

14-04

Opinion 14-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

February 4, 2015

Issued November 12, 2014

ISSUE

1. What are the ethical limits to participating in attorney rating systems, especially those that identify "the Best Lawyer" or "Super Lawyer"?

OPINION

2. Rule 7.1 of the Utah Rules of Professional Conduct (the "URPC") prohibits false or misleading communications concerning a lawyer or a lawyer's services. An unsubstantiated comparison of lawyers is false or misleading if it would lead a reasonable person to conclude that the comparison can be substantiated. Advertisement of a rating, or of inclusion in a ranking list as being "super" or "best" or the like, by a comparing organization is permissible where the comparing organization has made an appropriate inquiry into the lawyer's fitness, the lawyer does not pay to receive the rating itself (although she may pay for an investigation in accordance with Rule 7.2), the comparing organization's methodology or standard used to determine the rating or ranking is fully disclosed and explained and conveniently available to the public, and the communication disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. The factual basis for the comparison of the rated or listed lawyer's services to the services of other lawyers must be verifiable in order to pass muster under Rule 7.1. Any advertisement must state that the lawyer was included in a "super" or other such list or ranking rather than describe the lawyer as being a "super lawyer" or the "best lawyer." The statements that a lawyer is "super" or the "best" cannot be factually substantiated and are inherently misleading.

3. Rule 7.2 of the Utah Rules of Professional Conduct prohibits giving "anything of value to a person for recommending the lawyer's services; except that a lawyer may: . . . pay the reasonable costs of advertisements or communications permitted by this Rule. ..." Rule 7.2(b)(1). A lawyer who pays an entity to list her as the "best lawyer"

in an area or to otherwise compare her favorably to other lawyers violates Rule 7.2 because she is giving something of value to another to recommend the lawyer's services. She is not paying the reasonable costs of advertising. Similarly, trading votes with another in a survey to determine the "best lawyer" is giving something of value for the other person to recommend the lawyer's services and violates Rule 7.2. "[A]nything of value" would also include monies paid to a public figure or celebrity to recommend a lawyer. It is permissible for a lawyer to pay a fee to a comparing organization to conduct an investigation into the lawyer's fitness, but the outcome of the investigation must be independent of the fee.

BACKGROUND

4. Certain websites, advertisers and companies offer services in which they list lawyers as the "best" in a particular locale, practice area, city, etc. Sometimes these entities determine who they will list as the "best" simply by including whoever signs up (and pays them) first. Other times companies will run on-line voting contests to determine which lawyers, restaurants, and businesses are the "best" in the area based solely on the number of votes cast, a system that can be easily manipulated by lawyers with large staffs or multiple email addresses. Other entities purport to have more scientific or valid methods of identifying outstanding lawyers, in which they investigate each lawyer's fitness before deciding whether to rate the lawyer favorably. Still other entities investigate and approve of law firms or lawyers who have good business practices (e.g., have current business licenses and Utah State Bar licenses, have not been publicly disciplined, etc.), separate and apart from the lawyers' legal experience, skill, and expertise, or lack thereof, which they do not investigate or evaluate. The Committee has been asked to opine as to when these arrangements violate the Rules of Professional Conduct.

ANALYSIS

5. This Committee has twice stated that

"[t]he U.S. Supreme Court has made it clear that public communication concerning a lawyer's services (including any form of advertising) is commercial speech, enjoys First Amendment protection, and can be regulated only to further substantial state interests, and then only in the least restrictive manner possible. The cardinal rule concerning all public communication about a lawyer and her services is that the communication not be false or misleading."

Ethics Advisory Op. 09-01, ¶ 3 (Feb. 23, 2009) (quoting Ethics Advisory Op. 00-02 (Mar. 9, 2000)). Deceptive

advertising in the legal profession poses a particular risk because "the public lacks sophistication concerning legal services, [and therefore] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Safes v. State of Arizona*, 433 U.S. 350, 383 (1977). As an example, the U.S. Supreme Court indicated that "advertising claims as to the quality of services . . . not susceptible [to] measurement or verification . . . may be so likely to be misleading as to warrant restriction." *Id.* at 383-84. Similarly, the Utah Supreme Court has found that "[t]he state obviously has a substantial and compelling interest in protecting the public from false, deceptive, or misleading advertising" In re Utah State Bar Petition, 647 P.2d 991, 993 (Utah 1982) (citing *Safes*, 433 U.S. at 383).

6. Rule 7.1 of the Utah Rules of Professional Conduct states:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. 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.

