2017 NJSBA Annual Meeting

Marketing and Ethics in Your Practice

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RULE 1:19A. Committee on Attorney Advertising

1:19A-1. Appointment and Organization

(a) Appointment. The Supreme Court shall appoint a Committee on Attorney Advertising (hereinafter the Advertising Committee) consisting of seven members, five of whom shall be members of the bar and two of whom shall be public members. The initial members shall be appointed to terms of one, two, or three years. At the expiration of such terms all subsequent reappointments shall be for a term of three years. No member who has served four full three-year terms shall be eligible for immediate reappointment. A vacancy occurring during a term shall be filled for the unexpired portion thereof.

(b) Meetings; Quorum. A majority of the members of the Advertising Committee shall constitute a quorum, but no decision shall be made unless concurred in by a majority of those present. The Chair may designate subpanels of not fewer than three members, at least one of whom is a public member and a majority of whom shall be attorneys, in order to consider any matter and hold hearings, if necessary, and to report to the Advertising Committee. All final decisions shall be made by the Advertising Committee in accordance with these rules. The Advertising Committee shall meet at such times as directed by the Chair or the Supreme Court.

(c) Officers. The Court shall annually designate a member of the Advertising Committee to serve as Chair. A staff member of the Administrative Office of the Courts shall serve as Secretary.

Note: Adopted June 26, 1987, to be effective July 1, 1987; paragraph (a) amended July 10, 1998 to be effective September 1, 1998.

1:19A-2. Jurisdiction

(a) Advisory Opinions and Ethics Grievances. The Advertising Committee shall have the exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications with Rules of Professional Conduct 7.1 "Communications Concerning a Lawyer's Service," 7.2 "Advertising," 7.3 "Personal Contact with Prospective Clients" (excluding subsections (c), (d), (e) and (f)), 7.4 "Communication of Fields of Practice," and 7.5 "Firm Names and Letterheads," and with any duly approved advertising guidelines promulgated by the Advertising Committee with the approval of the Supreme Court.

(b) Rules of Procedure. The Advertising Committee shall, consistent with these Rules, establish procedures, publish forms and maintain records as required for its conduct.
(c) Advertising Guidelines. The Advertising Committee may adopt advertising guidelines consistent with the Rules of Professional Conduct set forth in section (a) and with these Rules, after affording the bar an opportunity to comment and after approval by the Supreme Court. Advertising guidelines may include by way of example, but not by way of limitation, disclosure requirements, restrictions beyond those set forth in RPC 7.2(a), time, place, and manner regulations, guidelines for determining the application of the "predominantly informational" and "extreme portrayal" requirements, and, generally, any guideline that the Advertising Committee deems either necessary or desirable in clarifying the application of the Rules governing advertisements and other communications within its jurisdiction. Upon adoption all advertising guidelines shall be published initially in the New Jersey Law Journal and New Jersey Lawyer.

(d) Pre-publication Review. The Advertising Committee may, in its discretion, require any attorney or firm or association of attorneys that has hired an advertising agency, public relations counsel, or entity providing assistance in connection with advertising or other related communications within the jurisdiction of the Advertising Committee, to submit to the Advertising Committee before publication for its approval, disapproval, or modification any series of advertisements or other communications within its jurisdiction, any advertising program, or any general public relations program.

(e) Education. The Advertising Committee may undertake such action as it deems necessary (1) to educate the public concerning rational means of selecting counsel and of determining whether counsel is needed, and (2) to educate the bar concerning the ethical limitations of attorney advertising.

(f) Reports. The Advertising Committee shall monitor the impact of all advertising and other communications within its jurisdiction to determine the extent to which existing Rules and guidelines achieve their goals and the extent to which there is any need for revision. Without limiting the Advertising Committee's observations in any way, it should specifically monitor the impact of all rules and advertising guidelines, as they exist from time to time, to determine if consumers are obtaining enough information about their need for lawyers and to aid them in the selection of lawyers, if price competition is being achieved, if damage to the qualities of the profession that serve society is occurring, and if consumers are being damaged through non-rational appeals.

The Advertising Committee shall submit to the Supreme Court an annual report, the first of which shall be filed on January 1, 1988. The first report of the Advertising Committee should report on the experience of New Jersey, as well as other states concerning attorney advertising. Prior to submitting its first annual report, the Advertising Committee shall conduct at least one public hearing on the desirability of retaining, revising, or repealing the then-existing advertising Rules or guidelines, or adopting any other proposed Rule on attorney advertising. Public hearings shall be held in subsequent years in the discretion of the Advertising Committee or as directed by the Supreme Court.

Note: Adopted June 26, 1987 to be effective July 1, 1987; paragraph (c) amended July 10, 1998 to be effective September 1, 1998.

1:19A-3. Advisory Opinion
(a) Form of Inquiry. All inquiries shall be addressed to the Secretary. The Advertising Committee shall accept inquiries from any member of the New Jersey bar. Inquiries shall be in writing and shall have appended to them a copy of the questioned advertisement or other related communication and shall contain a certificate that any opinion of the Advertising Committee will not affect the interests of the parties to any pending action. The inquiry shall be accompanied by a letter brief or brief citing the Rules of Court, Rules of Professional Conduct or Advertising Guidelines, if any, that are applicable, and shall state clearly the factual situation in detail and the inquirer's position as to the propriety of the advertisement or other related communication.

(b) Disposition of Inquiries. The Advertising Committee shall, so far as practical, act on an inquiry at its next meeting following receipt of the inquiry, provided that the inquiry is received by the Secretary at least ten business days prior to the Advertising Committee's meeting. In its discretion the Advertising Committee may authorize oral argument, which shall be electronically or stenographically recorded and may be transcribed. The Advertising Committee may, in its discretion, reconsider a prior decision (provided that the same is final) at any time, but a reversal or modification of a prior decision shall have prospective effect only. All advisory opinions shall be given in writing to the inquirer. The decision shall state the Advertising Committee's determination as to whether the advertisement or other related communication is proper; it shall also briefly state the rationale that supports it and the rule or rules relied upon. The Advertising Committee may condition its approval by requiring any reasonable changes that are, in its opinion, necessary to conform with the Rules of Court, Rules of Professional Conduct or Advertising Guidelines, including, but not limited to, disclosure requirements, and time, place, and manner regulations.

(c) Effect of Opinions; Publication. An opinion approving an advertisement or other communication shall, until and unless revised in accordance with section (d) or reconsidered, be a bar to prosecution of ethical charges against the lawyer or law firm, except for a prosecution based on a charge that it is false or misleading in violation of RPC 7.1(a)(1). An opinion disapproving an advertisement or other related communication shall, until and unless revised in accordance with section (d) or reconsidered, be binding upon the inquirer and anyone with actual or constructive knowledge thereof so that such use of a disapproved advertisement or other related communication shall be per se unethical conduct.

When the Advertising Committee believes it to be in the best interest of the bar or the public, it may publish its opinion in the New Jersey Law Journal and New Jersey Lawyer. Published opinions shall constitute constructive notice to, and shall be binding on, all members of the bar and in connection with any ethics proceedings, unless revised pursuant to section (d) or reconsidered.

(d) Petition for Review. Any aggrieved member of the New Jersey bar may seek review of any final action of the Advertising Committee relating to requests for advisory opinions in accordance with R. 1:19-8.

Note: Adopted June 26, 1987 to be effective July 1, 1987; paragraphs (a) and (c) amended July 10, 1998 to be effective September 1, 1998.
(a) Procedure for Considering Grievances. All ethics grievances alleging unethical conduct with respect to advertisements and other related communications set forth in Rule 1:19A-2(a) shall be considered solely by the Advertising Committee. Except as expressly stated herein, no District Ethics Committee shall take any action on such a grievance received by it, but shall forward it to the Secretary of the Advertising Committee for review and action.

