



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1007 (4/3/14)

Topic: Advertising a lawyer’s listing in “Best Lawyers.”

Digest: A lawyer may advertise his or her inclusion in “Best Lawyers” provided that the lawyer’s assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process.

Rules: 7.1

QUESTION

1. The inquirer states that he will be nominated for inclusion in the 2015 “Best Lawyers” publication for the New York Area, but is concerned that inclusion in “Best Lawyers” may violate Rule 7.1 because the listing implies that he has skills or results that are better than other lawyers without a basis in objective criteria. The inquirer notes that the listing in “Best Lawyers” might be considered a statement comparing him to other attorneys or implying to the public that he is one of the best attorneys without any presentation of objective criteria, and he suggests he may not be the “best” attorney as compared to others.

OPINION

2. The inquiry concerns a form of lawyer advertising. Whether advertising that a lawyer is listed in “Best Lawyers” is permissible is governed by Rule 7.1 in New York’s Rules of Professional Conduct (the “Rules”). In general, Rule 7.1 prohibits the use or dissemination of an advertisement that “contains statements or claims that are false, deceptive or misleading.” Rule 7.1(a)(1).¹

3. “Best Lawyers” publishes lists that may constitute professional ratings of lawyers in various geographic areas and areas of legal practice. Rule 7.1(b) provides that an advertisement may include information as to “bona fide professional ratings.” A rating is not “bona fide” unless it is “unbiased and nondiscriminatory.” Rule 7.1, Cmt. [13].

¹ The Committee responds to inquiries regarding an inquirer’s own conduct, rather than the conduct of a third party. In the scenario described above, inclusion in the “Best Lawyers” listing does not constitute an “advertisement” under Rule 1.0(a). A lawyer’s inclusion in the “Best Lawyers” list is determined by the publication, and does not occur due to any direct affirmative effort by the lawyer to be included in the listing. At the same time, if the “Best Lawyers” listing violates Rule 7.1, then the lawyer or the lawyer’s firm would violate the Rule by making reference to the listing in any marketing material.

[The professional rating] must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating services economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.”

Rule 7.1, Cmt. [13]. Thus, determining whether the “Best Lawyers” listing is a “bona fide professional rating” requires a fact specific inquiry into the methodology used by the publication to create the list.

4. The “Best Lawyers” publication explains that its list is based on peer-review and attempts to depict the consensus opinion of “leading lawyers” about the professional abilities of colleagues in the same geographical and legal practice areas. Nominations are open to anyone, although the primary sources for nominations are clients, other lawyers and marketing teams. In-house lawyers are not eligible to be nominated. Lawyers included in the previous “Best Lawyers” edition are automatically nominated into their practice area(s) for the next peer-review process. The ballots are distributed to lawyers currently listed based on the voter’s practice area(s) and geographic regions. The ballots ask if the respondent were unable to handle a case himself or herself, how likely would the respondent be to refer it to nominee, and requests a response rating on a scale of “1” to “5,” where “5” is the highest. Lawyers may not vote for themselves, and their names will be removed from their own ballots. Voters can complete ballots for lawyers in their own firm, but these votes do not weigh as heavily as votes from outside the firm. Best Lawyers staff reviews the votes and comments, selected lawyers are checked against state bar association sanction lists to ensure the nominees are in good standing, and then the listed lawyers are notified of their inclusion and the list is released to the public.

5. We have opined that for a rating to be “bona fide and nondeceptive it should at least be unbiased, nondiscriminatory and based on some defensible method.” N.Y. State 877 (2011); see also Rule 7.1, Cmt. 13. While we will not opine on whether a “Best Lawyers” listing is “bona fide,” the Committee has not identified a disqualifying defect in the methodology used. The lawyer must assess whether the methodology is unbiased, nondiscriminatory and defensible. The lawyer’s assessment should consider that nominations are open to everyone, and making an assessment of the following: (1) that the “leading lawyers” who participate in voting are limited to the lawyers who are currently listed in the publication; (2) the question posed to voters and the “1” to “5” ranking system; (3) the weighting of votes completed by lawyers in one’s own firm as compared to those outside the firm; (4) the review conducted by Best Lawyers staff; and (5) the automatic nomination of lawyers previously included in the publication. In addition, although it does not appear that inclusion is biased by direct economic interest in the form of the receipt of payment from the listed lawyers, an assessment of the bona fides of inclusion in “Best Lawyers” might also consider that automatic nomination of lawyers previously listed in the publication ensures the nomination of lawyers to whom Best Lawyers has sold additional marketing materials associated with the listing, including special reprints and enhanced advertising.

6. The inquirer also questioned whether advertising that he is listed in “Best Lawyers” may constitute a statement comparing the lawyer to other attorneys or implying that he is one of the best attorneys. Rule 7.1(d)(2) permits advertising that compares the lawyer’s services with the services of other lawyers and Rule 7.1(d)(4) permits advertising that describes or characterizes the quality of the lawyer’s or law firm’s services provided that the statement “can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated.” Comment [12] explains that descriptions of characteristics of a lawyer or law firm that compare its services with other firms and cannot be factually supported could mislead potential clients and therefore it would be improper for a lawyer to advertise that he or she is the “Best.” Rule 7.1, Cmt. [12].

7. We believe that describing a lawyer as the “Best” can be distinguished from inclusion in a “Best Lawyers” listing. Rather than stating that any particular lawyer is the “best,” the magazine publishes a long list of attorneys selected according to a nomination and voting methodology that is described in the publication, without ranking the attorneys or making any specific statement about a particular lawyer’s skills as compared to those who are not listed. The listing is simply a factual statement that the compilers of the listing have selected the lawyer based on the disclosed methodology. Even if the rating is construed as a comparison of the quality of the lawyer’s services to others, the lawyer’s determination that the rating is “bona fide” satisfies the requirement under Rule 7.1(e)(2) that the statement be factually supported as of the date that it is published or disseminated.

CONCLUSION

8. A lawyer may advertise his or her inclusion in “Best Lawyers” provided that an assessment of the methodology used to determine a lawyer’s inclusion reveals that it is an unbiased, nondiscriminatory and defensible process. Advertising a lawyer’s inclusion in the publication is distinguishable from making a statement in advertising that cannot be factually supported and is misleading. If the listing constitutes a comparison of lawyers’ skills, a lawyer’s determination that it is a “bona fide” rating satisfies the requirement that the statement be factually supported on the date that it is published or disseminated.

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