STATEWIDE GRIEVANCE COMMITTEE

Advisory Opinion #07-00188-A
Print Media Advertisement
Super Lawyers

Pursuant to Practice Book §2-28B, the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee[1], reviewed a request for an advisory opinion filed on June 28, 2007. On July 6, 2007, the undersigned requested additional information pursuant to Practice Book § 2-28B(d). On August 2, 2007, the attorneys partially complied with our request and provided the balance of the requested information on September 12, 2007, through counsel for the publisher of *Connecticut Super Lawyers* magazine. The proposed print advertisement is to be used in brochures and magazines with local circulation, generally for a single issue or edition. No specific publications have yet been determined.

The advisory opinion request concerns the propriety, under our advertising rules, of proclaiming oneself a "Super Lawyer 2007" in advertising materials. The proposed advertisement is attached as an exhibit to this opinion. This opinion is limited to a discussion of the 2007 *Connecticut Super Lawyers* selection process. We conclude that portions of the advertisement do not comply with the Rules of Professional Conduct.

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[1] Mr. Peter Jenkins replaced the lay person member originally assigned to this Reviewing Committee, Mr. William Carroll, due to a medical emergency that arose on October 2, 2007 resulting in Mr. Carroll's unavailability.

The 2007 process for selecting a "Super Lawyer" was explained to us in a letter from the publisher's attorney:

> [T]he process entails: peer evaluation by balloting, research into candidate biographies, evaluation by a Blue Ribbon Panel, and quality control. ... Every lawyer who has been licensed for more than five years receives a ballot....As of this year, the actual balloting process takes place mainly on-line. Lawyers are mailed a postcard with a secure access code (which prevents a lawyer from casting duplicate nominations) to cast ballots on the *Super Lawyers* website. ... For the balloting conducted in 2007, *Super Lawyers* mailed 14,769 postcards to all active resident Connecticut attorneys licensed for 5 years or more....This year, 331 (or 2.2 %) returned ballots. That population provided 1,850 nominations. Since some lawyers receive multiple nominations, 1098 lawyers were placed in the ballot pool....
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> ...To supplement the balloting, *Super Lawyers* research staff independently conducts a "star search" seeking qualified candidates. The staff reviews over 50 media outlets and other sources.... The list sources (which are proprietary) utilized are: (i) national and local periodicals, as well as legal trade journals; (ii) databases and on-line sources; and (iii) rosters of colleges and other associations...
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> [The] third step is peer evaluation by those lawyers receiving high point totals in Phases One and Two....[T]he Blue Ribbon Panelists comprise the top 10-20% of point scorers in each practice area in each state (depending on the size of the practice area). In 2007, 197 Connecticut lawyers were invited to be Blue Ribbon panelists. ...Of these, over half returned completed ballots, yielding 2,696 evaluations for 746 unique Connecticut lawyers....
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> **Phase Four: The Final Selection.** The various scores—Balloting, Research and Blue Ribbon Panel—are weighted and aggregated to yield a Final Score. The formula is proprietary. ...candidates are grouped according to firm size in order to get a representative sample from each firm size, recognizing that lawyers from large firms typically have a much easier time getting nominations and points than those practicing in smaller settings because of their high profile and larger number of colleagues. Typically, lawyers from large firms need a higher point threshold to be selected than lawyers from small firms or solo practitioners. With rare exceptions, no more than 20% of the lawyers at any one

> large law firm are selected.
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> In the end, the number of total lawyers ultimately selected is approximately 5% of the number of lawyers practicing in the state....
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> **Phase Five: Quality Control**....The staff runs certain reports that are useful in identifying suspect selections. These reports include: (i) whether a lawyer is an associate rather than a partner; (ii) whether a lawyer has been practicing less than ten years; (iii) reports on lawyers with low Blue Ribbon Panel scores; and (iv) disciplinary proceedings. These facts indicate that a candidate is presumptively unlikely to meet the strict selection criteria. While such factors will not necessarily disqualify lawyers from being selected, all data regarding such candidates are given a more thorough review before their selection is confirmed...
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> ...The number of ballot mailings has been determined by the number of Connecticut attorneys who are considered both resident in the state, and active in practice for five years or more....That number is further reduced by adjusting for those attorneys in practice for five years or less a figure which my client has found amounts to approximately 20% of each jurisdiction's total number of active licensed attorneys.

