

Which Is Better: Super or Best?

Some months ago, we all got a copy of a 36-page “magazine” titled “Southwest Super Lawyers.” Inside, there were articles and photographs of and about various lawyers in Arizona and New Mexico, many of whom we all recognized as super lawyers and, in many cases, super friends as well.

The magazine was sent to lawyers, and none of us thought much about whether such a limited mailing ran afoul of ER 7.1 (Communications Concerning a Lawyer’s Services).¹ This is the ethical rule that prohibits the making of false or misleading statements concerning a lawyer or a lawyer’s services. The publication even stated at page 17 that it was a “magazine published by attorneys, exclusively for attorneys.” But what many of us did not know was that at about the same time, another 28-page publication—a “Special Advertising Supplement”—was included in every copy of the Sunday *New York Times* sold in Arizona. This version presumably was sold to and read by a lot of people who were not necessarily lawyers. This second publication was also titled “Southwest Super Lawyers,” included the same names and, with a few exceptions, had the same promotional material found in the 36-page version. Noticeably absent was the assertion that it was intended exclusively for lawyers. What was stated in its place was the assertion that it was a “resource designed to empower and inform consumers of legal services.”


Both publications have complete and easy-to-understand explanations of the selection process used to determine a Super Lawyer. Both publications indicate that although no lawyer pays to be listed so designated, that same lawyer *does* pay to be included in the advertisement stating that he or she has been so selected. In other words, the lawyers who appear in the publications paid Law & Politics, the publisher and administrator of the Super Lawyer process, a fee for having the photographs, articles and listings found in them.²

But the New Jersey Supreme Court’s Committee on Attorney Advertising recently held that the Super Lawyer advertising scheme is a violation of New Jersey’s version of ER 7.1, because (1) it is likely to create an unjustified expectation about the results a given lawyer can achieve and (2) it compares the lawyer’s service with other non-Super Lawyers’ services, two factors that in years past have usually proved fatal to any ethical analysis of an advertisement for legal services.³

The New Jersey opinion is being challenged in court, has been temporarily “stayed” by the New Jersey Supreme Court, and very clearly constitutes a minority view in states’ ethics opinions⁴ and in court rulings.⁵ It can be distinguished from how the Arizona ethics authorities might hold in that Arizona specifically eliminated from the body of its ER 7.1 the provisions concerning comparisons with other lawyers’ services and the creation of unjustified expectations about results the lawyer can achieve, factors that in Arizona formerly constituted *per se* violations of the rule. Arizona’s ER 7.1 now makes factors

such as unjustified expectations and comparisons with other lawyers simply “tools” for analyzing whether there have been false or misleading statements made concerning the lawyer’s services.⁶

So, is it unethical to advertise yourself as a Super Lawyer in Arizona? Probably not. As long as a reasonable person, lawyer and non-lawyer alike, would conclude that it can be verified that the lawyer claiming to have been elected as a Super Lawyer is, in fact, so designated, Arizona’s ethical rules concerning lawyer advertising have apparently been satisfied. But lawyer listings will continue to draw both praise and condemnation from ethics authorities.⁷

The final result of the challenge to New Jersey’s present position may help all of us analyze the ethics of future lawyer listing promotions. 

endnotes

1. Rule 42, ARIZ.R.S.C.T.
2. A similar listing, called “Best Lawyers in America,” has been found to be perfectly ethical under the Arizona Rules of Professional Conduct. Ariz. Ethics Op. 05-03 (Advertising; Best Lawyers in America) (July 2005). The opinion limits its application to the designation of Best Lawyers in America.
3. N.J. Ethics Op. 39 (Advertisements Touting Designation as “Super Lawyer” or “Best Lawyers in America”) (July 24, 2006).
4. See Michigan State Bar Committee on Professional and Judicial Ethics, Informal Op. RI-341 (June 8, 2007); Iowa Ethics Op. 05-03 (2005); Iowa Ethics Op. 93-06 (1993); Virginia Ethics Op. 1750 (2006).
5. See *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000) (Martindale–Hubbell AV rating); *Allen, Allen, Allen & Allen v. Williams*, 254, F. Supp. 2d 614 (E.D. Va. 2003) (Best Lawyers in America).
6. Ariz. Ethics Op. 05-03; see also Comment 3 to ER 7.1, Arizona Rules of Professional Conduct (the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client).
7. Terry Carter, *The Ratings Game*, 93 ABA J. 27 (Jan. 2007).

“Bar Counsel Insider” is on p. 55.

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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