

ETHICS ADVISORY OPINION

17-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Local and regional newspapers, local web-based platforms (including television stations or networks) and national publishers compile annual "Best of..." surveys of their readers, or conduct evaluations of lawyers resulting in a designation or accolade as a "Best Lawyer" or "Super Lawyer" or similar appellation. Some of the publications require firms to ask for nominations from their customers or to pay a fee in order to be nominated for voting, while others accept all nominations and votes without the knowledge or consent of the nominee. All have differing criteria for receiving or achieving the particular designation or accolade. Most, if not all, of the organizations offer a badge or emblem for use on firm websites and in other marketing materials to publicize the bestowed honor, some of which will also serve on the firm website as a hyperlink to the website of the bestowing organization.

Question Presented:

May a South Carolina lawyer accept and advertise a designation or accolade such as "Best Lawyers" or "Super Lawyers," whether in a legal publication or in a newspaper readers poll, in conformity with the advertising rules of the South Carolina Rules of Professional Conduct?

Summary:

Yes, the lawyer may accept and advertise such a designation or accolade, and utilize any "badges," symbols, or other marks authorized by the designating entity in situations when:

- (1) the entity or publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing;
- (2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication's website is adequate if the standards are published therein);

- (3) the date of any such designation or accolade is included;
- (4) an advertisement makes it clear that the designation or accolade is made by a specific publication or entity through use of distinctive typeface or italics;
- (5) no payment of any kind for any purpose, including, but not limited to, advertising or purchase of commemorative items, is required of the lawyer, or the lawyer's firm, for receiving the designation, accolade, or inclusion in the listing; and
- (6) the organization charges the lawyer only reasonable advertising fees to the extent it not only confers such a designation or accolade but also provides a medium for promoting or advertising the designation or accolade to the public.

Discussion:

The courts or bars of several jurisdictions nationwide have addressed this issue.¹ They have uniformly approved the acceptance of designations or accolades and use of them (including proprietary “badges,” symbols, or other marks) in attorneys’ advertising subject to certain conditions designed to insure that the use of such accolades or designations is not false or misleading.

S.C. R. Prof. Conduct 7.1 prohibits communications regarding a lawyer that are “false, misleading, or deceptive.” A communication may violate the rule if it “contains a material

¹ The Committee has, of the date of this opinion, located the following decisions of state courts or bar authorities addressing the same question:

- North Carolina State Bar 2007 Formal Ethics Opinion 14 (<https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-14/>).
- *In re Opinion 39* of Committee on Attorney Advertising, 961 A.2d 722 (N.J. 2008).
- Delaware State Bar Ethics Opinion No. 2008-2 (<http://media.dsba.org/ethics/pdfs/2008-2.pdf>).
- Florida Bar Rule 4-7.14, Comment “Awards, Honors, and Ratings.”
- Notice to the Bar from the New Jersey Supreme Court Committee on Attorney Advertising, 5/4/16 (<http://www.judiciary.state.nj.us/notices/2016/n160518a.pdf>).
- State Bar of Michigan Ethics Opinion No. RI-341 (2007) (http://www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=1211).
- Washington State Bar Advisory Opinion No. 2008 (<http://mcle.mywsba.org/IO/print.aspx?ID=1252>).
- Utah State Bar Ethics Advisory Opinion No. 14-04 (<https://www.utahbar.org/ethics-advisory-opinions/ethics-advisory-opinion-14-04/>).
- Alaska Bar Association Ethics Opinion No. 2009-2 (found at https://www.alaskabar.org/servlet/content/2009_02.html).

misrepresentation of fact or law,” omits facts “necessary to make [a] statement considered as a whole not materially misleading,” or creates “an unjustified expectation about results the lawyer can achieve” *Id.*

In 2007, the North Carolina Bar, applying virtually identical Rule language to the communication of an attorney’s designation as a “North Carolina Super Lawyer” by the publication of that name made the following observations:

[I]n *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court found NBTA to be a "bona fide organization," with "objectively clear" standards, which had made inquiry into Peel's fitness for certification and which had not "issued certificates indiscriminately for a price." *Id.* at 102, 110. If a state is concerned that a lawyer's claim to certification may be a sham, the state can require the lawyer "to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Id.* at 109. In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information."

