

# STATE BAR ASSOCIATION OF NORTH DAKOTA

## ETHICS OPINION

Opinion No. 08-02

THIS OPINION IS WITHDRAWN AND SUPERSEDED BY 09-08

The Ethics Committee received a request for an opinion on whether attorneys can advertise or market themselves as “Super Lawyers” as designated by Minnesota Law and Politics.

### FACTS

The Requesting Attorney has been designated as a “Super Lawyer” by Law and Politics, a company that publishes Minnesota Law and Politics, special “Super Lawyer” advertising inserts for newspapers and regional magazines, and a Super Lawyers magazine, which is touted as featuring articles about attorneys named to the “Super Lawyers” list.<sup>1</sup> The process ostensibly used by Law and Politics to designate an individual as a “Super Lawyer” is described on the website <https://www.superlawyers.com>. The “Super Lawyers” designation identifies the individual as one of the top 5% of attorneys in their state or region. Designated attorneys are additionally listed by practice area and by those with the highest rankings, overall, and by specific practice area and gender. Designated attorneys apparently may select a primary practice area and two additional secondary practice areas that are searchable by members of the public on the superlawyers.com website.

Attorneys are not required to pay anything to be listed in the publications or website. However, one primary purpose of the designation is to sell advertising to the identified attorneys. For a fee, designated individuals can include a color picture and a

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<sup>1</sup> Law and Politics is described as a publication of Key Professional Media, Inc. This opinion will simply refer to Law and Politics as the entity that compiles and publishes the various lists of those designated “Super Lawyers.”

short biography or profile to accompany their identification in the publications and on the associated website. Larger advertising layouts are additionally available for purchase to identify an attorney or all attorneys in a firm identified through the selection process.

### **ISSUE**

Whether North Dakota attorneys identified as “Super Lawyers” through Law and Politics and associated entities may advertise or market themselves as such and if so, what, if any, disclosures are required.

### **DISCUSSION**

The Ethics Committee has taken a long standing position that it can only provide limited guidance on the content of attorney advertising. The Ethics Committee is not an investigatory body and cannot verify the veracity or accuracy of the claims made in an advertisement. It remains the obligation of each attorney to ensure that communications, in context, are truthful and not misleading. However, the Committee will identify specific concerns arising from the content of attorney advertising. State Bar Association of North Dakota Ethics Committee Opinion 97-11 (November 11, 1997); State Bar Association of North Dakota Ethics Committee Opinion 98-06 ( July 14, 1998); State Bar Association of North Dakota Ethics Committee Opinion 00-03 (May 3, 2000).

The issue raised in this request implicates Rule 7.1 of the North Dakota Rules of Professional Conduct governing communications concerning the services of a lawyer. This provision provides:

A lawyer shall not make a false or misleading communication about the lawyer, a person professionally associated with the lawyer, or their services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) 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;  
or

- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The issue also implicates constitutional standards governing permissible restrictions on attorney advertising. Drawing comparisons between the quality and cost of services provided to the consuming public lies at the heart of commercial speech and is constitutionally protected by the First Amendment. Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977). But the Supreme Court has also “recognized the special possibilities for deception presented by advertising for professional services.” In re R.M.J., 455 U.S. 191, 202 (1982). “The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the ‘product’ renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.” Id.

False and inherently misleading advertising is not protected and may be prohibited completely. Speech that is potentially misleading, although not inherently so, may not suffer a complete prohibition where the information can be presented in a way that is not deceptive. Id. at 203. Where an omission leaves an incomplete picture, the “preferred remedy is more disclosure, rather than less.” Bates, 433 U.S. at 375. Even facially truthful statements may justify a disclaimer or further disclosure where the potential to mislead remains. Peel v. Attorney Registration and Disciplinary Commission, 496 U.S. 91 (1990).

The Committee has significant concerns that any advertisement touting the “Super Lawyers” designation and what it purports to represent without any reference to the entity making that designation, its purpose, and the methodology used would be misleading. In addition, the statement that an attorney is a “Super Lawyer,” implying the

individual is one of the top 5% of the attorneys in the state or region, is necessarily comparative in nature. The statement that one has simply been recognized as such by Law and Politics, in the context of attorney advertising, remains comparative as the only purpose served is to communicate that assessment. The question is whether that assessment can be factually substantiated or disclaimed sufficient to render the statement neither false nor misleading.

In both the Minnesota Law and Politics publication and the superlawyers.com website, the methodology used to identify an attorney is described. The process ostensibly includes peer nomination and review together with internal review and adjustment by Law and Politics staff. The factors internal staff reportedly utilize in identifying additional candidates and evaluating candidates are outlined with a considerable degree of specificity. However, the final aggregate score attributed to a candidate is left to an undisclosed and claimed proprietary formula or methodology. Candidates are then additionally broken down by undisclosed firm size that purportedly varies from jurisdiction to jurisdiction.

The Committee is not in a position to judge the veracity or efficacy of the claims made by Law and Politics. However, the Committee has specific concerns that the methodology is presented with such degree of specificity and claimed objective and scientific validity as would lead a reasonable person to conclude that the claimed comparison could be substantiated. This is particularly troubling given that the process is not entirely transparent and members of the public remain unable to obtain all of the information upon which Law and Politics makes its selection.