Thus, an advertisement that has either: (1) "a substantial likelihood [to] 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," or (2) "an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers . . . presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated" would be considered misleading and therefore prohibited. URPC Rule 7.1, cmts. 2 & 3.

7. This Committee previously analyzed the current version of Rule 7.1 and issued several interpretive guidelines instructing lawyers how to avoid false or misleading statements in advertising.^[1] Ethics Advisory Op. 09-01, ¶¶ 6-12. Of specific relevance to the present issue, this Committee cited Connecticut Informal Ethics Advisory Op. 01-07 (2001), which states that "comparative statements would require factual substantiation to avoid being misleading. Because it is almost impossible to substantiate certain comparisons ('best attorney in town') the wiser course is to advertise qualities that can be substantiated." *Id.* at ¶ 9 (citing Geoffrey Hazard, W. William Hodes & Peter Jarvis, *THE LAW OF LAWYERING* (3d) § 55.4, at 55-21). This does not foreclose the possibility of advertising as a "best lawyer" but does require that the lawyer using the comparative language be able to factually substantiate the claim.

8. Commentators Hazard, Hodes and Jarvis have also

addressed the use of rating systems such as "Super Lawyers" and "Best Lawyers in America" publications:

Publications such as "Super Lawyers" and "Best Lawyers in America" use a variety of peer review and research procedures to generate lists of highly qualified lawyers in various fields of practice in most states. Because of the precautions taken to avoid "vote trading" or "ballot stuffing" and because advertisements in these publications cannot be purchased until after the separate selection process has been completed, most states have recognized these rating to be bona fide ratings that have real informational value; thus not being misleading, they are permissible.

Id. § 55.4, at 55-14 (Supp. 2014).

9. The issue of how a lawyer may factually substantiate the claim to be "the best" was thoroughly considered in New Jersey. In In re Opinion 39 of Committee on Attorney Advertising, 961 A.2d 722 (N.J. 2008), the New Jersey Supreme Court was presented with the question of whether lawyers could use the designation of "Best Lawyer," or "Super Lawyer," or Martindale-Hubble rankings in their advertisements. The Supreme Court Committee on Attorney Advertising concluded that comparative titles violated the N.J. Rules of Professional Conduct, and announced this decision in Opinion 39. The companies who provided the designations (Key Professional Media, Inc., d/b/a "Super Lawyers;" Woodward White, Inc. - publisher of "Best Lawyers in America;" and New Jersey Monthly, LLC) appealed the opinion, and the New Jersey Supreme Court referred the matter to a special master who researched the issue and compiled a report. In his report, which garnered the support of the Court, the special master recommended "twelve 'regulatory components . . . extracted from [the advertising decisions of other states] to provide[] some guidance to the Court" *Id.* at 728-29. The twelve components are:

1. The advertising representation must be true;
2. The advertisement must state the year of inclusion in the listing as well as the specialty for which the lawyer was listed;
3. The basis for the implied comparison must be verifiable by accurate and adequate disclosure in the advertisement of the rating or certifying methodology utilized for compiling the listing or inclusion that provides a basis upon which a consumer can reasonably determine how much value to place in the listing or certification; as a minimum, the specific empirical data regarding the selection process should be included (e.g., in a peer-review methodology, the number of ballots sent and the percentage of the ballots

returned....);

4. The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion;

5. The rating or certification cannot have been issued for a price or fee, nor can it have been conditioned on the purchase of a product, and the evaluation process must be completed prior to the solicitation of any advertising, such as for a special advertising supplement in a magazine or other publication;

6. 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;"

7. 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;

8. The peer-review or certification methodology must contain proper usage guidelines that embody these requirements and must be adhered to in the advertisement;

9. The advertising must be done in a manner that does not impute the credentials bestowed upon individual attorneys to the entire firm;

10. The peer-review or certification methodology must be open to all members of the Bar;

11. The peer-review rating methodology must contain standards for inclusion in the lists that are clear and consistently applied; and

12. The advertisement must include a disclaimer making it clear that inclusion of a lawyer in a Super Lawyers or The Best Lawyers in America list, or the rating of an attorney by any other organization based on a peer-review ranking is not a designation or recognized certification by the Supreme Court of New Jersey or the American Bar Association.

Id. at 729 (emphasis in original in ¶ 6).

After receiving these recommendations, Rule 7.1 of the N.J. Rules of Professional Conduct was amended as follows: "[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" disclaims approval by the Supreme

Court of New Jersey. N.J. Court Rules, RPC 7.1(a)(3). The official comment from the New Jersey Supreme Court following this rule describes the requirements for a comparison to be truthful:

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.

