

Bona Fide Lawyer Ratings Are Permitted-No Question

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[Editor's note: The article below was submitted in response to an article by Lazar Emanuel in February's NYPRR.]

Last month, the American Lawyer published a list of "Litigation's Rising Stars," dubbing them the "Fab 50." There was nothing especially new or unique about the rating or the moniker. Every year, Am Law anoints the "Litigation Department of the Year" and four runners up, and names 20 law firms to the "A List." The National Law Journal puts together its "Hot Lists." Super Lawyers® magazine, Best Lawyers in America, and Chambers U.S.A. all rate the top lawyers in various jurisdictions and practice areas.

We all know from experience that many New York lawyers who are selected for these sorts of lists advertise the distinction on their resumes. Having conducted our own mini-study, we can report on the behavior of the 30 law firms that have been named either to the Am Law "A List" or one of the top litigation departments in 2006: 81% of them advertise the honor on their websites.

Are they all violating New York's ethics rules?

Certainly not. In promulgating the latest round of amendments to the ethics rules, the Presiding Justices of the New York Appellate Divisions went out of their way to authorize lawyers and law firms to advertise "bona fide professional ratings," just as they can advertise "legal and nonlegal education, degrees and other scholastic distinctions," and "memberships in bar associations or other professional societies and organizations." 22 NYCRR §1200.6(b)(1).

Despite this explicit authorization, Lazar Emanuel, in last month's issue, says (to quote his headline) "Questions Persist on Issue of Lawyer Ratings." We respectfully disagree. The Presiding Justices settled any question. We can say that with confidence not just because we proposed the very language the PJs adopted, on behalf of one such rating service, Super Lawyers magazine, but also because the plain language of the rule leaves no ambiguity-and because, as the PJs evidently understood, it would be unconstitutional to prohibit a lawyer from truthfully reporting the credential.

Evolution of the "Bona Fide Professional Ratings" Rule

The story begins last summer, when the Presiding Justices proposed sweeping changes to the rules governing lawyer advertising in New York. One of the changes they proposed was a provision forbidding lawyers from "utiliz[ing] a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." §1200.6(c)(7). This provision was a novel formulation, which appears neither in the ABA Model Rules nor in the ethics rules of any other jurisdiction.

It was obvious, at least to us, that this rule was designed to target a particular sort of practice - lawyers who advertise with names like Freddy "Big Cash" Jones or Alvin "The Hitter" Bernstein, or law firms that adopt mottos such as, "We Win Big for You." These sorts of nicknames or mottos are problematic for two

complementary reasons. On the one hand, any hack could confer such a moniker on himself. There is no external validation of the claims being implicitly made. On the other hand, these self-promotional devices could mislead an unsophisticated consumer into believing that such monikers bear some relation to the lawyer's actual ability to deliver results.

Because the proposed formulation was so new, it made bona fide rating services like *Super Lawyers* nervous. This was particularly true after N.J. Opinion 39-an ethics opinion now stayed and under formal review by the New Jersey Supreme Court-which criticized *Super Lawyers and Best Lawyers* for, among other things, enabling lawyers to advertise claims that are unverifiable and potentially misleading. For reasons we describe below, we felt confident that this moniker provision in the New York rules was not intended to reach bona fide rating services. But here, as in any other regulatory arena, clarity is preferable.

So clarity is what we sought. We raised these concerns with the Presiding Justices, on behalf of Super Lawyers. We understand that *American Lawyer* did the same, and presume that other publications did too. We gave the Justices a detailed description of the Super Lawyers selection protocol. We also described some of the less objective, but still independent-and, in our view, bona fide-selection processes of other rating services.

Most importantly, we offered a fix. No need to excise the moniker provision, we assured them. Rather, we urged them to state clearly that nothing in the moniker provision prevented a lawyer from advertising "ratings or assessments by bona fide independent entities."

The Federal Trade Commission-which protects consumers from misleading advertising-weighed in, too. It urged the Presiding Justices to amend the proposed rules to allow "literally accurate superlative descriptions ... such as advertising that an attorney is listed among 'Super Lawyers.'"