An ethics grievance concerning advertising or other related communications by an attorney shall be filed with the Secretary of the Advertising Committee. Grievances shall be accepted from members of the public and the bar. The Advertising Committee may on its own motion initiate an ethics grievance. Upon receipt of an ethics grievance alleging unethical conduct the Secretary of the Advertising Committee shall acknowledge receipt to the grievant and may forward a copy of the grievance to the attorney or law firm responsible for an initial written response, provided that if the Secretary concludes that even if true the alleged facts show beyond debate no violation of the Rules, the grievance may be dismissed. If the Secretary requests a response, the lawyer or law firm shall file with the Secretary and serve (personally or by mail) upon the grievant a responding letter brief or brief within fourteen (14) days after service. Such lawyer or law firm shall also file with the Secretary a true copy of the advertisement, tape recording, video tape, or other related communication for the Advertising Committee's use, provided that no such filing shall be required for any advertisement or other related communication that was disseminated more than three years prior to receipt of the grievance by the Advertising Committee. The failure of an attorney or law firm to file and serve a response together with a true copy of the advertisement or other related communication as set forth above may, in the Advertising Committee's discretion, be taken as an adverse inference of an ethical violation.

(b) Initial Review and Dismissal by Advertising Committee. At the conclusion of the expiration of time provided for the attorney's filing of any initial response the Advertising Committee shall review the matter. If it concludes there is a need for further investigation, the Advertising Committee shall direct the Secretary to proceed accordingly and it shall reconsider the matter following such further investigation. Upon any matter within its jurisdiction coming to its attention, the Advertising Committee may arrange an informal conference with the lawyer or law firm. If the Advertising Committee concludes that there is no unethical conduct, it shall dismiss the grievance and so notify the parties in writing, briefly stating the reasons therefor. An appeal from the decision of the Advertising Committee to dismiss a grievance shall be available in accordance with Rule 1:20-15(e), but the Disciplinary Review Board shall be limited in its review to the legal conclusion of the Advertising Committee as to whether there is unethical conduct.

(c) Formal Complaint and Answer. In all other cases where the Advertising Committee concludes that the facts may demonstrate by clear and convincing evidence that unethical conduct has occurred, it shall direct the Secretary to file a formal complaint in accordance with Rule 1:20-4(d). The Secretary shall serve the formal complaint upon the original grievant, if any, and upon the respondent, who shall be required to file a formal answer within ten days of service of the formal complaint, all in accordance with Rule 1:20-4(e).

(d) Hearing Where Material Facts Not Disputed. Where in the opinion of the Advertising Committee there are no material controverted issues of fact, it shall bring the matter on for oral argument (which shall be electronically or stenographically recorded) on notice to the respondent. The Advertising Committee shall designate a presenter. The sole issue before the
Advertising Committee shall be whether, and the extent to which, discipline is required. The Advertising Committee shall prepare a written dated report containing its findings of fact on each issue presented in accordance with Rule 1:20-6(c)(2)(E). If public discipline is recommended, the report shall also contain a specific recommendation as to the extent thereof. Unless it dismisses the matter, the Advertising Committee shall promptly file its report and recommendation with the Disciplinary Review Board, which shall proceed in accordance with Rule 1:20-15(f). Dismissals shall be appealable and notice thereof given, as set forth in section (b) above.

(e) Hearings Where Material Facts Are Disputed. Where in the opinion of the Advertising Committee there are material controverted issues of fact (including, but not limited to, instances of alleged false, fraudulent, misleading, or deceptive advertisements or other communications), it may, after the filing of a formal complaint and answer, (1) hear and determine the matter itself in accordance with Rule 1:20-6(a) and (c) (in which case the hearing shall be electronically or stenographically transcribed), or (2) refer the matter to the appropriate District Ethics Committee for hearings in accordance with Rule 1:20-6 and the filing of a report with the Advertising Committee, which report shall be limited to findings of fact on the issues presented, in accordance with Rule 1:20-6(c)(2)(E). In either event the Advertising Committee shall, unless it dismisses the matter, render its report and recommendation to the Disciplinary Review Board in accordance with Rule 1:20-6(c)(2)(E). If public discipline is recommended, the report shall also contain a specific recommendation as to the extent thereof. If the matter is dismissed, notification of parties and appeal shall be the same as set forth in section (b) above.

(f) Action by Disciplinary Review Board on Reports Recommending Discipline. Where the Advertising Committee files with the Board a report recommending discipline, the Board shall, except as stated below, proceed in accordance with Rule 1:20-15(f). In considering a report and recommendation of the Advertising Committee the Board shall accept the facts found as conclusive. The sole issues to be determined shall be the legal conclusion reached by the Advertising Committee as to whether there is unethical conduct and the extent of final discipline to be imposed.

(g) Attorney for Respondent; Subpoenas. Insofar as necessary, Rules 1:20-4(g)(2) and 1:20-7(i) shall be applicable to proceedings by the Advertising Committee. Subpoenas may be signed either by any member of the Advertising Committee, or by its Secretary.

(h) Dual Grievances. When the ethical issues presented in a grievance involve both aspects of advertising and other related communications within the jurisdiction of the Advertising Committee and also other ethical issues not ordinarily within its jurisdiction, the Advertising Committee shall take jurisdiction of the entire matter if the grievance is predominantly related to advertising and other related communications within its jurisdiction. In all other cases of dual grievances, the Advertising Committee may accept such grievances. If it accepts such grievances the Advertising Committee shall, to the extent necessary to conclude all aspects of the grievance, exercise all the jurisdiction and functions of a District Ethics Committee. Otherwise, the Advertising Committee may decline jurisdiction in writing and refer its entire file in the matter to the appropriate District Ethics Committee. A District Ethics Committee to whom a dual ethics grievance has been referred in accordance with this section shall take jurisdiction over the entire matter and proceed in accordance with Rule 1:20-3(g). To the extent necessary to
conclude all aspects of the grievance so referred, a District Ethics Committee shall exercise all the jurisdiction and functions of the Advertising Committee.

Note: Adopted June 26, 1987 to be effective July 1, 1987; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraphs (b), (c), (d), (e), (f), (g) and (h) amended July 10, 1998 to be effective September 1, 1998.

1:19A-5. Records; Confidentiality

The Advertising Committee shall maintain such records and file such reports as shall be required by the Administrative Director of the Courts or the Supreme Court. With respect to requests for advisory opinions, both the request and the advisory opinion shall be available to the public; otherwise proceedings concerning advisory opinions shall be confidential except as ordered by the Supreme Court. With respect to ethics grievances, confidentiality shall be maintained in accordance with Rule 1:20-9.

Note: Adopted June 26, 1987 to be effective July 1, 1987; amended July 10, 1998 to be effective September 1, 1998.

1:19A-6. Immunity

The Rules governing immunity of ethics and fee arbitration committee members and the Secretary thereof, as well as grievants, clients, and witnesses as set forth in R. 1:20-7(e) and (f), shall apply to all proceedings of the Advertising Committee. This immunity shall not, however, extend to any publication or distribution of information in violation of the confidentiality provisions of Rule 1:19A-5.

Note: Adopted June 26, 1987 to be effective July 1, 1987; amended July 10, 1998 to be effective September 1, 1998.

1:19A-7. Referral to Office of Attorney Ethics

Wherever appropriate the Advertising Committee may bring to the attention of the Director of the Office of Attorney Ethics facts that it believes may constitute cause for temporary suspension, including, but not limited to, an attorney's use of a disapproved advertisement or other related communication. The Director may take such action as appropriate, including an emergent application for temporary suspension pursuant to Rule 1:20-11.

