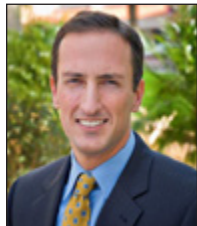


Q&A



LAWYER LIABILITY AND ETHICS

Truth in Advertising



Joseph Brophy
Jennings Haug
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Lawyers are like actors in the sense that both the legal and entertainment industries like to give themselves awards to convince the public of how wonderful and smart they are. And because if we do not, no one else will. We are all familiar with titles such as “AV Preeminent,” “BV Distinguished,” “Super Lawyers” and “Rising Stars.” The use of these titles is so common in our profession that few stop to think about the ethical implications of using them when advertising for legal services.

ER 7.1 governs communications concerning a lawyer’s services. False or misleading statements are prohibited. Implying that a lawyer is certified as a specialist in a particular field of law is also prohibited, unless the lawyer complies with Arizona Supreme Court Rule 44. But advertisements of awards are not mentioned in the text of the Rule or the comments.

Arizona ethics opinion 05-03 concluded that it is ethical for a lawyer to advertise that he is listed in The Best Lawyers in America, if the lawyer is in fact listed in that publication, and the advertisement includes the year and specialty for the listing. The ethics opinion relies on the Eleventh Circuit’s opinion in *Mason v. Florida*, 208 F.3d 952 (11th Cir. 2000), where the court concluded that a lawyer’s advertisement representing his “AV rating, the Highest Rating” was not misleading because, while the AV rating system is not generally known to the public, the statement can be verified. According to the court, “[a] rating, like a claim of certification, is not an unverifiable opinion of the ultimate quality of a lawyer’s work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney’s work.” Id. at 957.

Recently, however, New Jersey’s Supreme Court Committee on Attorney Advertising reviewed numerous lawyer awards commonly given in that jurisdiction. The Committee concluded that some of the awards were the result of “a cursory survey of lawyers in the area with no subsequent, independent

vetting by the conferring organization” or “popularity contests” based upon email or text message voting. The Committee warned New Jersey lawyers that they may not advertise receipt of such awards unless, as a threshold matter, the conferring organization made adequate and individualized inquiry into the lawyer’s professional fitness. Assuming that threshold is met, the lawyer must provide a description of the standard or methodology on which the award is based, either in the advertising itself or by reference to a “convenient, publicly available source.”

New Jersey’s Rule 7.1 is far more extensive than Arizona’s, and the Committee’s notice to the New Jersey bar relies on provisions of the Rule that Arizona does not have. But there may be less difference between the two states than meets the eye. Arizona’s opinion 05-03, in addition to being expressly limited to a lawyer’s advertisement for a listing in The Best Lawyer’s in America, cites the United States Supreme Court’s decision in *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91 (1990), which states that “if the certification had been issued by an organization that had made no inquiry into [a lawyer’s] fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading.” Id. at 102.

The primary difference between Arizona and New Jersey appears to be that New Jersey puts the burden on the attorney to make available to legal consumers the standard and methodology for any advertised awards, while Arizona, at least according to opinion 05-03 (a non-binding opinion), finds it sufficient that “[a] consumer who wishes to investigate the underlying basis for a lawyer’s [award] can simply read the [the basis for themselves].” But in either case, lawyers should not be advertising for awards that they paid to have bestowed upon them, or for which no inquiry is made into the lawyer’s qualifications.

Long story short, you still get to engage in the indecorous but self-satisfying practice of showing off by advertising the legal awards you have received. But do consider the standard and methodology used to issue those awards when deciding whether to advertise those accolades. And if you must pay an organization to “certify indiscriminately for a price” that you are a great lawyer, it is probably better, ethics aside, to keep that to yourself in the first place. ■

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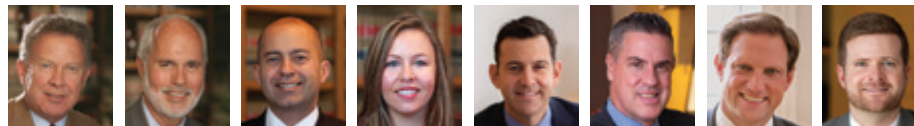
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