Letter from Attorney David Atkins, counsel for Key Professional Media, Inc. the publisher of *Connecticut Super Lawyers* magazine, to Attorney Kerry O'Connell, Assistant Bar Counsel for the Statewide Grievance Committee, pp. 2-3, 4-6, 7 (September 11, 2007).

The proposed advertisement provides the following information in a box under a banner that states "Connecticut Super Lawyers 2007" in large type: the name of the lawyer and his picture; the name, address, telephone, fax number and website address of the law firm; the email address of the attorney and a description of the attorney's legal experience with three listed practice areas.

Underneath the boxed information is the following statement:

> Considered among the best in their profession, attorneys featured in

> *Super Lawyers* represent the top 5% of the practicing attorneys in Connecticut. The *Connecticut Super Lawyers* for 2007 were selected by their peers in an extensive nomination and polling process conducted by Law & Politics and published in a special advertising section in the February 2007 issues of *Connecticut* magazine and *Connecticut Super Lawyers* magazine.

The name of *Law & Politics* and *Connecticut Magazine* appears underneath this description in large type followed by a statement of permission from the publisher to reprint the above information.

Lawyer advertising in Connecticut is regulated by Rule 7 of the Rules of Professional Conduct. In this case, Rule 7.1 governs our ability to restrict advertising that is false or misleading. Connecticut's rule is modeled after Rule 7.1 of the Model Rules of Professional Conduct (2000).

Rule 7.1 of the Connecticut Rules of Professional Conduct 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.

Our analysis of whether this proposed advertisement violates the Rules of Professional Conduct must begin with an historical discussion of legal advertising and an acknowledgement that such advertising is protected as commercial speech under the First Amendment. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), the Supreme Court held that attorney advertising was commercial speech entitled to some protection under the First Amendment. The Court concluded that such advertising could be regulated but the State could not

subject attorneys to blanket restrictions on advertising. The Court recognized that advertising by professionals posed special risks of deception to consumers "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.*, 383. Subsequently, the Supreme Court stated, "[t]he public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." *In re R.M.J.*, 455 U.S. 191, 202, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

The government may freely regulate commercial speech that concerns unlawful activity or is misleading. Currently, a three part analysis determines the legality of state restrictions on commercial speech that is not unlawful or misleading. *Florida Bar v. Went-For-It*, 515 U.S. 618, 623-24, 115 S. Ct. 2371, 132 L. Ed.2d 541 (1995) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 65 l.Ed. 2d 341, 100 S. Ct. 2343 (1980)). First, the asserted governmental interest in regulating the speech must be substantial; second, the regulation must directly advance the governmental interest asserted; and third, the regulation must be narrowly drawn and must not be more extensive than is necessary to serve that interest. *Florida Bar v. Went-For-It, Inc.*, supra, 623-24. The Supreme Court has recognized the effort to protect the reputation of attorneys, regulate members of the Bar and protect consumers as valid substantial interests. *Id.*, 625; *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). As discussed below, the restrictions we place on this proposed advertisement

are narrowly drawn to protect consumers primarily. The restrictions have the additional benefit of protecting the reputation of attorneys and regulating the Bar in accordance with the Rules of Professional Conduct.

In *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed.2d 83 (1990), the Supreme Court was asked to consider whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by the National Board of Trial Advocacy (NBTA). In a plurality decision, the Court held that the Attorney Registration & Disciplinary Commission of Illinois ("the Commission") could not prohibit attorney advertising of a NBTA certification because this would violate the First Amendment right to commercial speech. *Id.*, 110. Nevertheless, "[s]tates can require an attorney who advertises 'XYZ certification' to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Id.*, 109. *Peel* distinguished statements of opinion or quality from objectively verifiable facts that infer quality. *Id.*, 101-102. The latter are protected by the First Amendment.

Peel concluded that an attorney advertising himself or herself as certified is potentially misleading, and therefore the State may impose restrictions, such as a disclaimer, to ensure that the information is presented in as nonmisleading a manner as possible. *Id.*, 111-113 (Marshall, J., concurring) and *Id.*, 118 (White, J., dissenting) (Noting five justices believe the State could require a disclaimer because the advertisement was at least potentially misleading, Justice White stated, "[t]he upshot is that while the State may not apply its flat ban to any and all claims of

certification by attorneys, particularly those carrying disclaimers, the State should be allowed to apply its rule to the letterhead in its present form and forbid its circulation.").

