

NOTICE TO THE BAR

SUPREME COURT PROFESSIONAL RESPONSIBILITY RULES COMMITTEE – REPORT ON REFERRAL FROM THE COURT ON OPINION 39 OF THE COMMITTEE ON ATTORNEY ADVERTISING – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the April 1, 2009 Report of the Professional Responsibility Rules Committee (PRRC) on Referral from the Decision of the Supreme Court in In re Opinion 39 of the Committee on Attorney Advertising (197 N.J. 66 (2008)). In that decision the Court asked the PRRC, the Committee on Attorney Advertising (CAA), and the Advisory Committee on Professional Ethics (ACPE) for proposed amendments to the Rules of Professional Conduct regarding comparative attorney advertising on an expedited basis. The PRRC's rule amendment proposals are set forth in its report, which includes the joint report from the CAA and the ACPE as an appendix. The PRRC report and the joint CAA/ACPE report are published with this Notice. The reports are also available for downloading on the Judiciary's Internet web site at njcourts.com.

Please send any comments on the proposed RPC amendments in writing by Monday, June 1, 2009 to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on PRRC Report
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted via Internet e-mail to the following address:
Comments.Mailbox@judiciary.state.nj.us.

The proposed RPC amendments will not be covered at the previously announced May 19, 2009 hearing on the various amendments to the Rules of Court proposed in the 2007-2009 reports of the Supreme Court Rules Committees.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). However, comments submitted in response to this notice will be maintained in confidence if the author specifically requests confidentiality. In the absence of such a request, the author's identity and his or her comments may be subject to public disclosure after the Court has acted on the PRRC's recommendations.

/s/ Glenn A. Grant

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 1, 2009

Out-of-Cycle Report
of the
Professional Responsibility Rules Committee



On Referral from the Decision of the Supreme Court in
In re Opinion 39 of the Committee on Attorney Advertising

April 1, 2009

INTRODUCTION

This report responds to the referral of the Court in In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66 (2008), to the Professional Responsibility Rules Committee (PRRC or Committee), the Committee on Attorney Advertising (CAA) and the Advisory Committee on Attorney Ethics (ACPE) for expedited rulemaking proceedings.

BACKGROUND

In summary, in 2006, the CAA concluded that “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).” Opinion 39 of the CAA, 185 N.J.L.J. 360, 15 N.J. Lawyer 1549 (July 24, 2006) (Opinion 39). The Court stayed Opinion 39, granted petitions for review, and remanded the matter to retired Appellate Division Judge Robert A. Fall to sit as a Special Master to develop an evidentiary record. In June 2008, Judge Fall issued a comprehensive report on the legal and factual issues raised in the petitions. See Report of Special Master, available at www.judiciary.state.nj.us/notices/Opinion%2039%20Report.pdf.

In December 2008, the Court issued its decision in In re Opinion 39, concurring with Judge Fall’s conclusion that “state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine.” 197 N.J. at 79 (quoting Report at 149). The Court vacated Opinion 39 and concluded that the RPCs required review and that RPC 7.1(a)(3), at a minimum, must be modified, “because of the constitutional concerns identified in the Report and

in light of the emerging trends in attorney advertising.” Ibid. So the task could be undertaken in the context of the Court’s administrative rulemaking functions, rather than in an adversarial proceeding, the Court referred RPC 7.1(a) to the CAA, the ACPE and the PRRC to consider amendments “that will take into account the policy concerns expressed by the Rule while, at the same time, respecting legitimate commercial speech activities . . . in light of the analyses and recommendations presented in the Report”

The CAA and ACPE considered the referral and reported their recommendations to the PRRC in March 2009 (their joint report is attached as Appendix A). After careful consideration, the PRRC recommends:

RULE AMENDMENT AND OFFICIAL COMMENT PROPOSED BY THE PRRC¹

RPC 7.1. Communications concerning a lawyer's service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer’s services with other lawyers’ services, unless the basis for the comparison can be substantiated; or

(4) . . . no change

(b) . . . no change

¹ Proposed new text is underlined, as are existing paragraph designations and captions. No change in the text is indicated by “. . . no change.”

Official Comment by Supreme Court (_____, 2009):

The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that the communication is likely to create unjustified expectations or otherwise mislead a prospective client.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4, 1990; paragraph (b) amended January 5, 2009 to be effective immediately²; paragraph (a)(3) amended and Official Comment added _____, 2009, to be effective immediately.