Note: Adopted June 26, 1987 to be effective July 1, 1987; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998.

1:19A-8. Telephone Inquiries

Telephone inquiries to the Committee on Attorney Advertising shall be made in accordance with R. 1:19-9.

Note: Adopted July 10, 1998 to be effective September 1, 1998.
182 N.J.L.J. 612
November 7, 2005

14 N.J.L. 2240
November 7, 2005

Advisory Committee on Professional Ethics
Committee on Attorney Advertising

Appointed by the Supreme Court of New Jersey

JOINT OPINION

Opinion 698
Advisory Committee on Professional Ethics
Opinion 34
Committee on Attorney Advertising

Direct Mail Solicitation Letters and
Conduct that is Prejudicial to the
Administration of Justice

At the request of the Committee on Attorney Advertisement (CAA), we have reviewed several solicitation mailings which are in essence advertisements from law firms to prospective clients. The CAA has asked our views about whether there are ethical issues raised by these letters beyond those addressed in advertising rules. All advertisements and unsolicited mailings seeking to attract clientele are subject to various RPCs and opinions of the CAA and this Committee, notably CAA Opinion 29 (revised) (175 N.J.L.J. 609, 13 N.J.L. 310, February 16, 2004). In this opinion we examine solicitation letters for defects beyond those covered by the advertising rules, RPC 7.1 through 7.5.

One mailing makes the following statements: "We know that the cops and prosecutors will not tell you everything you need to know to protect your rights," and "so you can avoid being taken advantage of by police and prosecutors" and "perhaps they listened to the police officer who told them all they needed to do was show up in court and everything 'would be ok.'" There is an entire paragraph describing the local town's revenue source as being traffic tickets. There is no evidence of any factual basis for such statements. Absent such a basis, we find that such references cast baseless aspersions upon, and are prejudicial to, the administration of justice within the meaning of RPC 8.4(d). In accordance with RPC 3.8, a prosecutor has a duty to refrain from prosecuting a charge he or she knows is unsupported and to make timely disclosure of all evidence that supports innocence. Although these responsibilities pertain specifically to criminal cases, this committee believes these responsibilities apply with equal force to the prosecution of a traffic offense, quasi-criminal matter, or any other municipal court proceeding. As was relied upon in our Opinion 661. "The primary duty of a prosecutor is not to obtain convictions, but to see that justice is done," State v. Farrell, 61 N.J. 99, 104 (1972). Thus, "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. at 105 (quoting Beyer v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 70, 79 L. Ed. 1314, 1321 (1935)).

The statements in these letters as to what prosecutors and "cops" do suggest that prosecutors, and law enforcement officials as their agents, regularly violate RPC 3.8, and their responsibility to the public. Such sweeping statements offend RPC 8.4(d). Furthermore, the reviewed solicitation offends Opinion 29 (revised) of the Committee on Attorney Advertising, which states:

"In the future, attorney's who send solicitation letters seeking to obtain clients from among those persons charged with municipal court violations must:
5. Not attempt to indicate a special relationship or knowledge which will or may provide a more favorable result other than licensed New Jersey attorneys.

6. Not raise unjustified expectations or use language which is susceptible of unduly pressuring a person because of possible consequences or potential penalties unrelated to specific offense charged.

7. Not misstate the role of the prosecutor or municipal court judge, or their functions in the justice system."

Similarly, several mailings contain statements that the job of the prosecutor is to convict. This offends RPC 8.4(d) in that it misstates the duty of a prosecutor pursuant to RPC 3.8. In the same vein, one mailing includes the statement “You should be aware that the State of New Jersey is represented by a Prosecutor and their job is to find you guilty.” In addition to the 8.4(d) violation, this is a misstatement of fact which raises problems under CAA Opinion 29 (revised) and RPC 7.1(c) (1), as well as RPC 8.4(c). The mailing also states that the sender is a "former MUNICIPAL COURT JUDGE." The CAA has found such a statement to be permissible only if the attorney includes the years and location(s) of service in the advertisement.” CAA 22 (148 N.J.L.J. 1338 and 6 N.J.L. 1635, June 30, 1997)

Other direct mail advertising letters brought to our attention fail to adhere to the rules and to explicit directions contained in CAA Opinion 29 (revised). Notable deficiencies include the absence of the required word “Advertisement”, prominently displayed, violating RPC 7.3(b) (5) (i), and failing to disclose how the potential clients' information was obtained, also required by CAA Opinion 29.

Other problems also are presented. In one example, a brochure is headed “Confidential Special Report.” In fact, the brochure is an advertisement, there is nothing confidential or special about it. Such words are misleading and in violation of RPC 7.1(a) (1) and RPC 8.4(c). The body of the advertisement contains extreme statements such as “You will always be looking over your shoulder for the IRS! This usually means you have to work until you die!” “For taxpayers who don't file an Offer In Compromise - They request the IRS to ... Abate the IRS penalties for “Reasonable Cause”.

This can be as simple as explaining to the IRS that your basement flooded” (emphasis supplied). The implication is that a non-truth may get a person out of difficulty with an administrative agency, contravening 8.4(d). Similarly, statements such as "Then the IRS pulls out all of the stops. They simply seize your assets and sell them at an auction!" are misleading, in the extremity of their representations, without a basis in fact, in violation of RPC 8.4(c) and (d).

The Committee on Advertising joins in this opinion as to the conclusions concerning advertising violations.
OPINION 22

Communicating Former Service as Municipal Court Judge

The Committee has received an inquiry from an attorney who served as a municipal court judge in "numerous" cities and townships from 1979 through and including 1983. He has asked whether he may communicate the fact that he is a former municipal court judge in advertisements to be published in the regional newspaper and the Bell Atlantic Yellow Pages.

The information conveyed by a statement communicating one's former service as a public official readily identifies for consumers an attorney who has a familiarity with, is seeking, and willing to handle a particular type of matter. See Opinion 4, 122 N.J.L.J. 746 (1988)(attorney may advertise by area of practice in telephone directories) and Opinion 7, 127 N.J.L.J. 753 (1991)(attorney may communicate concentration in a field of practice). This is consistent with the requirement that attorney advertising be "predominantly informational." RPC 7.2(a).

However, the mere statement that one was once a municipal court judge, without more, may be potentially misleading. Pursuant to RPC 7.1(a)(1), a communication may be misleading if it "omits a fact necessary to make the statement as a whole not materially misleading." Information concerning the number of or exact years of an attorney's service as a municipal court judge and the municipalities in which that service took place will assist consumers in determining whether or not the attorney possesses the knowledge, experience and familiarity with local roads, businesses, or police departments they are looking for in an attorney to protect their rights. Conversely, the absence of such information may lead the consumer to make a hasty or uninformed decision concerning the choice of counsel. Consequently, we hold that an attorney may advertise the fact that the attorney is a former municipal court judge only if the attorney includes the years and location(s) of service in the advertisement.

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COMMITTEE ON ATTORNEY ADVERTISING
APPOINTED BY THE NEW JERSEY SUPREME COURT

Revised OPINION 29*

Written Solicitation of Clients Charged in Municipal Courts

The Committee has received numerous angry, and sometimes outraged, complaints from members of the public who are municipal court defendants. They have been solicited by attorneys, unknown to them, who often market their availability through a catalogue of hypothetical consequences if they are convicted of charges which are, in fact, unknown to the soliciting attorney.