N.J. Court Rules, RPC 7.1, cmt.

10. We consider the New Jersey special master's analysis to provide useful guidance. While Rule 7.1 of the Utah Rules of Professional Conduct has not been redrafted (as Rule 7.1 of the N.J. Rules of Professional Conduct has), we also find the comments to New Jersey's Rule 7.1 helpful and instructive. We conclude that a lawyer's participation in any rating system and use of that rating in the lawyer's advertising is permissible where: (1) the comparing organization has made appropriate inquiry into the lawyer's fitness; (2) a favorable rating from the comparing organization is not for sale and may not be purchased by the lawyer; (3) the lawyer ensures that the methodology or process used to determine the rating is fully disclosed and explained using plain language and is conveniently available to the public; and (4) the communication disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. Statements that explain in laymen's terms, and do not exaggerate the meaning or significance of professional credentials, are permissible.

11. Rule 7.1 prevents a lawyer from communicating to the public credentials that are not legitimate. A recommendation or endorsement that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee, is misleading to the public and therefore prohibited. Likewise, implying in advertising that a lawyer has been selected for inclusion in a rating system based upon the quality of the lawyer's services or some other process of independent endorsement when in fact no bona fide judgment as to quality has been objectively made is misleading and violates Rule 7.1. For example, paying the reasonable costs of advertising to a comparing organization for an endorsement, even after an investigation, violates Rule 7.1 where the basis for and scope of the investigation and endorsement is not fully disclosed to the public in clear and simple terms that the average consumer can understand. Without that information, a consumer cannot reasonably

determine how much value to place on the endorsement. Similarly, some publications hold contests that rely solely upon unsolicited votes in order to designate the "best" restaurants, businesses, lawyers, etc. in a certain geographical area without any inquiry into the fitness of the lawyers who garner the most votes. Such contests invite ballot stuffing, cannot be factually substantiated, and do not pass muster under Rule 7.1.

12. Even where appropriate disclosures have been made to satisfy Rule 7.1, the advertisement must still comply with all of the other Utah Rules of Professional Conduct, including Rule 7.2.

13. Rating systems may implicate Rule 7.2 of the Utah Rules of Professional Conduct, which prohibits giving anything of value to another to recommend the lawyer's services. A lawyer may not pay another person for channeling professional work. If a lawyer pays a fee to be listed as among the "best" lawyers, then the lawyer violates this rule. This is true whether or not the lawyer thereafter advertises this rating herself or not. A lawyer who trades votes with other lawyers violates Rule 7.2. This Committee established in Ethics Advisory Opinion 13-02 that reciprocal referral arrangements violate Rule 7.2. "If a lawyer refers a client to another lawyer or other professional pursuant to a reciprocal referral agreement,[2] then the first lawyer is giving 'something of value' in exchange for a past or future recommendation from the other professional." Hazard, Hodes & Jarvis, *THE LAW OF LAWYERING* (3d) § 56.5, at 56-9. Likewise, if one lawyer votes for her friend with the understanding that her friend will vote for her, this is "giving something of value" for a recommendation and violates Rule 7.2 in the same way. Further, a lawyer who pays a celebrity or public figure to recommend the lawyer violates Rule 7.2.

14. A lawyer may, for advertising purposes, pay a comparing organization to investigate that lawyer, provided that the outcome of the investigation is not predetermined and is independent of the fee. If the results from an appropriate investigation are thereafter advertised, the nature and scope of the investigation must be fully disclosed and explained using plain language and must be conveniently available to the public. Such an investigation may require "the inclusion of an appropriate disclaimer or qualifying language," especially if the investigation is limited to certain matters, such as good business practices. See Ethics Advisory Op. 09-01, ¶ 7. For example, the Better Business Bureau (the "BBB") indicates that its "accreditation does not mean that the business' products or services have been evaluated or endorsed by the BBB, or that BBB has made a determination as to the business' product quality or competency in performing services." BBB, <http://www.bbb.org/utah/for-businesses/about-bbb-accredit>

ation/ (last visited Oct. 22, 2014). Otherwise, a general endorsement may "create unjustified expectations or otherwise mislead a prospective client." See Ethics Advisory Op. 09-01, ¶ 7.

15. Once a lawyer has been appropriately investigated or evaluated by a comparing organization, it is not a violation of Rule 7.2 for a lawyer to pay "the reasonable costs of advertisements or communications" that the comparing organization incurs to include the lawyer in its rating system. However, it is impermissible for a lawyer to participate in a rating system in which the comparing organization charges ongoing fees for purported "reasonable costs of advertisements" that in reality are improper payments for its continued recommendation of the lawyer.