Since *Peel,* states have required disclaimers on potentially misleading attorney advertisements, and have banned misleading and deceptive advertisements altogether. *Hayes v. Zakia*, 327 F.Sup. 2d 224 (W.D.N.Y. 2004) (disclaimer required by New York for NBTA certification did not infringe on the Plaintiff's first amendment rights); *Farrin v Thigpen*, 173 F.Sup. 2d 427 (M.D.N.C. 2001) (inherently misleading personal injury commercial properly prohibited); *The Florida Bar v. Pape*, 918 So.2d 240, (Fla. 2005) cert. denied, 547 U.S. 1041 (2006) (use of pit bull cartoon and 1-800-pit-bull telephone number prohibited as deceptive); *Matter of Robbins*, 266 Ga. 681, 469 S.E.2d 191 (1996) ("specialist" is at least potentially misleading and subject to appropriate restrictions on its use); *N.C. State Bar v. Culbertson*, 177 N.C. App. 89, 627 S.E.2d 644 (2006) (attorney's letterhead stating "[p]ublished in Federal Reports, 3d Series" and website proclaiming him to be "one of the elite percentage of attorneys to be published in Federal Law Reports – the large law books that contain the controlling caselaw (sic) of the United States" held to be inherently misleading and subject to prohibition); *Walker v. Board of Prof'l Responsibility of the Supreme Court of Tennessee*, 38 S.W.3d 540 (Tenn. 2001) (Tennessee attorney not certified as civil trial specialist under state law appropriately required to indicate such when advertising "divorce law" as practice area); *In re PRB Docket No. 2002.093,* 177 Vt. 629, 868 A.2d 709 (2005) (attorneys claim of expertise in personal injury matters properly prohibited as misleading). See generally, R. Hoefges, "Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment

Commercial Speech Doctrine", 24 CARDOZO ARTS & ENT. L.J. 953 (2007).

We note that the Second Circuit has considered the use of disclaimers in commercial advertising in a different context (the rating of vacuum cleaners by Consumers Union, a nonprofit independent publisher of Consumer Reports). *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 221 U.S.P.Q. 400 (2d Cir. 1984). In that case, Consumers Union attempted to enjoin the maker of the vacuum cleaner from stating its Consumer Report rating in the advertisement, because Consumer Reports does not accept advertising and does not endorse any products. *Id.* The Court held that a disclaimer could alleviate the potentially misleading use of the rating. *Id.* It noted, "Disclaimers are a favored way of alleviating consumer confusion....Absolute prohibitions of speech...are improper where there is any possibility that an explanation or disclaimer will suffice. *Id.*, 1053 (citing *In re R.M.J.*, supra, 455 U.S. 203).

Finally, in Connecticut, our Supreme Court has acknowledged an attorney's First Amendment right to advertise within the parameters set forth by the United States Supreme Court. "Waiver of first amendment rights has never been a precondition of admission to the bar..." *Grievance Committee v. Trantolo*, 192 Conn. 27, 36, 470 A.2d 235 (1984) (the Connecticut Supreme Court found that the advertisement was not misleading and the court did not analyze the distinction between potentially misleading and inherently misleading advertisements).

Based on the case law, we find that statements made in attorney advertising may fall into one of three categories: 1) truthful and not misleading; 2) truthful but potentially misleading; and 3) actually or inherently misleading, false or deceptive. When an advertisement is truthful and not misleading it cannot be regulated or prohibited, except when it harms the public. See *Ohralik v.*

Ohio State Bar Ass'n., supra, 436 U.S. 447; *Florida Bar v. Went-For-It*, supra, 515 U.S. 618. When an advertisement is truthful but potentially misleading it can be regulated, generally with a disclaimer. *Consumers Union of United States, Inc. v. General Signal Corp.*, supra, 724 F.2d 1053. When an advertisement is inherently misleading, false or deceptive the State can prohibit it entirely. With regard to the latter point, we note even facially truthful statements can be actually and inherently misleading and can be prohibited under *Peel* and its progeny.

We conclude that the proposed advertisement before us contains the three types of commercial speech: first, truthful speech that is not misleading and is permissible without restriction ("The Boxed Information"); second, speech that is facially truthful but is potentially misleading and thus subject to a disclaimer restriction ("The Banner *Connecticut Super Lawyers 2007*); and third, speech that is inherently misleading and therefore prohibited ("Statement Located Underneath the Boxed Information").

