

The Second Battle of Trenton: The "Super" and The "Best"

BY LAZAR EMANUEL

As we write, the battle lines are being drawn for the Second Battle of Trenton. (See, Page 9.) On one side - the Committee on Attorney Advertising appointed by the New Jersey Supreme Court - and, on the other - an array of opponents with vested interests in maintaining the designations "Super Lawyer" and "Best Lawyer". The battle will undoubtedly extend to lawyers in New York as our Appellate Divisions consider and respond to comments on the extensive changes they propose to make to the Disciplinary Rules governing Lawyer Advertising & Solicitation. (See, NYPRR, page 1, August 2006.) The Courts' public comment period ends on September 15, and the changes are scheduled to take effect on November 1, 2006.

On July 17, 2006, the New Jersey Committee issued its Opinion 39. The Opinion begins:

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*.

New Jersey Rules of Professional Conduct

To understand the Committee's position, we need to review the relevant provisions of the New Jersey Rules of Professional Conduct. RPC 7.1 states:

- (a) A lawyer shall not make false or misleading communications about the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: ...
 - (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
 - (3) compares the lawyer's services with other lawyers' services....

On August 14, two prominent Newark law firms - Stryker, Tams and Dill, LLP and Gibbons, Del Reo, Dolan, Griffinger & Vecchione, PC - filed a petition (the "Stryker/Gibbons Petition") with the New Jersey Supreme Court on behalf of six New Jersey lawyers and one Proposed Intervenor Petitioner. The proposed intervenor is Key Professional Media, Inc., d/b/a "Super Lawyers" and "Law & Politics", publisher of several magazines which are distributed and marketed as supplements to local public magazines and newspapers. In New Jersey, the magazine was first distributed in 2005 as an advertising

insert in *New Jersey Monthly*. In New York, the Manhattan Edition of *New York Super Lawyers* is distributed as an advertising supplement to the New York Times. According to the Company's website (www.superlawyers.com):

Super Lawyers names the top attorneys in Manhattan as chosen by their peers and through the independent research of Law & Politics. 2006 New York Super Lawyers is based on surveys of more than 59,000 lawyers in Manhattan. The goal was to select as Super Lawyers the top 5 percent of New York attorneys in more than 60 practice areas. New York Super Lawyers is published annually in a special advertising supplement in The New York Times which reaches 684,000 Manhattan readers. New York Super Lawyers - Manhattan Edition has been mailed to more than 76,000 Manhattan lawyers.

[Author's note: The Stryker/Gibbons petition does not address Best Lawyers in America, a publication released both as a book and as a "Special Advertising Section" attached to magazines of general circulation. In New York, *The New York Area's Best Lawyers* was an 84page Special Advertising Section bound in to the summer edition of New York magazine. The cover of the special section shows that it was prepared by *The Best Lawyers in America*. The section was published by Woodward/White, Inc. of Aiken, SC, in cooperation with ALM, publisher of the New Jersey Law Journal and the New York Law Journal, among many other publications directed to lawyers. Because the New Jersey Committee's Opinion 39 specifically refers to Best Lawyers in America in essentially the same terms as *Super Lawyers (supra)* and because the Best Lawyers website (www.bestlawyers.com) contains a news item questioning the Committee's conclusions, we assume that Best Lawyers will also take action to upset or modify the Committee's Opinion.]

Questions Raised By Petition

The Stryker/Gibbons Petition asks the New Jersey Supreme Court for review of Opinion 39. The Petition states:

This Opinion's adverse effects on the Bar have been immediate and widespread. An entire publication has been shut down and scores of New Jersey attorneys that previously used their Super Lawyers selection to promote their practices can no longer do so.

After explaining the process which Super Lawyers follows in selecting its Super Lawyers, the Stryker/Gibbons Petition raises the following five questions:

1. Is a blanket prohibition on comparing advertising under *RPC 7(a)(3)* an unconstitutional abridgement of commercial free speech?
2. Does this advertising create an "unjustified expectation" of results, in violation of *RPC 7.1(a)(2)*?
3. Did the Committee's factually baseless exemption of Martindale Hubbell from its advertising prohibition deny substantive due process of law and equal protection of the law to petitioners?
4. Does the Opinion amount to a gag rule or prior restraint upon attorneys' First Amendment rights to express their opinions as to other lawyers' abilities?
5. Did the Committee violate due process by denying petitioners notice and an opportunity to be heard, and did it violate the procedures of R. 1:19A2(c) by issuing a de facto advertising guideline without an opportunity for comment by the bar or Supreme Court approval?

