

**DELAWARE STATE BAR ASSOCIATION**  
**COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 2008-2

February 29, 2008

This opinion is merely advisory and is not binding on the inquiring attorney or the  
Court or any other tribunal

**ISSUE PRESENTED**

The inquirer seeks guidance as to whether it is permissible under the Delaware Lawyers' Rules of Professional Conduct to include on a lawyer's website or in an email solicitation or newsletter that the lawyer has been designated "Super Lawyer" or "Best Lawyer" in a particular practice area.

**CONCLUSION**

It is permissible for a lawyer to advertise that she has been designated a "Super Lawyer" or "Best Lawyer" as long as the lawyer states the year and particular specialty or area of practice of the designation and the advertising otherwise remains within the bounds of Rules 7.1., 7.2 and 7.3

**BACKGROUND FACTS**

At issue in this inquiry are two publications: Super Lawyers, and Best Lawyer. Law & Politics, a division of Key Professional Media, Inc. performs the polling, research and selection of Super Lawyers. Since 1990, Law & Politics has published legal magazines and has published Super Lawyers since 1991. Best Lawyer is a peer-review publication in the legal profession, founded in 1981 and first published in 1983. A member of the Delaware Bar has been selected as a "Super Lawyer" and a "Best Lawyer." She inquires whether "it is permissible under the

Delaware Lawyers' Rules of Professional Conduct to include on a lawyer's website or in an email solicitation or newsletter that the lawyer has been designated "Super Lawyer" or "Best Lawyer."<sup>1</sup>

A lawyer who is listed as a "Super Lawyer" or "Best Lawyer" is chosen based upon a methodology that each organization uses in selecting the lawyers. With respect to Super Lawyers, the Super Lawyers website provides information regarding the selection process used in designating a lawyer as a "Super Lawyer".<sup>2</sup> The website states that the purpose of the selection process is to create a credible, comprehensive, and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel. The website also details how Law & Politics performs the selection process. The multi-step process begins when Law & Politics distributes a survey to lawyers throughout the state. A lawyer is only included in the survey if they have practiced for at least five years. The survey requires the lawyer to nominate another lawyer. In addition, an attorney-led research staff searches for outstanding lawyers by reviewing periodicals and other online sources. The next step is Law & Politics' evaluation of several factors and an examination of the background and experience of the lawyers. Lawyers are then separated out into practice area and perform a peer evaluation. The peer evaluation is comprised of lawyers, who have received high votes, and they then review and score the list of candidates. The final selection groups the attorneys by practice area and selects those with the highest point totals as "Super Lawyers". This results in 5% of total lawyers within a state receiving the "Super Lawyer" designation.

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<sup>1</sup> The inquiring attorney also asked with respect to "Top Lawyer"; however insufficient information about Top Lawyer was available in connection with the factual standards as developed in this Opinion.

<sup>2</sup> [http://www.superlawyers.com/about/selection\\_process.html](http://www.superlawyers.com/about/selection_process.html)

The Best Lawyers website provides information on the selection process used in determining lawyers for selection, which is based entirely on peer review.<sup>3</sup> An attorney is nominated in three ways. First, lawyers in previous editions are automatically nominated. Secondly, Best Lawyers asks the voting lawyers to nominate outstanding lawyers who have not yet been nominated. Finally, Best Lawyers allows marketing directors to nominate lawyers from their own firms but stresses that they exercise prudence in doing so. The survey asks the voting lawyers to select which lawyer they would refer if they could not handle a case, and are asked to designate a letter grade to each referral. The letter grades are converted to a numerical equivalent, averaged, and from the results, Best Lawyer selects the lawyers for the list. Although the designation is ultimately based on the subjective judgments of fellow attorneys, the website states that the breadth of their survey, candor of respondents, and sophistication of polling methodology, largely correct for any biases. Best Lawyers' website asserts that their list represents the most reliable, accurate, and useful guide to the best lawyers.

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<sup>3</sup> <http://www.bestlawyers.com/aboutus/selectionprocess.aspx>

## DISCUSSION

The Inquirer seeks guidance on whether a Delaware lawyer may list a designation on a lawyer's website or in an email solicitation or newsletter. There are three applicable provisions of the Delaware Lawyers' Rule of Professional Conduct ("LRPC"): Rule 7.1, Rule 7.2 and Rule 7.3. The focus of the inquiry is Rule 7.1, and the Committee will assume that any communication will comply with Rule 7.2 and Rule 7.3. The remainder of this Opinion will address solely whether the proposed conduct is permissible given the proscriptions of Rule 7.1. That Rule (Communications concerning a lawyer's services) states:

Rule 7.1:

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.

Comment 2 to LPRC Rule 7.1 states:

Truthful statements that are misleading are also prohibited by this Rule. 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.

The comment further discusses the issues of comparisons of lawyers' services and creating an unjustified expectation about the results. However, the Preamble to the Rules emphasizes that the comments are to be construed simply as a guide to interpretation and that the text of the Rule is authoritative. Therefore, although the Rule and the comments are helpful,

they are not sufficient in enabling the Committee in their decision. Furthermore, inquirer's question is a case of first impression in Delaware. Due to the lack of authority in this matter, guidance must be sought outside of Delaware.