1. The Boxed Information:

The boxed information in the proposed advertisement does not violate the Rules of Professional Conduct. All of the information contained in the box is the type of information that is presumed not to be in violation of the Rules of Professional Conduct. See Rule 7.2(i) of the Rules of Professional Conduct.

Subject to our discussion of *Super Lawyers*, below, the practice areas listed and description of legal experience, also comply with Rule 7.4 of the Rules of Professional Conduct because there is no other language stating or implying that the lawyer or law firm is a specialist in these areas of law. This opinion assumes that the three listed practice areas are not self-selected, but are the

practice areas for which the attorney was selected as a "Super Lawyer" through their selection process, since the entire advertisement is subsumed under a prominent *Super Lawyers* magazine banner. If this is not the case, then the attorney must remove the area(s) of practice for which he was not selected as a "Super Lawyer" since that reference would be misleading under Rule 7.1.

2. The Banner *Connecticut Super Lawyers 2007:*

We find that the reference to an attorney as a "Super Lawyer" in an advertisement is potentially misleading and confusing to consumers. The word "super" is defined in the dictionary as outstanding, great or better than others of its kind, to a degree greater than normal. Webster's New World Dictionary (3d College Ed. 1988). Synonyms include: superior, greater, better, outstanding and distinguished. Roget's International Thesaurus (4th Ed. 1977). The common understanding of the word "super" instinctively implies the highest level of quality. Accordingly, we find the fact that one has been selected as a "Super Lawyer" by *Connecticut Super Lawyers* magazine leads to no other conclusion then the lawyer is superior to those lawyers not so selected. As a result, we find that the term "Connecticut Super Lawyers 2007" is potentially misleading because it creates an unjustified expectation as to the lawyer's ability to achieve particular results and amounts to an unsubstantiated comparison of the "Super Lawyer's" ability to the ability of one who is not a "Super Lawyer", in violation of Rule 7.1.

An appropriate explanation and disclaimer could alleviate consumer confusion. Any statement regarding the designation of "Super Lawyer" should be explained and placed in the context of a designation by a commercial magazine for a particular year. For example, an attorney can state that he or she has been designated a "Connecticut Super Lawyer" in *Connecticut Super*

Lawyers 2007 magazine, but the attorney cannot state that he or she is a "super lawyer" without referencing this context. While a consumer may infer the quality of an attorney based in part on this designation, an attorney advertising the designation cannot conclude or give an opinion that this designation makes him or her more qualified than other attorneys.

The disclaimer should detail the particularities of the selection process for 2007 and, at a minimum include specific empirical data regarding the selection process. We considered whether a link to the *Super Lawyers* website would provide the consumer with the appropriate disclaimer regarding the *Super Lawyers* selection process. We conclude that this process is not appropriate in light of the information currently displayed on the *Super Lawyers* website. Super Lawyers, "Super Lawyers Selection Process" at http://www.superlawyers.com/about/selection_process.html (last visited October 1, 2007). There, the process is described in general terms, but no specific empirical data is given for any jurisdiction, including Connecticut. Accordingly, we conclude that a link to the *Super Lawyers* website is insufficient to create an appropriate disclaimer.

3. Statement Located Underneath the Boxed Information:

The advertisement states, "[c]onsidered among the best in their profession, attorneys featured in *Super Lawyers* represent the top 5% of the practicing attorneys in Connecticut." We find this statement has insufficient factual support, is inherently misleading and not entitled to protection under the First Amendment. This statement violates Rule 7.1 of the Rules of Professional Conduct and must be removed.

The basis for this statement is the survey taken by *Super Lawyers*. That process, however, involves factors which exclude attorneys who are otherwise eligible. See Letter from David Atkins

to Assistant Bar Counsel (September 11, 2007). Attorneys practicing less than 5 years, which the publisher estimates to be 20% of the practicing bar in each jurisdiction, are not mailed ballots. *Id.* Associates and attorneys practicing less than 10 years are "presumptively unlikely" to meet the selection criteria. *Id.* Despite balloting results, no more than 20% of lawyers at a large firm are normally allowed to be selected. *Id.* As noted above, in 2007, only 331 lawyers took part in the initial survey and created an initial pool of 1,098 candidates. *Id.* *Super Lawyers* then performed a "star search" to find lawyers who may have been overlooked by the initial vote. *Id.* *Super Lawyers* chose approximately 700 attorneys for the magazine listing. That figure represents 5% of the approximately 14,000 ballots originally mailed. *Id.* In our view, the selection process does not attempt to rank every practicing Connecticut attorney and appears, in part, to be subjective and arbitrary.