DISCUSSION

As adopted in 1984 and in its present form, New Jersey RPC 7.1(a) defines, as prohibited “false or misleading” communications, a communication that “is likely to create an unjustified expectation about results,” RPC 7.1(a)(2), and a communication that “compares the lawyer’s services with other lawyers’ services,” RPC 7.1(a)(3). RPC 7.1 is similar in substance to the former version of the American Bar Association’s corresponding Model Rule of Professional Conduct 7.1.³

In 2002, as part of the report of its “Ethics 2000” Commission, the ABA amended Model RPC 7.1 to delete two specific examples of “false or misleading” communications from the text of the rule: comparative statements and statements likely to create unjustified expectations about results. The Ethics 2000 Commission Reporter’s Explanation of Changes, available at www.abanet.org/cpr/e2k/e2k-rule71rem.html, stated that such “categorical prohibitions . . . [had] been criticized as being overly broad and have therefore been relocated from text to the commentary as examples of statements that are likely to be misleading. The Commission

² The January 2009 amendment is technical, correcting the citation to a cross-referenced Rule.

³ As Judge Fall observed, a substantial difference between the two, however, is that former ABA Model Rule 7.1 permitted comparisons that could be “factually substantiated,” while RPC 7.1 prohibits them altogether.

believes this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection.”

As discussed in more detail in the 2009 CAA/ACPE Report, both the ACPE and the CAA recommended retention of RPC 7.1(a)(2) (prohibiting advertising “likely to create an unjustified expectation about results”) because it highlights a type of inherently misleading statement that should remain specifically prohibited. The PRRC concurs. Thus, the primary focus of the Committees’ review was the comparison of services addressed by RPC 7.1(a)(3).

To allow comparative communications, the ACPE initially preferred an amendment that deletes RPC 7.1(a)(3) and relocates the regulation of such communications to Official Comments, guidelines, and advisory opinions of the CAA. See 2009 CAA/ACPE Report at 5-6, 7. The ACPE suggests Official Comments similar to the Model RPC’s comments, which include, in Comment 3, a provision noting that disclaimers and qualifications could cure otherwise misleading statements.

The CAA initially preferred that comparative advertising be permitted, not by eliminating RPC 7.1(a)(3), but by supplementing the existing text to prohibit comparisons with other lawyers’ services “unless the comparison can be factually substantiated with information available to consumers.” See 2009 CAA/ACPE Report at 4-5. Finding the lengthy ABA comments unduly repetitive, the CAA would add one Official Comment to address disclaimers and qualifying language.

After the CAA and ACPE each reviewed the initial recommendations of the other, they agreed, while still preferring their respective initial approaches, that a useful response to the issues raised in the Court’s opinion would be an amendment to RPC 7.1(a)(3) to prohibit comparisons with other lawyers’ services “unless the comparison can be factually substantiated.”

The PRRC does not view the differences between the CAA and ACPE proposals as substantial. In essence, the ACPE would address comparative advertisements and the concepts of disclaimers and qualifying language in Official Comments, which would allow a more flexible approach in the application of the RPC in light of free speech and consumer protection concerns. The CAA, which is charged with protecting the public and regulating and advising in the area of attorney advertising, would include in the text of the RPC the requirement that comparisons be capable of substantiation, which would provide greater ease in regulation.

The PRRC recommends a modified version of the approach that both the CAA and ACPE found acceptable. The PRRC proposes that the Court retain RPC 7.1(a)(3) and add new language allowing comparisons to other lawyers' services if the "basis for the comparison can be substantiated." The PRRC also recommends the Official Comment suggested by the CAA, which states that "an appropriate disclaimer or qualifying language may preclude a finding that the communication is likely to create unjustified expectations or otherwise mislead a prospective client."

The Committee recognizes that First Amendment principles preclude an outright ban on comparative advertising. After due consideration, the PRRC recommends that expansion of the RPC to include a general qualification – that the "basis for the comparison can be substantiated" – in the text of the RPC itself, rather than in a comment. In addition, the PRRC recommends retention of the text of the RPC at its relatively general level because it applies to all communications by attorneys about their services, not simply the situations that prompted the referral. Further, too much specificity in a rule risks omission of scenarios not envisioned at the time of its adoption. The Committee respectfully notes the twelve "regulatory components" or factors recommended by Special Master Judge Fall in his thorough and comprehensive analysis.

See Report at 302-03. Rather than incorporate such detailed factors in RPC 7.1, they may be more appropriately addressed by way of guidelines and in the application of the RPC in future cases.