Impact on New York Lawyers

How can a court battle in Trenton affect lawyers in New York, especially since New York's Rules make no present reference to either Super Lawyers or Best Lawyers or to any other term that compares one lawyer's services to another's? (DR 2101(A) in its present form prohibits any communication to a prospective client or to the public that is "false, deceptive or misleading," but the Stryker/Gibbons Petition argues that the screening process used by Super Lawyers assures that the designation "Super Lawyer" is neither false nor misleading.)

But the second Battle of Trenton can affect New York lawyers because the Appellate Divisions have proposed significant amendments to New York's DR 2101. For example, DR 2101(D)(8) would provide that an advertisement or solicitation by a lawyer may not "include, depict, utilize or contain...a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." This new rule would seem to prohibit the use of terms like Super Lawyers or Best Lawyers.

Further, DR 2101(E) would prohibit the following, unless they comply with DR 2101(F):

1. statements reasonably likely to create an expectation about results the lawyer can achieve
2. statements comparing a lawyer's services with the services of other lawyers
3. testimonials or endorsements of former clients
4. statements describing or characterizing the quality of a lawyer's services

DR 2101(F) would permit the statements and testimonials under DR 2101(E) if:

1. they are predominantly informational in nature; are not false, deceptive and misleading; and are not in violation of a disciplinary rule;
2. they are objectively verified by the lawyer or law firm as of the date on which they are first disseminated
3. they are accompanied by a disclaimer stating: "prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained."

Except for the two requirements that the lawyer objectively verify the statement or testimonial as of the date of dissemination, and that he include the necessary disclaimer, it's hard to see how the substance of the proposed New York Rules will differ significantly from the existing New Jersey Rules.

True, the New York Rules would appear to permit statements comparing a lawyer's services with the services of other lawyers, as well as statements that are likely to create an expectation of results, so long as they are not false, deceptive and misleading, while the New Jersey Rules deem such statements to be inherently false and misleading. But the additional requirement in proposed DR 2101(D)(8) that an advertisement not include any "nickname, moniker, motto or trade name that implies an ability to obtain results in a matter" cancels any real difference. Can the designations "Super Lawyers" and "Best Lawyers in the New York Area" be construed as anything other than statements which would imply to a client the ability of the lawyer "to obtain results in a matter"?

As we have noted, the comment period established by the Appellate Divisions will expire on September 15, 2006. The New Jersey Supreme Court will still be considering Opinion 39 on that date. The New York Courts must therefore decide whether they too want to face the attack on the proposed changes in DR 2-101 that will inevitably be mounted by New York lawyers on behalf of themselves and the publishers of *Super Lawyers* and *Best Lawyers in America*. (At a recent CLE program on lawyer advertising in Manhattan, several personal injury lawyers announced that they were already making plans to file a constitutional challenge in federal court if the proposed New York rules take effect in anything like their present form.) In any event, the present posture of the issues would suggest that no matter what the New Jersey or New York courts decide, the issues of due process and constitutionality raised in the Stryker/Gibbons Petition will ultimately require resolution by the U.S. Supreme Court.

What's At Stake?

Lawyers participate directly in several ways in the process by which the designations *Super Lawyers* and *Best Lawyers* are assigned and exploited. First of all, they cooperate in the steps by which individual lawyers are selected for these designations. *Super Lawyers* describes this process as it relates to New Jersey as follows:

The *Super Lawyers* selection process is divided into four phases:

(1) **Creation of a candidate pool.** *Super Lawyers* mails more than 30,000 ballots to New Jersey lawyers admitted more than five years. Accompanying the ballot is a full description of the selection process. *Super Lawyers'* research staff also engages in its own research for qualified candidates. (2) **Research.** Research is conducted utilizing twelve search criteria. Each attribute is given a specific point value. (3) **Peer Evaluation by Practice Area.** Review and refinement of the candidate pool is conducted by practitioners receiving the highest point value in their areas of practice. (4) **Selection.** Once all point totals are counted, candidates are grouped according to the size of their firms. The top five percent in each category are named *Super Lawyers*.