4325-0857-7312, v. 1

[1] We again note that Utah's Truth in Advertising Statute, Utah Code Ann. § 13-11a-1, et seq., and Utah's Consumer Sales Practices Act, Utah Code Ann. § 13-11-1, et seq., should be consulted as well.

[2] We note that Rule 7.2 of the Model Rules of Professional Conduct ("MRPC") permits reciprocal referral agreements if they are "not exclusive" and if "the client is informed of the existence and nature of the agreement." MRPC Rule 7.2(b)(4). Utah has not adopted this provision; thus, any reciprocal referral agreement in Utah violates Rule 7.2 of the Utah Rules of Professional Conduct.

DISSENT (TWO MEMBERS DISSENTING)

1. We fully agree with the Committee's Opinion with respect to Rule 7.1 regarding false or misleading communications. However, we disagree with one aspect of the Committee's Opinion regarding Rule 7.2 and write separately to outline that disagreement.

2. Rule 7.2(b) prohibits giving "anything of value to a person for recommending the lawyer's services; except that a lawyer may: (1) pay the reasonable costs of advertisements or communications permitted by this Rule." The Committee opines: "[A]nything of value' would also include monies paid to a public figure or celebrity to recommend a lawyer." (Para. 3) and "Further, a lawyer who pays a celebrity or public figure to recommend the lawyer violates Rule 7.2" (Para. 13). We believe that prohibiting celebrity recommendations unhelpfully confuses what may be the "reasonable costs of advertising" with what Rule 7.2 clearly prohibits - paying "others for channeling professional work." Comment [5].[1]

3. The context in which a celebrity would recommend an attorney would typically be through a paid advertisement. The Committee's Opinion will, apparently, permit the

celebrity to appear in an ad and to say "Let me tell you about Firm Abbott & Costello . . ." but not to say "We recommend that if you have a legal problem in z, you contact the Abbott & Costello firm." We think most of the public will fail to see a difference between the two scenarios and will think that either scenario involves the celebrity endorsing or recommending the attorney.

4. Presumably the celebrity will charge more to appear in the advertisement simply because he is a celebrity. We do not think it wise to have a rule that asks what portion of the celebrity's fee is for acting and what portion is for being willing to recommend the attorney.

5. Commentators Hazard, Hodes & Jarvis appear to agree with my analysis, writing:

Rule 7.2(b)(1) addresses the sometimes uncertain line between permitted advertising and prohibited solicitation as it applies to the use of "runners" and other third party facilitators of communications. . . . [S]peaking in the most literal terms, it might be said that the proprietor of an advertising medium is also a "runner" of sorts, who is being paid to "recommend," after all, the subject of the advertisement. The same could be said of a television actor paid to endorse a lawyer's "product," or a company that produces and auto-dials pre-recorded commercial messages. To avoid these awkward results, Model Rule 7.2(b)(1) clearly permits such arrangements on the theory that they are merely instrumentalities of permitted advertising. THE LAW OF LAWYERING (3d) § 56.2, at 56[^] (2014).

1. We think celebrity appearances in ads are better addressed solely under Rule 7.1 regarding misleading advertising. If the celebrity purports to have some special expertise in order to recommend the attorney (e.g. a Utah Jazz player recommending an attorney engaged in sports law), then a disclaimer may be necessary to indicate that this is a paid advertisement to avoid misleading the consumer..

2. We would eliminate the two references forbidding paying celebrities to recommend an attorney for the above reasons.

4312-5959-2480, v. 1

Notes:

[1] We again note that Utah's Truth in Advertising Statute, Utah Code Ann. § 13-11a-1, et seq., and Utah's Consumer Sales Practices Act, Utah Code Ann. § 13-11-1, et seq., should be consulted as well.

[2] We note that Rule 7.2 of the Model Rules of

Professional Conduct ("MRPC") permits reciprocal referral agreements if they are "not exclusive" and if "the client is informed of the existence and nature of the agreement." MRPC Rule 7.2(b)(4). Utah has not adopted this provision; thus, any reciprocal referral agreement in Utah violates Rule 7.2 of the Utah Rules of Professional Conduct.

[1] Comment 5 of Rule 7.2 states in relevant part:

Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers, (emphasis added).

The Committee appears to believe that paying for "airtime" is permitted but paying celebrities to perform during that air time is not. This is a flawed approach to construing this comment. The word 'include' in a statute generally signals that entities not specifically enumerated are not excluded." Singer, Sutherland's Statutes and Statutory Construction § 47:25 at 444 (2014).