This Committee's analysis starts with *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990). Peel was licensed to practice law in Illinois and other States. He also had a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy (NBTA), which offers periodic certification to applicants who meet exacting standards of experience and competence in trial work. The Administrator of respondent Attorney Registration and Disciplinary Commission of Illinois filed a complaint alleging that Peel, by using a professional letterhead that stated his name, followed by the indented notation "Certified Civil Trial Specialist By the [NBTA]" and the unintended notation "Licensed: Illinois, Missouri, Arizona," was, inter alia, holding himself out as a certified legal specialist in violation of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. The Commission recommended censure. The State Supreme Court adopted the Commission's recommendation, concluding that the First Amendment did not protect the letterhead because the public could confuse the State and NBTA as the sources of his license to practice and of his certification, and because the certification could be read as a claim of superior quality. The United States Supreme Court reversed. There was no majority opinion of the Court; however, a plurality of four stated that a lawyer's inclusion of his certification on letterhead was not misleading, and that:

"A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but it is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice".<sup>4</sup>

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<sup>4</sup> *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990).

That court further noted that if the organization that issued the certification did not inquire into petitioner's fitness, or issued certifications indiscriminately for a price, the statement, even if true, could be misleading.<sup>5</sup>

The only other published opinion found by the Committee is *Mason v. Florida Bar*, 208 F.3d 952 (11<sup>th</sup> Cir. 2000). In that opinion, the court permitted a lawyer to include in advertisements his designation as "AV Rated" by Martindale-Hubbell, finding that the statement was not misleading. The court noted that consumers need not be familiar with, nor fully understand, Martindale-Hubbell's ratings system in order to find it useful and not misleading.<sup>6</sup> In that opinion; however, the state bar disciplinary authority prosecuting the lawyer explicitly acknowledged that Martindale-Hubbell was a highly respected and valuable source of attorney information.

State Ethics Committees other than Delaware have also addressed the similar issue of whether it is misleading for an attorney to include a private selection designation in advertisements. The Arizona State Ethics Committee first considered whether it was unethical for a lawyer to advertise the lawyer's listing in *The Best Lawyers in America* in 1991.<sup>7</sup>

Arizona's rule, Rule 7.1 of the Rules of Professional Conduct ("ER") states:

"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 a not materially misleading."

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<sup>5</sup> *Id.* at 102.

<sup>6</sup> *Mason v. Florida Bar*, 208 F.3d 952, (2000)

<sup>7</sup> Arizona Opinion 91-08 (1991).

Prior to an amendment of the above stated rule, the Committee determined that advertising such a listing was unethical because although the listing could be verified, the implication of superior service could not be verified. In December 2003, the rule was amended and the subsection pertaining to comparison of services was deleted. The rule is now identical to Delaware's rule on Communications Concerning a Lawyer's Services. In consideration of the amended rule, Arizona's Ethics Committee determined that the prior opinion was no longer viable and that generally, an Arizona lawyer is ethical in referring to the lawyer's listing in an advertisement about the lawyer.<sup>8</sup> Although the listing's inclusion in the advertisement is an implied comparison with a subjective basis, the listing can be verified.<sup>9</sup> However, the Committee also stated that such a listing could be considered unethical if the lawyer omits a fact necessary to make the statement considered as a whole not misleading. Therefore, to make the listing ethical, the lawyer would need to indicate the year of the publication and the specialty for which she was listed.

Therefore, the Committee believes that a necessary (but not sufficient) requirement with respect to the proposed conduct is that the organization that issues the certification to a Delaware attorney must comply with the standards established by the *Peel* decision: The organization must not obtain an economic benefit from the Delaware attorney for recognizing her as a "Super" or "Best" lawyer.

In determining whether it is permissible for a Delaware lawyer to list in advertisements his or her status as a "Super Lawyer" or "Best Lawyer", consideration of the selection process used by the publications in making the designations is necessary. An essential factor is whether

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<sup>8</sup> Arizona Opinion 05-03 at 2 (2003).

<sup>9</sup> Id.

the organization researches the lawyer's background and experience. Both Super Lawyers' and Best Lawyer's websites profess to examine the background of each candidate. Super Lawyer examines several factors including experience, honors, representative clients, and verdicts and settlements. Best Lawyer reviews the state bar sanction lists to confirm that the candidate is in good standing. By further examining the background of the candidates, the organizations take measures to ensure that an unqualified lawyer would not receive the designation, thereby reducing the likelihood that the inclusion of the designation would be misleading.

An additional factor mentioned by the court in *Peel*, is that the organization must not designate a lawyer simply for paying a fee. Neither Super Lawyer nor Best Lawyer selects their lawyers based on paying a fee. Best Lawyer's website stresses that the lawyers are not required to nor are they allowed to make payments for the designation.

In both processes, there are several steps that are undertaken to determine the eligible lawyers. Furthermore, information on the selection process is available on both their websites making it accessible to the consumers in helping them to determine how the designation was made. Although consumers may not fully understand the process that is used, they can be informed and value the designation accordingly.

