyers in America*,” “*Super Lawyers*” or similar comparative titles violate both Rule 7.1(a)(2) and 7.1(a)(3). The Opinion focused on “*Super Lawyers*,” which it said first appeared in an advertising insert to a 2005 *New Jersey Monthly* magazine and a subsequent stand-alone magazine, “both devoted primarily to advertisements by law firms promoting their designation as “Super Lawyers.” Rule 7.1(a)(3) states that a communication is misleading if it “compares the lawyer’s services with other lawyers’ services.” The New Jersey Committee stated that “the use of superlative designations by lawyers is inherently comparative” and thus violates Rule 7.1(a)(3). “These self-aggrandizing titles have the potential to lead an unwary consumer to believe that the lawyers so described are, by virtue of this manufactured title, superior to their colleagues who practice in the same areas of law.” The Committee emphasized the “*Super Lawyers*” approach as based on advertising and designed for “mass consumption,” in contrast to ratings organizations such as Martindale-Hubbell, which it characterized as directed to lawyers and “likely to have minimal recognition to the public.”

The New Jersey Committee went on to analyze this type of advertising under Rule 7.1(a)(2), which states that a communication is misleading if it “is likely to create an unjustified expectation about results the lawyer can achieve. . . .” “When a potential client reads such advertising and considers hiring a ‘super’ attorney, or the ‘best’ attorney, the superlative designation induces the client to feel that the results that can be

obtained by this attorney are likely to surpass those that can be achieved by a mere ‘ordinary’ attorney. This simplistic use of a media-generated sound bite title clearly has the capacity to mislead the public.”

In analyzing the facts in the question before it, the Section believes that a lawyer advertising his or her inclusion in a publication like *The Best Lawyers in America* in a manner such as that required by that publication is not false or misleading. Again, such advertising could include the fact that the lawyer is included in *The Best Lawyers in America*, but not that they are “best lawyers” or to suggest that a listing in *Best Lawyers* guarantees a particular result in a legal case or that they are necessarily more skilled than lawyers who are not listed in the publication.

If advertising inclusion in *The Best Lawyers in America* is limited as just described, the Section does not believe it is false or misleading and would not violate either Rule 7.1(a)(2) or Rule 7.1(a)(3).

Conclusion:

We conclude that it is permissible for a lawyer to state that the lawyer is included or listed in *The Best Lawyers in America*.