STATEWIDE GRIEVANCE COMMITTEE

Advisory Opinion #07-00776-A
Print Media Advertisement
Super Lawyers "Top 50 List"

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 August 6, 2007. On August 13, 2007, the undersigned requested additional information pursuant to Practice Book § 2-28B(d). On September 12, 2007, the attorneys complied with our request and provided the balance of the requested information. The proposed print advertisement is to be used in the fall publication of *Connecticut Super Lawyers* magazine. We conclude that portions of the advertisement do not comply with the Rules of Professional Conduct.

The advertisement provides the following information: the name of the law firm and an acronym for the firm; the address, telephone, fax number and website address of the law firm; the name of four lawyers chosen for 2007 *Connecticut Super Lawyers* along with a group photograph; a description of the firm's practice areas and a description of each individual attorney's areas of practice. One attorney lists the fact that he was named to *Super Lawyers* top 50 list. The description of the firm's practice areas states, it has "served its clients with excellence, integrity, and dedication in a broad range of legal areas, including [name of practice areas]."

---

[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 selection to *Connecticut Super Lawyers* 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, 1,098 lawyers were placed in the ballot pool....
>
> ***
>
> ...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...
>
> [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....
>
> **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.
>
> In the end, the number of total lawyers ultimately selected is approximately 5% of the number of lawyers practicing in the state....
>
> **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....*Super Lawyers* publishes various lists of subsets of the lawyers selected in each state. For example, it may publish a "top 10" list, a "top 50" list, a "top 50 female list", or a "top 100" list. These lists are compiled based on the total weighted scores of all lawyers selected for the state's edition. It is the same process of weighted scores used to select the final *Super Lawyers* list....The only adjustments made to these "top" lists is a check by the *Super Lawyers* research staff to make sure that particular law firms are not over-represented on such "top" lists.
>
> ***
>
> ...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).

1. Firm Information and Practice Areas:

Pursuant to Rule 7.2(i) of the Rules of Professional Conduct, the listing of the firm's name, address, phone and fax numbers, website address and practice areas for the firm and individual attorneys is information presumed not to violate the provisions of Rule 7.1 of the Rules of Professional Conduct and therefore is not false or misleading.

Subject to our discussion of *Super Lawyers*, below, the practice areas listed by the firm and each of the four lawyers 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 listed practice areas for each of the four individual lawyers are not self-selected, but are the practice areas for which the attorney was selected as a "Super Lawyer" through their selection process. The juxtaposition of the practice areas after each attorney's *Super Lawyers* listing, creates the impression the attorney was selected as a *Super Lawyer* in the practice areas. 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 would be misleading under Rule 7.1. Furthermore, we find that the names of the four lawyers appearing in the advertisement satisfies the provisions of Rule 7.2(d) of the Rules of Professional Conduct, which requires an advertisement to name at least one lawyer admitted in Connecticut responsible for the advertisement.

The description of the firm's practice areas contains the statement that it has "served its clients with excellence, integrity, and dedication in a broad range of legal areas, including" [names of practice areas]. This phrase must be removed because it is misleading under the commentary to

Rule 7.1 of the Rules of Professional Conduct. Rule 7.1 of the 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.

The commentary to Rule 7.1 elaborates on the types of statements that are misleading. They include statements leading to unjustified expectations that the same results could be obtained for other clients, without reference to specific facts and circumstances of each client's case. Under the commentary to Rule 7.1, the firm's statement is a comparison of its services to the services of other attorneys, and could be construed to lead a reasonable person to have unjustified expectations as to the results that could be obtained in their particular case.

2. *Super Lawyers* References:

We are guided in this opinion by the advertising rules in the Rules of Professional Conduct. However, our ability to regulate or prohibit this legal advertisement is limited by the first amendment right to commercial speech. Therefore, we begin our analysis of the propriety of advertising that an attorney was chosen for 2007 *Connecticut Super Lawyers* and was named to the *Connecticut Super Lawyers* magazine "Top 50" list by reviewing the constitutional law regarding legal advertising and its protection 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 allows a consumer to 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.

The commentary to Rule 7.1 of the Rule's of Professional Conduct discusses advertisements that may be truthful, but misleading.

> A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

It provides for the inclusion of appropriate disclaimers to alleviate the misleading element. "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." Id.

We conclude that the proposed advertisement before us contains speech that is facially truthful but is potentially misleading and thus subject to a disclaimer restriction (the" congratulates its attorneys chosen for 2007 *Connecticut Super Lawyers* " and the "named to *Super Lawyers* top 50 list" language).

A. The Listing of Attorneys as Chosen for 2007 *Connecticut Super Lawyers*:

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 "2007 *Connecticut Super Lawyers*" 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.

B. The Listing of Attorney as Named to *Super Lawyers* Top 50 List:

One of the attorneys lists the fact that he has been named to *Super Lawyers* top 50 list. The statement that the listed attorney has been named to the *Super Lawyers* top 50 list violates Rule 7.1. As our discussion above indicates, the use of the term "Super Lawyer" is potentially misleading and confusing to consumers. The listing of an attorney as having "been named to the *Super Lawyers* top fifty list", should also detail the particularities of that selection process.

We note, as a part of the record of this advisory opinion request, that the magazine has a disclaimer accompanying its Top 50 list. *Connecticut Super Lawyers* p. 18 (2007). It indicates that "[t]he following is an alphabetical listing of the lawyers who received the highest point totals in the 2007 *Connecticut Super Lawyers* balloting, research and blue ribbon review process." Id. The inclusion of a similar disclaimer or qualifying language explaining the basis for the top 50 listing, prevents the implication that the attorney is claiming he is one of the top 50 attorneys in Connecticut.

Accordingly, this reviewing committee opines that the foregoing portions of the advertisement do not comply with the Rules of Professional Conduct.

(E)

OPINION DATE: 10/05/2007

Advisory Opinion 07-00776-A

Attorney Shari Bornstein

Advisory Opinion 07-00776-A

Attorney David I. Channing

Advisory Opinion 07-00776-A

Peter M. Jenkins

Mr. Peter Jenkins