N.C. State Bar 2007 Formal Ethics Opinion (“FEO”) 14 (<https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-14/>).

Referencing an earlier opinion, N.C. State Bar 2003 FEO 3, regarding advertising membership in the “Million Dollar Advocates Forum,” the 2007 opinion stated that such an advertisement was determined not to violate Rule 7.1 where:

- 1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership;
- 2) the standards for membership are explained in the advertisement or information on how to obtain the standards is provided in the advertisement;
- 3) the organization has no financial interest in promoting the particular lawyer; and
- 4) the organization charges the lawyer only reasonable membership fees.

Id. Applying this specifically to a lawyer being designated as a *North Carolina Super Lawyer* and advertising that fact, the 2007 opinion stated that the *Super Lawyers* organization “appears to

be a bona fide organization, as described in Peel ..., in that it has objectively clear and consistently applied standards for inclusion in its lists and inclusion is available to all lawyers who meet the standards.” *Id.* Applying the standards of its 2003 opinion in the context of a *Super Lawyers* designation, the opinion held advertising such designation or accolade was not misleading or deceptive within the meaning of Rule 7.1 where:

1. the publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing;
2. the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication’s website is adequate if the standards are published therein; and
3. no compensation is paid by the lawyer, or the lawyer’s firm, for inclusion in the listing.

Id. The opinion further stated that an advertisement must make it clear that the “Super Lawyer” designation is made by a specific publication or entity through use of distinctive typeface or italics “and may not simply state that the lawyer is a ‘Super Lawyer,’” which would constitute an unsubstantiated comparison prohibited by the rule. *Id.* Finally, the opinion noted that where, as with *North Carolina Super Lawyers*, the listing was redone annually, any advertisement should include the specific year in which the lawyer was so designated in order to prevent misleading the public that the designation was perpetual. Compliance with these guidelines as articulated in the 2007 North Carolina Bar opinion satisfy the requirements of S.C. R. Prof. Cond. 7.1.

The guidelines set forth above also address the prohibition of S.C. Rule of Prof. Conduct 7.2(c) that a lawyer not pay anything of value for a recommendation except “the reasonable costs of advertisements or communications permitted by this Rule.” *Id.* Applying similar language in the North Carolina rules, the 2007 opinion stated that an attorney could purchase an advertisement in the *North Carolina Super Lawyers* advertising supplement or magazine at the going advertising rate so long as payment for an advertisement was not a prerequisite to participation or inclusion in the evaluation and listing process for the organization.

The Committee also notes that any advertisement utilizing an accolade or designation such as “Super Lawyer” must also comply with generally applicable rules regarding advertisements set forth in Rules 7.2(d) through (h). The Committee would particularly note that Rule 7.2(i) requires that the information regarding the standards for selection – either the standards themselves, or direction on where to find them—must appear in the specified format (no unreadable type) and on the same page as the accolade or designation.

In summary, a South Carolina licensed attorney may, consistent with Rules 7.1 and 7.2,

accept and advertise a designation or accolade from an organization such as “Super Lawyers,” “Best Lawyers,” as well as a local newspaper’s “Best of” readers poll, and utilize any “badges,” symbols, or other marks authorized by the designating entity in situations where (1) the entity or publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing; (2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication’s website is adequate if the standards are published therein); (3) the date of any such designation or accolade is included; (4) an advertisement makes it clear that the designation or accolade is made by a specific publication or entity through use of distinctive typeface or italics; (5) no payment of any kind for any purpose, including, but not limited to, advertising or purchase of commemorative items, is required of the lawyer, or the lawyer’s firm, for receiving the designation, accolade, or inclusion in the listing; and (6) the organization charges the lawyer only reasonable advertising fees to the extent it not only confers such a designation or accolade, but also provides a medium for promoting or advertising the designation or accolade to the public.