*Opinion 29 has been revised solely to replace the citation of the Open Public Records Act (N.J.S.A. 47:1A-1) with R.1:38 appearing on pages 2 and 6 of the revised opinion. The Open Public Records Act (OPRA), N.J.S.A. 47:1-1 et seq., at N.J.S.A. 47:1A-1, excludes the Judiciary from its definition of a "public agency" by referring specifically to "any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency." This statutory definition evidences an intent by the Legislature to exclude the Judiciary from its mandate. Further, in enacting OPRA, the Legislature included specific language acknowledging a separate governing structure for Judiciary records and providing in N.J.S.A. 47:1A-7(g) that "[t]he [Government Records] council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches." Municipal court records fall under the jurisdiction of the Judicial Branch and access to public records is, therefore, governed by Rule 1:38.

The names of these prospective clients are obtained directly by the attorney through contractual arrangements with an inside agency which specializes in obtaining names of municipal court defendants under the provisions of Rule 1:38.

Although some solicitations are individually addressed, many lack a salutation or merely state: Dear Ms. or Sir, Dear Sir or Madam; Dear Fellow New Jersey Driver; Dear Prospective Client, or other similar generic heading.

The body of these solicitation letters is often formulaic, exhibiting a lack of any knowledge as to the nature of the actual charge faced by the individual being solicited. Illustrative of these broad-based approaches are:

- "It has come to my attention that you recently received a Municipal Court summons which may subject you to one or all of the following: points on your license, loss of your license, increased insurance costs, jail, community service and/or a substantial fine."
- "It has recently come to our attention that you may have received a motor vehicle summons or criminal complaint."
- "A review of the docket in Municipal Court indicates that you have been issued a traffic ticket(s) and a criminal complaint."
- "I am contacting you regarding the motor vehicle ticket you recently received."
- "Public court records reflect that you've recently been cited for a traffic summons. If that summons is for a moving violation, then you've been targeted by your insurance company for an increase in your already outrageously high insurance premiums!"
- "According to Court records, your hearing date is rapidly approaching for your recent traffic charges."
- "It has come to our attention that you have recently received a criminal complaint from the __________ Township Municipal Court."
- "Court records show that there may be charges pending against you in Municipal Court."
- "I am writing you this letter to offer my firm's professional services. A review of the ______ Twp. Municipal Court records reveals that you have received a traffic(s) and/or a criminal complaint."

Other solicitation letters have been addressed to minors and some have sought business by requesting that, "if you or someone you know has recently received a motor vehicle ticket, a summons to appear in municipal court or has been injured as a result of an accident, I may be able to help."

These unsolicited letters, sent to individuals unknown to the attorney, often exert pressure to accept immediate representation by (a) cataloguing hypothetical penalties and consequences which may have no relationship to the actual offense charged, (b) indicating that the soliciting attorney is able to exert extralegal influence to obtain a result or (c) is better equipped then other attorneys in the legal community to successfully represent the unknown individual charged with an unknown offense.

Such examples of this approach (often with emphasis added) are:

- "My office knows the law and knows how to use the law to your best advantage."
- "Call my office today at _______ to find out how you can put the law on your side and even the score."
- "The police have an attorney to prosecute their case and so should you!"
- "The penalties for certain motor vehicle violations can be very costly."
For almost all traffic tickets, both the Division of Motor Vehicles and your car insurance company will impose surcharges and eligibility points for up to three years.

Do not surrender! Our law office can provide you with a competent, experienced attorney who can assist you in relieving many of your concerns.

"Remember, the police and Courts have attorneys represent them in prosecuting you.

"If you plead guilty or are found guilty of charges, you may face serious penalties such as suspension of Driver's License, substantial fines and surcharges, increase in insurance premiums and possible incarceration.

"It is extremely important that you understand that the State is represented by a Prosecutor, an attorney whose job it is to convict you of this [unknown] offense.

"Please understand that motor vehicle violations may involve loss of license, motor vehicle points, surcharges, fines and potential incarceration.

"The "Deck" is stacked against you. Unfortunately, when you get a traffic summons, whether it's a speeding ticket or a DWI charge, the State will use everything in its power to convict you"

"The Police Officer will team up with the Prosecutor. Finally, there's the Judge. He or she will hand down your sentence. They set fines, suspension time and/or jail time!"

"Get a lawyer that has experienced in the town where you got your ticket! Someone who knows "the system" and knows New Jersey's laws inside and out!"

"Did you know that certain [unknown] traffic offenses carry severe penalties that may result in increased insurance premiums or loss of coverage, elevated fines, community service or jail time. In your case, you may have important constitutional rights that need to be protected.

"Many traffic tickets carry heavy fines and/or points on your driver's license. And do not forget your automobile insurance company which will also impose expensive surcharges and eligibility points for three years. Consequently, your insurance premiums may substantially rise.

Attorneys who send these letters invariably exert pressure by reciting penalties and consequences that may have no application to the particular charge. The solicitation letters many times put forth promises, in violation of R.P.C. 7.3(c)(2), which unduly raise the prospective client's expectations in violation of R.P.C. 7.1(a)(2), are comparative in nature in violation of R.P.C. 7.1(a)(3), and use marketing devices which may also, in the context of the specific charge, be false or misleading in violation of R.P.C. 7.1(a)(1). Complaints from the public as to these sales pitches in a volume too great to ignore have prompted the Committee to publish this Opinion, setting municipal court solicitation requirements which will ensure that attorneys act within the Rules of Professional Conduct that govern written solicitation for professional employment.

In future, attorneys who send solicitation letters seeking to obtain clients from among those persons charged with municipal court violations must:

1. Personally verify the accuracy of all statements contained in the solicitation letter, including the name and address of the addressee and the specific nature of the charge, which charge must be recited in the body of the letter.

2. Advise the prospective client that his or her name and the offense charged in the specific municipal court was obtained by an appropriate inquiry under Rule 1:38.

3. Be specific in the salutation to the individual to whom the letter is being sent.

4. Satisfy himself or herself that the individual charged with the municipal court offense is not under the age of 18 years.

5. Not attempt to indicate a special relationship or knowledge which will or may provide a more favorable result than other licensed New Jersey attorneys.

6. Not raise unjustified expectations or use language which is susceptible of unduly pressuring a person because of possible consequences or potential penalties unrelated to the specific offense charged.

7. Not misstate the role of the prosecutor or municipal court judge, or their functions in the justice system.

Finally, the Committee urges that all attorneys who advertise their services to defendants in municipal court matters review the Rules of Professional Conduct in order to remind themselves of the obligations of an attorney seeking professional employment through written communications. These include the requirements that (a) the envelope used to forward any such letter [See Committee on Attorney Advertising Opinion 20, 144 N.J.L.J. 1046 (June 19, 1996) and 5 N.J.L.J. 1302 (June 17, 1996)] and the letter itself, contain the word ADVERTISEMENT in capital letters, prominently displayed at the top of the first page of text, R.P.C. 7.3(b)(5)(i), in a font which is two sizes larger than the general text of the solicitation letter and (b) the notices required at the bottom of the last page of text, R.P.C. 7.3(b)(5)(ii) and (iii), be in a font size no smaller than the general text of the letter.
Opinion 39
Committee on Attorney Advertising

Advertisements Touting Designation as “Super Lawyer” or “Best Lawyer in America”

The Committee has received complaints and inquiries relating to New Jersey lawyers advertising themselves or their colleagues as “Super Lawyers” and/or “Best Lawyers in America.” The issue is whether advertisements in any medium of distribution publicizing certain New Jersey lawyers as “Super Lawyers” or “Best Lawyers in America” violate the prohibition against advertisements that are comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2). It is the Committee’s position that this type of advertisement is prohibited by the Rules of Professional Conduct.

This new form of comparative advertising first appeared in an advertising insert to a 2005 New Jersey Monthly magazine and subsequent stand-alone magazine, both devoted primarily to advertisements by law firms promoting their designation as “Super Lawyers.” A 2006 New Jersey Monthly “Super Lawyers” magazine and subsequent stand-alone magazine have now been published.