Accordingly, we find that, in this context, and with the record before us, the statement "[c]onsidered among the best in their profession, attorneys featured in *Super Lawyers* represent the top 5% of the practicing attorneys in Connecticut" is inherently misleading and not entitled to protection under the First Amendment. We do not conclude here whether a bona fide analytical study of every practicing lawyer in Connecticut, would still be prohibited by Rule 7.1.

We are not persuaded that when the Supreme Court decided *Peel*, it intended to protect designations of quality when they were used to create an exclusive and superlative designation as to unranked attorneys. *Peel*, supra, 496 U.S. 100 (1990). Rather, we believe that the *Peel* holding is limited to the restatement of objectively verifiable facts. In *Peel*, supra, 496 U.S. 101 n.10, the Court disagreed with Illinois' position that a lawyer's claim of NBTA certification was a

proclamation of superiority to those lawyers without the certification. In contrast to the attorney's claim of certification in *Peel,* the attorney in the proposed advertisement before us plans to proclaim himself "among the best" and "in the top 5%" of practicing lawyers. Applied to the proposed advertisement before us, *Peel* leads us to conclude that the claim "[c]onsidered among the best in their profession, attorneys featured in *Super Lawyers* represent the top 5% of the practicing attorneys in Connecticut" is inherently misleading.

We believe that a consumer is savvy enough to give the distinction "Super Lawyer" whatever weight it is worth, once the consumer is able to consider the methodology used by an appropriate disclaimer. However, when an attorney uses the election to *Connecticut Super Lawyers* magazine as the basis for trumpeting the quality of his services in comparison to others, we do not believe this claim is protected by the First Amendment. If the Supreme Court did not recognize a board certified trial specialist by the National Board of Trial Advocacy (NBTA) as a better lawyer than one without certification, we find that the statements of a for-profit magazine are not authoritative proof that the attorney listed is actually a better lawyer than 95% of his peers. To that end and in comparison, we observe that as detailed in *Peel*, supra, 496 U.S. 95, n.4, a certification from the NBTA requires extensive training, experience, continuing legal education courses, numerous references, a writing sample, and an actual exam rather than a peer review process.

In our view, the claim that a "Super Lawyer" is "among the best" and represents "the top 5%" of practicing Connecticut attorneys violates Rule 7.1 of the Rules of Professional Conduct. This claim is not factually supported by either the selection process utilized by *Super Lawyers* or

the data received for 2007. In reality it is an opinion as to quality, which is subject to prohibition in light of its inherent likelihood to mislead a consumer. *In re R.M.J.,* supra, 455 U.S. 200-201; *Farrin, supra*, 173 F.Sup. 436-438.

In conclusion, this reviewing committee finds the designation "Connecticut Super Lawyer" potentially misleading because it connotes a superior quality to an attorney in violation of Rule 7.1 of the Rules of Professional Conduct. Use of the designation in attorney advertisements requires an appropriate explanation and disclaimer in order to avoid confusing consumers and creating unjustified expectations. We also conclude, it is inherently misleading to claim that the list of *Connecticut Super Lawyers 2007* represents "among the best" and "the top 5%" of attorneys in the State of Connecticut, therefore we prohibit the claim under Rule 7.1 of the Rules of Professional Conduct. Accordingly, this reviewing committee opines that the foregoing portions of the advertisement do not comply with the Rules of Professional Conduct.

(E)

OPINION DATE: 10/04/2007

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CONNECTICUT Super Lawyers 2007

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Eric Grant litigates complex business matters. In addition to jury and non-jury trials, he regularly represents clients in arbitration and mediation proceedings. His diverse clientele includes businesses in the construction, real estate, finance, banking, manufacturing and professional services industries. Eric's litigation experience includes matters involving commercial contracts, construction projects, trade secrets, corporate governance and employment matters. He has served as a court-appointed arbitrator, sits on the board of nonprofit organizations and is an active member of the community. He graduated from Trinity College and the New York University School of Law, with honors.

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