Therefore, based solely on the characteristics of the organization issuing the designation, a Delaware attorney would be able to include his designation as a "Super Lawyer" or "Best Lawyer", based on their selection process. However, further analysis is required to ensure compliance with LPRC 7.1.

Therefore, the Committee would recommend that if a Delaware lawyer includes the designation in an advertisement, he or she should also indicate the year they were listed and the area of practice of his or her listing.

Virginia also issued an Attorney Advertising Opinion in 2003 and stated that a lawyer may advertise the fact that he or she is listed in a publication such as The Best Lawyers in America, finding that when furnished with this type of reliable, objective information, consumers of legal services are better able to make informed decisions concerning available legal services.<sup>10</sup> The Committee did state that the lawyer may not ethically communicate to the public credentials that are not legitimate, such as one that is available to any lawyer who is willing to pay a fee, because it would be misleading to the public. Additionally, the Committee stated that if a lawyer does include the designation in a communication, the attorney should exercise discretion and prevent the statement from being misleading. The opinion was approved by the Supreme Court of Virginia in August of 2005.

At least two State Ethic Committees have considered this issue specific to being listed as a “Super Lawyer” – Michigan and Iowa. Michigan’s State Ethics Committee considered whether it was permissible for a lawyer to advertise that s/he has been designated a “Super Lawyer”.<sup>11</sup> Michigan’s Rule of Professional Conduct 7.1 includes three subsections and states:

“A lawyer may, on the lawyer’s own behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer’s law firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading or deceptive. A communication shall not:

- (a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading;
- (b) be likely to create an unjustified expectation about results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

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<sup>10</sup> Virginia Advertising Opinion A-0114 (2003).

<sup>11</sup> Michigan Opinion RI-341 (2007).

(c) compare the lawyer’s services with other lawyer’s services, unless the comparison can be factually substantiated.”

The Committee relied on the Virginia opinion in approving an advertisement in which a lawyer merely states that they were listed in the publication. However, they stated that although the listing was permissible, a lawyer is prohibited from stating that because you are so listed, you are the best.<sup>12</sup> Similarly, the Iowa State Bar Association Committee on Ethics and Practice Guidelines deemed it permissible for attorneys to include in their marketing materials that they were so designated a “Super Lawyer” by the applicable publication.<sup>13</sup> Specifically, it found that the review process and requirements to be designated “Super Lawyer” by the publication satisfied the criteria necessary for the Iowa Rules of Professional Conduct – a peer reviewed process open to the members of the bar who are familiar with the attorney’s work and such designation does not rest upon any payment or purchase of any subscription.<sup>14</sup>

The New Jersey Ethics Committee in Opinion 39 took the position that advertisements describing attorneys as Super Lawyers, Best Lawyers, or similar comparative titles violated the prohibition against advertisements that are inherently comparative in nature or that are likely to create an unjustified expectation.<sup>15</sup> The Committee held that advertising which promotes a designation such as “Super Lawyer” or “Best Lawyer in America” violated RPC 7.1(a)(3), that states a communication is misleading if it compares the lawyer’s services with other lawyers’ services.<sup>16</sup> The Committee also found that the type of advertising did not comply with RPC

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<sup>12</sup> Mich. Opinion at 2.

<sup>13</sup> Iowa Opinion 07-09 (2007).

<sup>14</sup> Id. (citing Iowa Opinion 07-04 p. 4 (2007)).

<sup>15</sup> NJ Opinion 39 (2003).

<sup>16</sup> NJ Opinion at 2.

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.<sup>17</sup> However after issuing this opinion, prohibiting the inclusion in advertisements, the New Jersey Supreme Court stayed the opinion and continues to do so.

In sum, other States' Ethics Committees have concluded lawyers may include the designation of "Super Lawyer" or "Best Lawyer" in an advertisement or other communication while remaining in compliance with the State's Ethics Rules. This committee believes a Delaware Lawyer may do the same. However, a Delaware lawyer should only state in the advertisement that s/he were included in the listing of "Super Lawyers" or "Best Lawyers" by the publication. The Delaware lawyer may not present such a designation in a light that implies s/he is superior or better than another member of the Delaware Bar. The Delaware Lawyer should note the area of practice s/he was designated as a "Super Lawyer" or "Best Lawyer." It also should be noted that the Delaware Lawyer should not use the "Super Lawyer" or "Best Lawyer" terminology in the abstract—that is, the term must be used only with reference to the listing publication, and contain the year(s) of listing. This Committee believes that a Delaware Lawyer will not comply with LPRC 7.1 if they list a designation that they received simply because they paid a fee.

Therefore, by including the listing of the lawyer as "Super Lawyer" or "Best Lawyer" in an advertisement or other communication, it is possible for the lawyer to comply with LRPC Rule 7.1. In doing so, the lawyer must make certain that the statement, as a whole, is not misleading, and follow the guidelines established by the Committee in this opinion.

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<sup>17</sup> NJ Opinion at 2.