The advertisements appearing in both magazines were solicited as paid-for advertising, with the size of the advertisements dependent on the price paid. The primary focus of these advertisements was to congratulate the chosen lawyers for their designation as “Super Lawyers.”

The “Super Lawyer” designations have spawned a new surge of attorney marketing in the form of advertisements placed in New Jersey lawyer-directed papers, in local newspapers and by distribution to the public through attorney mailers, flyers, brochures, telephone book listings, and on websites, all of which tout the “Super Lawyer” label and congratulate or promote the so-called “Super lawyers.”

The Committee has also received inquiries concerning the propriety of the advertising and promotion of a New Jersey attorney’s status as a “Best Lawyer in America.” There are some differences between the “Super Lawyer” and “Best Lawyer” designations. First, the “Best Lawyer” methodology of selection is based solely on peer review interviews with attorneys. Second, the “Best Lawyer” selection is not focused upon encouraging lawyers to advertise in an advertising supplement and appear to market its “Best Lawyer” compendium primarily to other lawyers. However, “Best Lawyer” seems to be trending towards a “Super Lawyer” business plan with similar advertising supplements in other jurisdictions, but not yet in New Jersey.

This Committee has not previously addressed this issue. The Advisory Committee on Professional Ethics, however, has addressed the propriety of attorney advertising through Who’s Who in New Jersey. ACPE Opinion 311, 98 N.J.L.J. 633 (July 24, 1975). That Committee concluded that an attorney may be listed in a directory which is used primarily for reference purposes but warned that attorneys must be wary of directories whose primary purpose is promoting the listings and must also be careful of using self-aggrandizing statements in those listings. The Committee recognizes that this Opinion was issued prior to significant law changes in the field of attorney advertising but finds that some of the underlying concerns noted in the Opinion remain viable today.

Advertising which promotes a designation such as “Super Lawyer” or “Best Lawyer in America” does not comply with RPC 7.1(a)(3). RPC 7.1(a)(3) states that a communication is misleading if it “compar[es] the lawyer’s service with other lawyers’ services.” Use of superlative designations by lawyers is inherently comparative and, thus, not within the approved ambit of New Jersey’s Rules of Professional Conduct. Such titles or descriptions, based on an assessment by the attorney or other members of the bar, or devised by persons or organizations outside the bar, lack both court approval and objective verification of the lawyer’s ability. These self-aggrandizing titles have the potential to lead an unwary consumer to believe that the lawyers so described are, by virtue of this manufactured title, superior to their colleagues who practice in the same areas of law.

Similarly, this type of advertising does not comply with RPC 7.1(a)(2). RPC 7.1(a)(2) states that a communication is misleading if it “is likely to create an unjustified expectation about results the lawyer can achieve . . . .” When a potential client reads such advertising and considers hiring a “super attorney” or the “best attorney,” the superlative designation induces the client to feel that the results that can be achieved by this attorney are likely to surpass those that can be achieved by a mere “ordinary” attorney. This simplistic use of a media-generated sound bite title clearly has the capacity to materially mislead the public.

Moreover, the Committee notes that the entire insert to the New Jersey Monthly “Super Lawyers” publication, including biographical sketches and even the listing of attorneys, is marked by the magazine as an advertisement. For this reason, and also because of the proximity of attorney advertisements to magazine text on individual “Super Lawyers,” any advertisements placed in the “Super Lawyers” magazine insert or stand-alone version are prohibited, even when such advertisements do not include the words “Super Lawyer.” It is inevitable that a member of the public, reading an article about a certain attorney who has been designated by the magazine as a “Super Lawyer,” will note a nearby advertisement congratulating that lawyer (though not using the prohibited words “Super Lawyer”), and will attribute the marketing designation to the subject of the advertisement. Hence, the placement of an attorney advertisement in the magazine insert serves the same purpose as the use of the superlative, inherently comparative, marketing title. Therefore, the Committee has concluded that attorney advertisements, even those advertisements that do not repeat the moniker of “Super Lawyer,” appearing in the “Super Lawyers” magazine insert, are prohibited.

Further, it may be that biographical sketches appearing in the “Super Lawyers” insert to the New Jersey Monthly magazine are paid for by the subject attorneys or written in whole or in part by the attorneys. If this is so, then the “article” is misleading as it appears to be journalistic material but is, in fact, mere self-promotion. Accordingly, to the extent biographical sketches or other “articles” in the “Super Lawyers” insert are paid for by the subject attorneys or written in whole or in part by the attorneys, such “articles” must bear the word “advertisement” in large print at the top.

Lastly, the Committee has reviewed the survey sent to New Jersey lawyers that supports the selection of attorneys for the “Super Lawyer”
designation. It is the Committee's position that participation in a survey of this type, where an attorney knows or reasonably should know that the survey would lead to a descriptive label that is inherently comparative such as "Super Lawyer" or "Best Lawyer," is inappropriate.

The survey results for "Super Lawyer" designation are not intended to cater to other attorneys but, rather, are designed for mass consumption. In contrast, other ratings organizations such as Martindale-Hubbell, which rates attorneys AV, BV or CV, are directed toward other attorneys. Martindale notes that not all attorneys or firms are rated and that most attorneys as they become more experienced move from a CV towards an AV rating. These ratings are familiar to other lawyers and likely have minimal recognition to the public.

Accordingly, advertisements describing attorneys as "Super Lawyers," "Best Lawyers in America," or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2).

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, they are 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.
COMMITTEE ON ATTORNEY ADVERTISING

OPINION 42
Committee on Attorney Advertising

RPC 7.1 – Comparing an Attorney’s Services With Other Attorneys’ Services: Permissible Language
When Communicating Inclusion in “Super Lawyers” and “Best Lawyers” Lists or Referring to Membership in Organizations Such as “Million Dollar Advocates Forum”

The Committee on Attorney Advertising recently considered a grievance regarding an attorney’s solicitation letter that touted his inclusion in a “Super Lawyers” attorney ranking list and membership in the “Million Dollar Advocates Forum.” The grievance was resolved informally after the attorney revised his solicitation letter. Because the problem is likely to recur, the Committee decided to issue this opinion to provide guidance to the bar on permissible language when communicating inclusion in such lists or referring to membership in organizations such as the “Million Dollar Advocates Forum.”

In 2006, the Committee on Attorney Advertising issued Opinion 39, concerning attorneys advertising inclusion in ranking lists published by organizations such as Best Lawyers of America ("Best Lawyers") and Key Professional Media ("Super Lawyers"). 185 N.J.L.J. 360, 15 N.J.L.J. 1549 (July 24, 2006). The New Jersey Supreme Court granted a petition for review of Opinion 39 and remanded the matter to a Special Master, who held a hearing and issued a comprehensive Report that was presented to the Court. In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66 (2008). In its decision, the Court acknowledged that the language of Rule of Professional Conduct 7.1(a)(3) prohibited statements comparing attorneys’ services and held that it would revise the Rule to “take into account the policy concerns expressed by the Rule while, at the same time, respecting legitimate commercial speech activities.” Id. at 79-80.

The Court issued amendments to Rule of Professional Conduct 7.1 effective November 2, 2009. Amended Rule of Professional Conduct 7.1(a)(3) provides that “a communication is false or misleading if it . . . compares the lawyer’s services with other lawyers’ services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: ‘No aspect of this advertisement has been approved by the Supreme Court of New Jersey’ . . . .” The official comment to amended Rule of Professional Conduct 7.1 provides:

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney’s fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

[Official Comment to RPC 7.1.]
Amended Rule of Professional Conduct 7.1(a)(3), therefore, requires that the factual basis for a comparison of attorneys’ services must be verifiable. Further, the attorney must include the name of the comparison organization and must be satisfied that the confrerrer has made appropriate inquiry into the attorney’s fitness. The attorney must include a description of the standard or methodology on which the accolade is based. Lastly, the attorney must state that the advertisement has not been approved by the Supreme Court. This information is necessary to protect consumers from communications that are misleading and likely to raise unjustified expectations. When adequate information is available to consumers of legal services, they should be able to differentiate between accurate puffery and unsustainable exaggeration.