In a recent Advisory Opinion from the State of Connecticut addressing the issue of advertisements touting the “Super Lawyers” designation, the reviewing committee concluded that a disclaimer simply referencing the Super Lawyers website and its

description of the selection process was insufficient:

We considered whether a link to the Super Lawyers website would provide the consumer with the appropriate disclaimer regarding the Super Lawyers selection process. We conclude that this process is not appropriate in light of the information currently displayed on the Super Lawyers website. Super Lawyers. "Super Lawyers Selection Process" at [http://www.superlawyers.com/about/selection\\_process.html](http://www.superlawyers.com/about/selection_process.html) (last visited October 1, 2007). There, the process is described in general terms, but no specific empirical data is given for any jurisdiction, including Connecticut. Accordingly, we conclude that a link to the Super Lawyers website is insufficient to create an appropriate disclaimer.

Advertising Advisory Opinion of the Connecticut Statewide Grievance Committee, No. 07-00188-A (October 4, 2007). See also Advertising Advisory Opinion of the Connecticut Statewide Grievance Committee, No. 07-00776-A (October 5, 2007). An opinion from the New Jersey Supreme Court Advisory Committee on Attorney Advertising provided a similar assessment of the described selection process:

The methodology used by the media corporation to award the "Super Lawyer" designation is unclear. Although the designations are purportedly based in part on a poll of practicing New Jersey attorneys and input from non-attorneys, then weighted in accordance with a non-disclosed system established by the publishers, Law & Politics and/or its sister corporation Key Professional Media, they do not make available the specific methodology for objective review or analysis. A careful review of the selective aspects of the promotional methodology, however, underscores the arbitrary selection and ranking process used by the publisher, and provides no empirical or legally sanctioned support for the results.

N.J.Eth. Op. 39 (July 24, 2006).

The New Jersey Supreme Court Advisory Committee on Attorney Advertising opinion has currently been stayed by the New Jersey Supreme Court. Advisory opinions from other jurisdictions have seemingly endorsed aspects of the evaluative process used to designate an individual as a "super lawyer" or found the publication's description of the selection process to be a sufficient disclaimer. See MI Eth. Op. RI-341 (June 8, 2007); PA Eth. Op. 2004-10 (December 2004); PA Eth. Op. 2005-125 (September 2, 2005); IA Eth. Op. 2007-09 (October 30, 2007) (citing IA Eth. Op. 2007-

04); De Eth. Op. 2008-2 (February 29, 2008); NC Eth. Op. 2007-14 (January 28, 2008). These Committees have concluded that it is possible to use the “Super Lawyers” designation in advertising while complying with ethical rules on communications on attorney services.

In a recent opinion, the Delaware State Bar Association Committee on Professional Ethics explained:

In sum, other States’ Ethics Committees have concluded lawyers may include the designation of “Super Lawyer” or “Best Lawyer” in advertisement or other communication while remaining in compliance with the State’s Ethics Rules. This committee believes a Delaware Lawyer may do the same. However, a Delaware lawyer should only state in the advertisement that s/he were included in the listing of “Super Lawyers” or “Best Lawyers” by the publication. The Delaware lawyer may not present such a designation that implies s/he is superior or better than another member of the Delaware Bar. The Delaware Lawyer should note the area of practice s/he was designated as a “Super Lawyer” or “Best Lawyer.” It also should be noted that the Delaware Lawyer should not use the “Super Lawyer” or “best Lawyer” terminology in the abstract—that it, the term must be used only with reference to the listing publication, and contain the years(s) of listing. This Committee believes that a Delaware Lawyer will not comply with LPRC 7.1 if they list a designation that they received simply because they paid a fee.

Therefore, by including the listing of the lawyer as a “Super Lawyer” or “Best Lawyer” in an advertisement or other communication, it is possible for the lawyer to comply with LRPC Rule 7.1. In doing so, the lawyer must make certain that the statement, as a whole, is not misleading, and follow the guidelines established by the Committee in this opinion.

De Eth. Op. 2008-2 (February 29, 2008).

The Committee is cognizant that whether a statement is misleading may depend on the group to which the communication is directed. It appears from the publication that the primary recipients of the Minnesota Law and Politics and Super Lawyers magazines are attorneys. The primary users of the associated website is not known, but the site is designed in part to enable an individual to search for attorneys by location and practice area. The website contains the statement that a practice area search will help “you find an attorney who specializes in a specific area of law.” The Committee has specific concerns that an attorney’s apparent self identification of practice areas,

together with the Super Lawyer designation and the features and descriptions of the website, may mislead consumers.

### CONCLUSION

In conclusion, the Ethics Committee can only provide limited guidance on the content of attorney advertising. The Committee does, however, express specific concerns that any advertising references to the "Super Lawyers" designation without an explanation of the purpose for the designation and the methodology used to select identified attorneys may be misleading to consumers and therefore violate Rule 7.1 of the North Dakota Rules of Professional Conduct. The Committee also expresses specific concerns that a selected attorney's apparent ability to self identify primary and secondary practice areas which are the basis for attorney searches on the superlawyers.com website, which states that a search will help in finding a "Super Lawyer" that "specializes" in a specific area of the law, may mislead consumers and therefore violate Rule 7.1 of the North Dakota Rules of Professional Conduct.

This opinion was drafted by Tag C. Anderson and adopted by the Ethics Committee by unanimous vote on April 10, 2008.<sup>2</sup>

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Dan Greenwood, Chair

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<sup>2</sup> James Hill, Joseph Wetch Jr. and Anthony Weiler did not participate in the drafting or deliberations culminating in this opinion.