The Presiding Justices responded by adopting the explicit protection noted above, authorizing lawyers to advertise their "bona fide professional ratings" - almost verbatim the language we proposed.

The Plain Language

The "legislative" history aside, the Presiding Justices chose language that makes abundantly clear that they intended to authorize lawyers to advertise their inclusion in Super Lawyers, Best Lawyers, or any other bona fide rating. The two rules create no ambiguity:

Rule A: "[A]n advertisement may include information as to . . . bona fide professional ratings."

Rule B: "An advertisement shall not . . . utilize a nickname, moniker, motto or trade name" if it "implies an ability to obtain results in a matter."

Even without Rule A, it would be a stretch to say that a lawyer who accurately reports a rating from an independent publisher is "utiliz[ing] a moniker," much less utilizing a moniker that implies "an ability to obtain results in a matter." A rating is not a moniker. Far from authorizing anyone to advertise, "I am a Super Lawyer," the magazine actively educates its honorees to advertise only the objectively truthful fact

of a listing-as in, "Listed in 2006 edition of Manhattan Super Lawyers magazine," and will no longer accept advertisements that do not conform to this guideline.

More importantly, Rule A achieved the intended goal of removing any doubt on the matter. If accurately reporting a "bona fide professional rating[]" is an impermissible advertisement of a "moniker," then Rule B swallows Rule A. And if that is the case, then the Presiding Justices accomplished nothing when they went out of their way to safeguard bona fide professional ratings. The only way to give Rule A any legal meaning is to conclude that it is permissible to advertise any professional rating as long as it is bona fide, and that Rule B, as its words suggest, takes aim only at self-aggrandizing bluster.

What Is Bona Fide?

All of which begs the question, what makes a professional rating "bona fide"?

We can start, as any court or ethics prosecutor would, with normal parlance. Virtually any dictionary you might pick up will define "bona fide" as "authentic"; "genuine"; "characterized by good faith and lack of fraud or deceit." A professional rating is bona fide, if the process is not a scam, but a "genuine" effort to assess the characteristics it purports to assess-whether it be reputation in the profession, accomplishment, experience, or some combination of these attributes. Even beyond the dictionary, the term "bona fide" has an accepted meaning in the law, as part of myriad statutory, administrative or case-law-derived rules.

When we urged the PJs to adopt this term, we focused on a line of Supreme Court cases, in the field of lawyer advertising, and in particular on *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), where the Court struck an ethics rule that prohibited lawyers from advertising their membership in the National Board of Trial Advocacy, a nongovernmental entity that certifies lawyers as having met a particular set of criteria relating to litigation experience. The Court concluded that lawyers have a First Amendment right to advertise such accolades. The Court explained that states bear the "burden of distinguishing between certifying boards that are bona fide and those that are bogus." *Id.* at 109. States may prohibit "unscrupulous attorneys" from holding themselves out as having received a rating "issued by an organization that . . . made no inquiry into [their] fitness, or by one that issued certificates indiscriminately for a price." *Id.* at 102. These are the "bogus" ratings. Conversely, rating services that make an inquiry and do not sell the credentials are "bona fide."

Mr. Emanuel wonders, "Can a rating system conceived and organized by a company with a commercial interest in promoting it be considered 'bona fide' . . .?" Of course it can, whether as a matter of plain language or precedent. A rating service's commercial interest has no bearing on whether its rating is "genuine," "authentic," or untainted by fraud-except if the business model is to sell the accolade for a price. A rating conferred by *The American Lawyer* is bona fide even though the publisher has a "commercial interest in promoting it," and other lawyer rating services, including Martindale-Hubbell, operate as part of a commercial enterprise.

As described in greater detail on the Super Lawyers website and in its magazines, the selection methodology is as rigorous and objective as a rating could possibly be. As Super Lawyers explained to the Presiding Justices, the magazine balances peer votes by lawyers statewide with independent research on every candidate and evaluation by a Blue Ribbon Panel consisting of top lawyers in the relevant field

and jurisdiction. Its procedures are designed to determine which lawyers are most reputable among their peers and most accomplished. Most importantly, Super Lawyers adheres to a strict separation between its selection process and advertising payments.

That makes it bona fide. No question about it.

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