The solicitation letter recently reviewed by the Committee provided: “Because of my dedication to our clients and success in the courtroom, I have been named as a Super Lawyer by New Jersey Monthly Magazine for five (5) consecutive years (2006 through 2010), and I am a Life Member of the Million Dollar Advocates Forum, which puts me in an elite group of less than one percent (1%) of all lawyers in the United States.” This language grossly violates the rules governing attorney advertising.

The advertisement calls the attorney “a Super Lawyer” instead of saying that he was included in the “Super Lawyers” list published by Thomson Reuters. There is an obvious and crucial difference between stating that one is “a Super Lawyer” and stating that one received an accolade or honor by being included on a list called “Super Lawyers.” This point was addressed by the Special Master in the Report submitted to the Court in In re Opinion 39 of the Committee on Attorney Advertising, supra:

Where superlatives are contained in the title of the list itself, such as here, the advertising must state and emphasize only one’s inclusion in the Super Lawyers or The Best Lawyers in America list, and must not describe the attorney as being a “Super Lawyer” or the “Best Lawyer.”

[Special Master Report, June 18, 2008, page 303.]

The claim in the solicitation letter that the attorney is in “an elite group of less than one percent (1%) of all lawyers in the United States” also is improper. As the Special Master stated in the Report:

Likewise, claims that the list contains “the best” lawyers or, e.g., “the top 5% of attorneys in the state,” or similar phrases are misleading, are usually factually inaccurate and should be prohibited.

[Id.]

The Committee agrees with these comments of the Special Master regarding permissible language and phrasing to be used by attorneys touting this type of honor or accolade. The claim that an attorney is “super,” “best,” “elite,” or in a top percentile of attorneys, cannot be factually substantiated. Such hyperbolic words and phrases are utterly and inherently misleading and may not be used in attorneys’ communications.7

Attorneys must also refrain from making inaccurate or misleading statements about the reasons for inclusion in such lists or membership in organizations such as the “Million Dollar Advocates Forum.” In the solicitation letter reviewed by the Committee, the attorney stated that he was included in the list called “Super Lawyers” and obtained membership in the “Million Dollar Advocates Forum” because of his dedication to his clients and success in the courtroom.

An attorney obtains inclusion in the list generated by Thomson Reuters (“Super Lawyers”), Best Lawyers in America (“Best Lawyers”), and similar organizations by receiving a sufficient score or rating in accordance with the organization’s standards and methodology. As required by amended Rule of Professional Conduct 7.1(a)(3), the advertisement must include a description of the standard or methodology used by the organization. An attorney obtains membership in the “Million Dollar Advocates Forum” because the attorney obtained a recovery of at least one million dollars in a case and then paid a substantial fee to the “Forum” for lifetime membership. Advertisements must include a description of the criteria to be met to obtain membership in organizations such as the “Forum.” Attorneys may not casually state that a reason such as “dedication to clients” was the basis for their receipt of this type of honor or accolade.
It has also come to the Committee's attention through the hotline that some newspapers conduct contests to anoint attorneys, businesses, and pizza parlors as "top" in the region. Apparently, this type of accolade is conferred based on online voting by newspaper readers. There is no indication that the newspaper conducts an inquiry into the fitness of the attorneys who "win" such contests. These appear to be mere popularity contests and attorneys may not refer to such honors or accolades in any communications about the attorney's services.

Accordingly, attorneys may communicate that they are included in ranking lists only if the factual basis for the comparison of attorneys' services can be substantiated or verified, and the comparing organization has made appropriate inquiry into the attorney's fitness. The attorney must include in the communication the name of the comparing organization and a description of the standard or methodology on which the honor or accolade is based. The attorney must state that the advertisement has not been approved by the Supreme Court. The attorney must include the year the honor or accolade was conferred and the specialty, if any, for which the attorney was listed. When the title of the list contains a superlative such as "super," "best," "leading," "top," or "elite," the attorney must state and emphasize only the attorney's inclusion in the list and must not state that he or she is "super," "best," "leading," "top," or "elite." Similarly, an attorney may not state that the list in which he or she is included reflects "the best" attorneys or a "top percentage" of attorneys, or that he or she belongs to an organization comprising an "elite percentage" of attorneys. Such statements cannot be substantiated and are inherently misleading.

1 Key Professional Media "Super Lawyers" list was acquired by Thomson Reuters in February, 2010.

2 The Special Master also noted that an advertisement touting inclusion in such lists must "state the year of inclusion in the listing as well as the specialty for which the lawyer was listed." Id. at 302. Stating the year of inclusion and the attorney's specialty, if any, will inform potential clients about the relevance of the honor or accolade. Accordingly, the Committee also agrees with, and hereby adopts, this finding of the Special Master.
NOTICE TO THE BAR

ATTORNEY ADVERTISING OF AWARDS, HONORS, AND ACCOLADES THAT COMPARE A LAWYER’S SERVICES TO OTHER LAWYERS’ SERVICES – REMINDER FROM THE COMMITTEE ON ATTORNEY ADVERTISING

The Supreme Court Committee on Attorney Advertising has received numerous grievances regarding attorney advertising of awards, honors, and accolades that compare a lawyer’s services to other lawyers’ services. Examples of such awards, honors, and accolades are: “Super Lawyers,” “Rising Stars,” Best Lawyers,” “Superior Attorney,” “Leading Lawyer,” “Top-Rated Counsel,” numerical ratings, and the like. The Committee issues this Notice to the Bar to remind lawyers that they may refer to such awards, honors, and accolades only when the basis for the comparison can be verified and the organization has made adequate inquiry into the fitness of the individual lawyer. Further, whenever permissible references to comparative awards, honors, and accolades are made, Rule of Professional Conduct 7.1 requires that additional language be displayed to provide explanation and context.

As a preliminary matter, a lawyer who seeks to advertise the receipt of an award, honor, or accolade that compares the lawyer’s services to other lawyers’ services must first ascertain whether the organization conferring the award has made “inquiry into the attorney’s fitness.” Official Comment to Rule of Professional Conduct 7.1. “The rating or certifying methodology must have included inquiry into the lawyer’s qualifications and considered those qualifications in selecting the lawyer for inclusion.” In re Opinion 39, 197 N.J. 66, 76 (2008); see also Committee on Attorney Advertising Opinion 42 (December 2010). This inquiry into the lawyer’s fitness must be more rigorous than a simple tally of the lawyer’s years of practice and lack of disciplinary history. Pursuant to Rule of Professional Conduct 7.1(a)(3)(ii), the basis for the comparison must be substantiated, bona fide, and verifiable.

