

# Commentary: Questions Persist On Issue of Lawyer Ratings

BY LAZAR EMANUEL

A careful reading of the text of the new Advertising Rules which became effective today, February 1, discloses only a glancing reference by the Presiding Justices to an issue which must ultimately be resolved more clearly and precisely - the issue of lawyer ratings and the commercial rating services (e.g., Martindale Hubbell, Best Lawyer, Super Lawyer) which depend upon them for their income.

The relevant section of the new Rules is DR 2-101(A), which forbids advertising that is false, deceptive or misleading or that violates a disciplinary rule. Subject to these basic restrictions, DR 2-101(B) permits the inclusion in a lawyer advertisement of the follow information:

(1) legal and non legal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by this Part; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies and organizations, including offices and committee assignments therein; foreign language fluency; and *bona fide professional ratings*. (Emphasis added.) [Editor's note: this phrase was not in the original draft of the proposed Rules.]

Obviously, this compels definition of a new term, "bona fide professional ratings." In their wisdom, however, the Presiding Justices did not choose to add a definition of the term to the glossary of Definitions which introduces the Code of Professional Responsibility (see, 22 NYCRR § 1200.1), although they did add several other new definitions. Nor, to our knowledge, is the term "bona fide" defined anywhere else in the Code.

What constitutes a "bona fide professional rating?" Among the other definitions of "bona fide" in both Webster's and Black's are the words "genuine, authentic." Can a rating system conceived and organized by a company with a commercial interest in promoting it be considered "bona fide," or did the Justices intend to limit us to systems approved by professional organizations with no commercial interest in the consequences?

## Comparable to Advertising a Specialty

The issue is not very different from the issue which confronted the framers of DR 2-105, which deals with claims by lawyers with respect to their areas of practice or to their specialties. The Rule permits lawyers to identify areas of law in which they practice, or to state that their practice is limited to a particular area of law, but it does not permit them to claim that they are specialists in a particular field, except that: 1) a lawyer admitted to practice patent law before the U.S. Patent and Trademark Office may use the designation "Patent Attorney;" and 2) a lawyer certified as a specialist in a particular area of law by a private organization approved for that purpose by the ABA, or by "the authority having jurisdiction over

specialization under the laws of another state" may state that he has been certified in that area. However, he must also state that:

Certification is not a requirement for the practice of law in New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law. [Editor 's Note: At the beginning of 2006, according to the ABA's website on specialization, New York lawyers who qualified were able to advertise their certification in the following specialties: Accounting Professional Liability; Business Bankruptcy; Civil Trial Advocacy; Consumer Bankruptcy; Creditors' Rights; Criminal Law Trial Advocacy; DUI Defense; Elder Law; Estate Planning Law; Family Law Trial Advocacy; Juvenile Law - Child Welfare; Legal Professional Liability; and Medical Professional Liability. (See, Simon's Code of Professional Responsibility Annotated, 2006 Edition, p. 286.)

If certification as a specialist by an organization approved for that purpose by the ABA or by a governmental authority administering the standards for specialization in another state does not entitle a lawyer to claim that he has greater competence than other experienced attorneys in his field, how can a system for comparing the skill of lawyers administered by unsupervised and unapproved commercial interests qualify as "bona fide" ratings?

### **Peer Ratings and "Nicknames"**

Further, how can the rating "best lawyer" or "super lawyer" escape rejection as "...a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter," a designation listed as prohibited to lawyers by the new Rules (See, NYPRR, September 2006, page 7)? Those designations, introduced by the Presiding Justices in the original draft of the proposed Rules, have been retained in the new Rules under the heading "An advertisement shall not [utilize]..." (DR 2-101(C) (7)).

The issues created by commercial ratings of lawyers have been subjected to increased scrutiny in the last year. The January 2007 edition of the ABA Journal (page 27) includes an article by Terry Carter entitled, "The Ratings Game." In it, the author names five firms which are currently reporting and advertising lawyer ratings: Martindale-Hubbell; The Best Lawyers in America; Super Lawyers; Chambers USA; and Lawdragon. He comments, "There are more players to be found - and likely more to come."

As Mr. Carter reports, the first attack on commercial lawyer ratings came in July 2006, when the New Jersey Committee on Attorney Advertising issued Opinion 39, prohibiting any advertising by New Jersey lawyers which utilized the terms "Super Lawyers" or "Best Lawyers in America". The Committee's opinion was challenged in the New Jersey Supreme Court by two prominent Newark law firms and by the publisher of magazine supplements using the designation "Super Lawyer." The matter is still pending before the Court.

In the meantime, in their first proposals to amend the New York Rules, the Presiding Justices introduced the prohibition against any advertising which utilizes "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." Lest the reader conclude that I have misconstrued the connection between those words and commercial peer ratings, I quote Mr. Carter:

In New York, the proposed amendments are somewhat similar to New Jersey's Opinion 39 and would prohibit any "nickname, moniker, motto or trade name that implies an ability to obtain results."

So we are confronted by this question: if a "nickname, moniker, motto or trade name" is prohibited if it implies an ability to obtain results, why didn't the Presiding Justices apply that prohibition specifically to terms like "super lawyer" and "best lawyer", two terms which clearly suggest a lawyer's ability to influence results? Or did the Justices conclude that terms like "best lawyer" and "super lawyer" could not be construed as "bona fide professional ratings." In either event, they have left us with a dilemma which will only be resolved over time, and only by interpretation in the lower courts.

Assuredly, even if the Justices intended to prohibit such terms as "super lawyer" and "best lawyer," the interests relying on continued use of those terms will not simply go away. On the contrary, they will put up the same stiff fight as they have in New Jersey.

This week, a lawyer in the office received a card from the publisher of New York Super Lawyers 2007. It asked him to visit the company's web site and vote for "the top lawyers whose work you have observed first hand." It informed him that in September 2007, the publisher would distribute a New York Times supplement in Manhattan, as well as the regional edition of a "Super Lawyers Magazine," which would be sent to "lawyers across the state, plus nationwide to the lead counsel of Russell's 3000 companies."

How long will it be before the issues surrounding commercial lawyer rating services are raised in the lower courts? Or, perhaps, the New York State Bar Association will wish to take the issue up in a new Ethics Opinion?