In its New York magazine supplement, *Best Lawyers* described its selection process this way:

The method used to compile *Best Lawyers* remains unchanged since the first edition was compiled more than 20 years ago. Lawyers are chosen for inclusion based solely on a vote of their peers....The nomination pool for the 2007 edition consisted of all lawyers whose names appeared in the previous edition of *Best Lawyers*, lawyers who were nominated since the previous survey, and new nominees solicited from listed lawyers. In general, lawyers were asked to vote only on nominees in their own specialty in their own jurisdiction. Lawyers in closely related specialties were asked to vote across specialties...Voting lawyers were also given an opportunity to offer more detailed comments on nominees. Each year, half of the voting pool receives fax or email ballots; the other half is polled by phone.

In the selection process used by *Super Lawyer* and *Best Lawyers*, therefore, lawyers participate by contributing their nominations and their ballots, and they also participate by allowing themselves to be nominated and designated.

More significantly, lawyers who receive either designation participate by placing their ads in the supplements and Special Advertising Sections published by both companies.

The Special Section accompanying the Summer issue of New York magazine, for example, contained 84 pages with ads ranging from simple business card listings to two page spreads. Many of the ads contained the photos of law firm partners or of individual lawyers. At the top of each page, the legend "Special Advertising Section" appeared.

Obviously, this has become Big Business, and the interests involved will fight to protect it until the end. The issues ultimately come down to these:

- Does the legal profession want to permit any official, court sanctioned process by which lawyers are compared or rated? If so,
- Should the process be limited to the certification of specialists by organizations approved by the state or by the ABA (see, e.g., ABA Model Rule 7.4 and New York's DR 2105(C)), or should comparisons and ratings extend beyond specialization to include quality ratings as well? Alternatively, or additionally,
- Should commercial enterprises be permitted to devise and control a process by which lawyers are rated or compared?
- If commercial enterprises are permitted to "rate" or compare lawyers, should lawyers be permitted to:
 - Participate in the rating or selection process; and/or
 - Advertise in, or cite, any such rating?
- If the legal profession attempts to prohibit commercial enterprises from rating lawyers, or to prohibit lawyers from participating in and advertising the results of the rating process, can lawyers successfully overcome those prohibitions by asserting their constitutional rights under the First Amendment or other provisions?

These are big and critical issues, and their resolution is far from clear.

Illustrative of the scope of the problem facing the courts was the special treatment extended to Martindale Hubbell in Opinion 39 by the New Jersey Committee on Attorney Advertising. After striking down ads in *Super Lawyers* and *Best Lawyers*, the Opinion states:

In contrast, other rating organizations, such as Martindale Hubbell, which rates attorneys AV, BV or CV, are directed toward other attorneys. Martindale notes that not all attorneys or firms are rated and that most attorneys as they become more experienced move from a CV towards an AV rating. These ratings are familiar to other lawyers and likely have minimal recognition to the public.

As we might have expected, this special treatment of Martindale, a LexisNexis affiliate, was challenged directly in the Stryker/Gibbons Petition as a "factually baseless exception," and as a denial to *Super Lawyers* of equal protection and due process. Martindale bases its ratings on its Peer Review Ratings system, which "evaluates" lawyers and law firms in the U.S. and Canada. The evaluations are based on "the confidential opinions of members of the Bar and the Judiciary, including both those who are rated and those who are not." According to Martindale Hubbell itself (See, Peer Review Ratings - The Process, www.martindale.com):

Martindale Hubbell representatives conduct personal interviews to discuss lawyers under review with other members of the Bar. A compilation of these opinions from various sources is necessary to form a consensus, and lawyers under review are sometimes asked to provide professional references to assist with the process.

In addition, confidential questionnaires are sent to lawyers and judges in the same geographic location, area of practice or industry as the lawyer being rated. Members of the Bar are instructed to assess their colleague's legal ability and general ethical standards.

On the face of it, it's difficult to see how the Martindale selection system is more transparent or reliable than either of the others.

Only time and the courts will determine how this all plays out.

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