

# Litigation Over Lawyer Ratings Continues in NY and NJ

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Still unresolved in both New York and New Jersey is the issue of lawyer ratings by such organizations as Martin-Dale-Hubbell, Super Lawyers, and Best Lawyers. Several new rating services have entered the field since the issue surfaced so dramatically in Opinion 39 of the New Jersey Committee on Lawyer Advertising. (see, NYPRR, September 2006, *The Second Battle of Trenton*.) In Opinion 39 (issued June 17, 2006), the NJ Committee said:

The Committee has received complaints and inquiries relating to New Jersey lawyers advertising themselves or their colleagues as "Super Lawyers" and/or "Best Lawyers In America." The issue is whether advertisements in any medium of distribution publicizing certain New Jersey lawyers as "Super Lawyers" or "Best Lawyers In America" violate the prohibitions against advertisements that are comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a) (2). It is the Committee's position that this type of advertisement is prohibited by the *Rules of Professional Conduct*.

Two prominent Newark law firms – Stryker, Tams and Dill, LLP and Gibbons, Del reo, Dolan, Griffinger & Vecchione, PC, acting for several New Jersey lawyers and for Key Professional media, d/b/a "Super Lawyers" – immediately petitioned the Supreme Court of New Jersey for a determination that Opinion 39 was unconstitutional.

Thus, in New Jersey, the issue was framed in stark terms – either a lawyer was able to advertise his designation as "Super Lawyer," or he was not. And there the matter sits. The Supreme Court has not considered or decided the issue. Instead, on March 23, 2007, the Court remanded the matter to retired appellate Division Judge Robert A. Fall as Special Master. Judge Fall was ordered to:

1. .... (Develop) "On an expedited basis, an evidentiary record in respect of the facts and legal issues that relate to the petition for review..."
2. As part of his determination on the scope and content of the record, consider all motions to expand the record pending before the Supreme Court, and
3. File his findings and conclusions... within forty-five days of the completion of the plenary hearing.

A phone call to the Supreme Court on October 10 confirmed that the matter is pending before the Special master.

## The New York Approach

In the meantime, the same issue has taken a different course in New York. Basically, it is not being framed in the same stark terms and makes resolution of the issue both more difficult and potentially less helpful to enforcement agencies.

When the four appellate Divisions announced their joint rules controlling lawyer advertising on January 4, 2007 (the rules became effective on February 1), they did not address directly advertising using comparative lawyer ratings like "Super Lawyer" or "Best Lawyer." The only provisions of the new rules that relate to the issue – and these, only tangentially – are contained in Dr 2-101(B) and (Dr 2-101(C)(7).

Dr 2-101(B) permits a lawyer to advertise a number of facts about him/herself. Included in these facts are "bona fide professional ratings." This begs the question: "are ratings by commercial interests – e.g., "Super Lawyer", "Best Lawyer", "Hot List" – "bona fide ratings?"

Dr 2-101(C), on the other hand, lists items which may not be used in lawyer advertising. Among these (Item 7) is: "... a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." This raises two questions: 1) is a designation like "Super Lawyer" a "nickname, moniker, motto or trade name"? and 2) does the designation imply "an ability to get results in a matter"? (see, NYPRR, February 2007 and march 2007.)

Now, the issue is likely to be resolved in the federal courts as part of a much larger issue: What, if any, rules are the states entitled to apply to lawyer advertising under the Constitution?

In *Alexander v. Cahill*, N.D.N.Y. No. 5:07-CV-117, (July 23, 2007), a petition by New York lawyers to challenge the new rules, Federal northern District Court Senior Judge Frederick Scullin considered that very question and found that many of the rules imposed by the appellate Divisions were unconstitutional, including, specifically, "that portion of {Dr 2-101(C) (7) prohibiting use of "a nickname, moniker or motto." as to "trade names," also included in (7), he found that the prohibition was more extensive than necessary to protect the state's interests, and therefore also unenforceable. (see, *Central Hudson*, *infra*.)

This past month, the defendants in *Alexander*, constituting the Chief Counsel of the various Departmental Disciplinary Committees or Judicial District Grievance Committees, appealed to the Court of Appeals.

The question of lawyer advertising has been considered by the Supreme Court in several cases. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court extended the protection of the first amendment to lawyer advertising as commercial speech. It held, however, that while lawyer advertising cannot be subjected to blanket suppression, the states may impose reasonable restrictions on the time, place and manner of the advertising. The Court also made clear that advertising that is false, deceptive or misleading is not entitled to protection.

In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Court announced a four-part test for regulating the content of commercial speech, including lawyer advertising: 1) does the advertising concern a lawful activity and is it not misleading? 2) is the government interest in regulating the activity substantial? 3) does the regulation directly advance the

government's interest? and 4) is the regulation more extensive than necessary to advance that interest. (See, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

Meanwhile, as the proceedings in New York and New Jersey proceed to a climax, lawyers are continuing to advertise their designation as "Super Lawyer" or "Best Lawyer". This past August, the 108-page metro Edition of New York Super Lawyers 2007 was bound into the New York Times Sunday magazine.

It will certainly be interesting to see the outcome of all this.