The Committee has reviewed numerous awards, honors, and accolades that do not include a bona fide inquiry into the fitness of the lawyer. Some of these awards are the result of popularity contests – the lawyer “wins” the award when enough people email, telephone, or text their vote. Other awards are issued for a price or as a “reward” for joining an organization. Still others are generated based in large part on the participation of the lawyer with the conferring organization’s website. For example, a lawyer can enhance his or her “rating” with the organization by endorsing other lawyers, becoming endorsed in return, responding to questions from the public about legal matters on the organization’s website, and the like. Factors such as the payment of money for the issuance of the award; membership in the organization that will issue the award; and a level of participation on the organization’s Internet website render such awards suspect. Lawyers may not advertise receipt of such awards unless, as a threshold matter, the conferring organization made adequate and individualized inquiry into the professional fitness of the lawyer.
When an award, honor, or accolade meets this preliminary test, the lawyer must include additional information when referring to it in attorney advertising, whether that advertising be a website, law firm letterhead, lawyer email signature block, or other form of communication. First, the lawyer must provide a description of the standard or methodology on which the award, honor, or accolade is based, either in the advertising itself or by reference to a “convenient, publicly available source.” Official Comment to RPC 7.1. Second, the lawyer must include the name of the comparing organization that issued the award (note that the name of the organization is often different from the name of the award or the name of the magazine in which the award results were published). RPC 7.1(a)(3)(i). Third, the lawyer must include this disclaimer “in a readily discernible manner: ‘No aspect of this advertisement has been approved by the Supreme Court of New Jersey.”’ RPC 7.1(a)(3)(iii). All of this additional, accompanying language must be presented in proximity to the reference to the award, honor, or accolade.

Further, when the name of an award, honor, or accolade contains a superlative, such as “super,” “best,” “superior,” “leading,” “top-rated,” or the like, the advertising must state only that the lawyer was included in the list with that name, and not suggest that the lawyer has that attribute. Hence, a lawyer may state that he or she was included in the list called “Super Lawyers” or “The Best Lawyers in America,” and must not describe the lawyer as being a “Super Lawyer” or the “Best Lawyer.”

Lastly, the Committee has reviewed numerous law firm advertising that includes badges or logos of comparative awards (such as the yellow “Super Lawyers” badge) but does not include the required additional information in a discernible manner in proximity to the reference to the award. Every reference to such an award, honor, or accolade – even when it is in an abbreviated form such as the badge or logo – must include the required accompanying information: (1) a description of the standard or methodology; (2) the name of the comparing organization that issued the award; (3) the statement “No aspect of this advertisement has been approved by the Supreme Court of New Jersey.” Only the description of the standard or methodology can be presented by reference (with the statement that the standard or methodology can be viewed at that website or hyperlinked page). The other required information must be stated on the face of the advertising, readily discernible and in proximity to the reference to the award. The accompanying information cannot be buried at the bottom of a page, or in tiny print, or placed outside the screen shot on a website.

For example, a reference to the Super Lawyers accolade should provide:

Jane Doe was selected to the 2016 Super Lawyers list. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection_process_detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.
Lawyers who seek further assistance as to compliance with the rules governing attorney advertising may make inquiry of the Committee on Attorney Advertising. See Court Rules 1:19A-3 and 1:19A-8.

/s/ Jonathan M. Korn

Jonathan M. Korn  
Chair, Committee on Attorney Advertising

Dated: May 4, 2016
THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 661

July 2016

QUESTION PRESENTED

Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company?

STATEMENT OF FACTS

Recognizing that many potential clients search for a lawyer by using internet search engines, Lawyer A uses various search-engine optimization techniques to try to ensure that his name appears on the first page of the search results obtained when a potential client uses a search engine to seek a lawyer. One way Lawyer A seeks to achieve this goal is by participating in internet search-based advertising programs offered by search engines that are in widespread use by many types of businesses.

These search-based advertising programs allow a business to select specific words or phrases ("keywords") that will cause the business's advertisement to pop up in the search results of someone using that keyword in a search. The advertiser does not purchase exclusive rights to specific keywords; the same keywords can be used by a number of advertisers.

Lawyer B is a competing lawyer in Lawyer A's town. Lawyer B's area of practice is similar to Lawyer A's. Lawyer A and Lawyer B have never been law partners or engaged in joint representation in any case.

One of the keywords selected by Lawyer A is the name of Lawyer B. Lawyer A's keyword selection causes Lawyer A's name and a link to his website to be displayed on the search engine's search results page any time an internet user searches for Lawyer B using the search engine. Lawyer A's advertisement will appear to the side of or above the search results in an area designated for "ads" or "sponsored links." In addition to displaying Lawyer A's name and a link to Lawyer A's website, the ad or sponsored link may contain additional text concerning Lawyer A and his practice. Usually Lawyer B's name would also be listed in the search results. Moreover, if Lawyer B had also purchased similar advertising services from the search engine and had used his own name as a keyword, Lawyer B's name would also be listed in the ad or sponsored link section as well as in the regular search results when Lawyer B's name was used by a potential client as a search term.
Lawyer A’s keyword advertisement or sponsored link does not indicate whether or not Lawyer A and Lawyer B are affiliated. Lawyer B did not authorize Lawyer A to use Lawyer B’s name in connection with Lawyer A’s keyword advertisement.

DISCUSSION

Advertising, including internet advertising, is addressed in Part VII of the Texas Disciplinary Rules of Professional Conduct. The Texas Disciplinary Rules do not specifically address the question of whether it is permissible for a lawyer to use a competitor’s name to enhance the lawyer’s internet advertising. However, several provisions of the Texas Disciplinary Rules must be considered with respect to this question.

Rule 7.01(d) states that “[a] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.”

Rule 7.02(a) prohibits a lawyer from making or sponsoring “a false or misleading communication about the qualifications or the services of any lawyer or firm.” A communication is false or misleading if it “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading[.]” Rule 7.02(a)(1). Comment 3 to Rule 7.02 explains the standard set forth in Rule 7.02(a)(1) as follows:

“Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”

Under these Rules, if Lawyer A’s use of Lawyer B’s name as a keyword in search-engine advertising results in an advertisement that holds out Lawyer A to be a shareholder, partner, or associate of Lawyer B, then Lawyer A’s use of Lawyer B’s name would violate Rule 7.01(d). Furthermore, if such use of Lawyer B’s name would lead a reasonable person to believe that Lawyer A and Lawyer B are associated in some way, then the use of Lawyer B’s name as a keyword would be a misleading communication in violation of Rule 7.02(a).

In the opinion of this Committee, the use of a competitor’s name as a keyword in the factual circumstances here considered would not in normal circumstances violate either Rule 7.01(d) or Rule 7.02(a). The advertisement that results from the use of Lawyer B’s name does not state that Lawyer A and Lawyer B are partners, shareholders, or associates of each other. Moreover, since a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on web pages showing search results, it appears highly unlikely that a reasonable person using an internet search engine would be misled into thinking
that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer whose name was used in the search. Compare *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013) (finding no violation of Wisconsin right-of-privacy statute when one law firm used the name of a competing law firm as a keyword in search-engine advertising).

In addition to Rules 7.01(d) and 7.02(a), Rule 8.04(a)(3) must also be considered. Rule 8.04(a)(3) prohibits a lawyer from engaging in conduct “involving dishonesty, fraud, deceit or misrepresentation.” In the opinion of the Committee, given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation. Thus such use of a competitor’s name in internet search-engine advertising is not a violation of Rule 8.04(a)(3). In reaching this conclusion, this Committee has considered but does not concur with 2010 Formal Ethics Opinion 14 of the Ethics Committee of the North Carolina State Bar (April 27, 2012) (ruling that a lawyer’s use of a competitor’s name as a keyword in a search-engine advertising program violates the equivalent of Texas Disciplinary Rule 8.04(a)(3) because such use constitutes “conduct involving dishonesty” in that the conduct shows “a lack of fairness or straightforwardness”).

It should be noted that this opinion addresses only whether the use of a competitor’s name in internet search-engine advertising programs violates the Texas Disciplinary Rules of Professional Conduct. Although such use of a competitor’s name as a keyword in advertising programs does not in the opinion of the Committee involve a violation of the Texas Disciplinary Rules, a Texas lawyer’s participation in such an advertising program must comply with the other provisions of the Texas Disciplinary Rules applicable to advertising, in particular Disciplinary Rule 7.04 on advertisements in the public media. Moreover, depending on the circumstances, a Texas lawyer advertising through keywords on internet search engines may be subject to other requirements or prohibitions imposed by federal or state law or by professional ethics rules of other jurisdictions.

**CONCLUSION**

A lawyer does not violate the Texas Disciplinary Rules of Professional Conduct by simply using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company. The lawyer’s statements included in this advertising program must not contain false or misleading communications and must comply in all respects with applicable rules on lawyer advertising.
Marc Garfinkle maintains a solo practice in Morristown, New Jersey, where he limits his practice to matters relating to legal ethics, bar admission, judicial misconduct and attorney discipline. He is also the municipal public defender in Livingston, New Jersey.

Admitted to practice in New Jersey, Mr. Garfinkle has been a member of the American, New Jersey State, Morris County and Essex County Bar Associations, as well as the Association for CLE Administrators (ACLEA). He is Past Chair of the District VB Ethics Committee, writes a monthly “Practice Paper” on legal ethics for the New Jersey Law Journal, and is a frequent guest of the media in professional responsibility matters. He produces CLE seminars, workshops and retreats for lawyers and has provided live ethics-related seminars to state bar associations in Ohio, Missouri, South Carolina, Alaska and Oregon, as well as the ICE trial attorneys for the United States Department of Homeland Security. Mr. Garfinkle’s online programs have been produced by Lawline.com, West Legal EdCenter, Solo University.com and RocketMatterCLE, among other providers. He is also the self-published author of several books including $olo Contendere: How to Go Directly from Law School into the Practice of Law Without Getting a Job (3d. Ed.), The Hip-Pocket Guide to Testifying in Court, The New Lawyer’s Hip-Pocket Guide to Appearing in Court, The Law Enforcement Officer’s Hip-Pocket Guide to Testifying in Court and The Hip-Pocket Guide to Speaking in Public.

Mr. Garfinkle received his B.A. from Marietta College and his J.D. from UC Hastings (formerly Hastings College of the Law, University of California).
CHRISTINA VASSILIOU HARVEY focuses her practice on personal injury litigation. She has experience litigating personal injury cases on both the plaintiff and defense sides, including medical malpractice, professional malpractice, slip and falls, motor vehicle accidents, worker’s compensation, and product liability cases. In addition, she handles complex civil litigation, horseracing law, and disability matters.

Ms. Harvey practices in the federal and state courts in New Jersey and Pennsylvania, at both the trial and appellate levels, as well as before administrative agencies.

Ms. Harvey has authored articles for the New Jersey Lawyer magazine, the New Jersey Lawyer newspaper, NJ Esq., The Affiliate, The Young Lawyer and the New Jersey State Bar Association Young Lawyers Division (NJSBA-YLD) newsletter. She has lectured on attorney ethics, technology issues, and other subjects for the New Jersey Institute of Continuing Legal Education, the New Jersey State Bar Association, and the Monmouth Bar Association.

Ms. Harvey serves as Vice President to the Board of Directors of the Rutgers University School of Law – Newark Loan Repayment Assistance Program, a member of the New Jersey Law Journal Young Lawyers Advisory Board, the Co-Chair of the NJSBA Membership and Public Relations Committee and President of the Mercer County Women Lawyers Caucus. Ms. Harvey also serves as a founding board member to the Community Justice Center, a non-profit organization that assists disabled veterans to obtain disability benefits. In addition, she previously served as Trustee to the NJSBA, Chair to the NJSBA-YLD and Programming Coordinator for the American Bar Association Young Lawyers Division. She has been recognized by her peers and named as a 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, and 2016 “New Jersey Super Lawyer Rising Star.” She has also received three “Star of the Quarter” awards for her work in the American Bar Association Young Lawyers Division. The NJSBA-YLD awarded Ms. Harvey the Outstanding Young Lawyer of the Year Award in 2015, the Professional Achievement Award in 2013, and the Service to the Bar Award in 2009. She was recently honored as a New Leader of the Bar by the New Jersey Law Journal in 2015.

Before joining the Firm, she was an associate at Sterns & Weinroth. After graduating from Rutgers University School of Law, Newark, she was a law clerk
to the Honorable Dorothea O’C. Wefing, Presiding Judge of the Superior Court of New Jersey, Appellate Division, during the 2004-2005 court term. Prior to law school, Ms. Harvey was a contract specialist for the United States Navy.

**Practice Areas**

- Personal Injury
- Municipal Defense

**Bar Admissions**

- New Jersey, 2004
- New York, 2005
- S. District Court, District of New Jersey, 2005
- S. Court of Appeals, Third Circuit, 2011
- S. District Court, Eastern District of Pennsylvania, 2012

**Honors**

- Outstanding Young Attorney of the Year by NJSBA YLD, 2015
- Professional Achievement Award by the NJSBA YLD, 2013
- Service to the Bar Award, New Jersey State Bar Association, Young Lawyers Division, 2009
Jason T. Komninos, Esq. is a solo-practitioner with an office in Hackensack, NJ.

Mr. Komninos graduated *magna cum laude* with a B.A. in psychology from the University of Hartford. He received his J.D. from Pace University School of Law.

In 2016, Mr. Komninos was elected to serve as Secretary of the Municipal Court Practice Section of the New Jersey Bar Association. He is also a member of the American Bar Association, the Bergen County Bar Association, and the National College for DUI Defense.

Mr. Komninos has taught criminal law and legal research and writing at the Fairleigh Dickinson University Paralegal Program. He also currently serves on the District IIB Ethics Committee.
Kenneth Vercammen is an Edison, Middlesex County, NJ trial attorney where he handles Criminal, Municipal Court, Probate, Civil Litigation and Estate Administration matters. Ken is author of the American Bar Association’s award winning book “Criminal Law Forms” and often lectures to trial lawyers of the American Bar Association, NJ State Bar Association and Middlesex County Bar Association. As the Past Chair of the Municipal Court Section he has served on its board for 10 years. He is admitted to the Supreme Court of the United States.

Awarded the Municipal Court Attorney of the Year by both the NJSBA and Middlesex County Bar Association, he also received the NJSBA- YLD Service to the Bar Award and the General Practitioner Attorney of the Year, now Solo Attorney of the Year.

Ken Vercammen is a highly regarded lecturer on both Municipal Court/ DWI and Estate/ Probate Law issues for the NJICLE- New Jersey State Bar Association, American Bar Association, and Middlesex County Bar Association. His articles have been published by NJ Law Journal, ABA Law Practice Management Magazine, YLD Dictum, GP Gazette and New Jersey Lawyer magazine. He was a speaker at the 2013 ABA Annual meeting program “Handling the Criminal Misdemeanor and Traffic Case” and serves as is the Editor in Chief of the NJ Municipal Court Law Review.

For nine years he served as the Cranbury Township Prosecutor and also was a Special Acting Prosecutor in nine different towns. Ken has successfully handled over one thousand Municipal Court and Superior Court matters in the past 27 years.

His private practice has devoted a substantial portion of professional time to the preparation and trial of litigated matters. Appearing in Courts throughout New Jersey several times each week on Criminal and Municipal Court trials, civil and contested Probate hearings. Ken also serves as the Editor of the popular legal website and related blogs. In Law School he was a member of the Law Review, winner of the ATLA trial competition and top ten in class.

Throughout his career he has served the NJSBA in many leadership and volunteer positions. Ken has testified for the NJSBA before the Senate Judiciary Committee to support changes in the DWI law to permit restricted use driver license and interlock legislation. Ken also testified before the Assembly Judiciary Committee in favor of the first-time criminal offender “Conditional Dismissal” legislation which permits dismissal of some criminal charges. He is the voice of the Solo and Small firm attorneys who juggle active court practice with bar and community activities. In his private life he has been a member of the NJ State champion Raritan Valley Road Runners master’s team and is a 4th degree black belt.

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