The PRRC concludes that the focus should be on adequate disclosure of the basis for the comparison, rather than on the comparison itself. The requirement that the basis of a comparison can be substantiated reflects a need for adequate disclosure. A communication comparing a lawyer's services to other lawyers' services is inherently based on opinions, which, unlike facts, cannot be objectively verified. Further, the PRRC at this time is not sufficiently informed to say whether a given methodology is bad or good, and thus whether the underlying comparison is flawed or not. What is important is that consumers be informed about the basis of the comparison so they can make up their own minds about the usefulness of the comparison. In this regard, the PRRC respectfully directs the Court's attention to the third regulatory component identified by Judge Fall. See Report at 302 (noting that adequate disclosure provides "basis upon which a consumer can reasonably determine how much value to place" on comparison" and "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 ballots returned)"). That factor lends some meaning to how the basis for a comparison can be adequately disclosed.

With respect to the proposed Official Comment, the PRRC agrees that a communication that includes "an appropriate disclaimer or qualifying language may preclude a finding that the communication is likely to create unjustified expectations or otherwise mislead a prospective client." The concern with adoption of the full list of ABA comments, however, is that they may not be expressed in a sufficiently pointed way to address all of the issues raised by the referral.

Examples have been given of disclaimers that may accompany a communication to preclude it from being misleading. For example, an advertisement of inclusion on a listing of attorneys may contain a statement that inclusion on the list was based on a peer-review survey sent to X number of attorneys, of whom Y completed responses. It also could include qualifying language, similar to that contained in the attorney certification rules (see RPC 7.4(d)), stating that “the listing has not been approved or passed on by the Supreme Court.” Ultimately, whether a disclaimer or qualifying language prevents a comparison from being misleading is a question that must be determined on a case-by-case basis.

In conclusion, the Committees have proposed variations of amendments that will allow attorneys to make comparative communications, while at the same time address the need to protect consumers from misleading statements. The PRRC anticipates that an appropriate Rule will result in an explanation that the focus is not on the verifiability or “accuracy” of the comparison itself, but on adequate disclosure of the basis used to make the comparison so consumers can make an informed decision about the reliability and usefulness of the comparison. Of necessity, a full exposition of an amended RPC must evolve on a case-by-case analysis through CAA opinions and decisions of the Court applying the RPC. Such an exposition also may include further refining by way of the adoption of CAA guidelines.

Respectfully submitted,


Professional Responsibility Rules Committee
Stewart G. Pollock, Chair

Appendix A: Report of the CAA & ACPE



COMMITTEE ON ATTORNEY ADVERTISING
AND
ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

TO: Professional Responsibility Rules Committee

FROM: Carol Johnston 
Secretary to the Committee on Attorney Advertising
Secretary to the Advisory Committee on Professional Ethics
On Behalf of Both Committees

DATE: March 2, 2009

RE: Committee on Attorney Advertising and Advisory Committee on Professional
Ethics Recommendations for Revision of *Rule of Professional Conduct 7.1*

In December 2008, the New Jersey Supreme Court remanded an appeal of a Committee on Attorney Advertising decision regarding attorneys advertising inclusion on ranking lists published by organizations such as Best Lawyers of America ("Best Lawyers") and Key Professional Media ("Super Lawyers") to the Advisory Committee on Professional Ethics (ACPE), the Committee on Attorney Advertising (CAA), and the Professional Responsibility Rules Committee (PRRC). The Court requested the various committees to consider "a redrafted Rule that will take into account the policy concerns expressed by the Rule while, at the same time, respecting legitimate commercial speech activities." In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66, 79-80 (2008). The CAA and the ACPE considered the current New Jersey Rule, the current and prior American Bar Association (ABA) Model Rules and Comments, and various formulations of the Rule adopted by other states. While the Committees did not agree on specific language for a revised Rule, each Committee considered potential modifications to their respective proposals that could bring the recommendations closer. The initial recommendations of each Committee and the proposed modifications discussed by the Committees are set forth below.

The current version of New Jersey RPC 7.1(a) provides:

- (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyer's services; or

* * *

In the Opinion 39 case, Special Master Judge Fall found that our Court Rule per se prohibits comparison of a lawyer's services even if the comparison can be substantiated, and does not permit misleading expressions in the communication to be ameliorated by suitable and appropriate disclaimers or qualifications. Special Master Judge Fall stated:

There is no provision in the New Jersey Rules of Professional Conduct that permits a "substantiated" comparison of lawyers' services, or contemplates that "an appropriate disclaimer or qualifying language" in the lawyer advertisement might preclude a finding that the advertisement is likely to create an unjustified expectation or otherwise mislead. This latter concept, of course, embraces the principle first articulated in Bates v. State Bar of Arizona, 433 U.S. 350, 384, 97 S. Ct. 2691, 2709, 53 L. Ed. 2d 810, 836 (1977), and then explicitly stated in In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 938, 71 L. Ed. 2d 64, 75 (1982), that the remedy, in the first instance, when addressing potentially misleading information, is not necessarily a blanket ban, "but preferably a requirement of disclaimers or explanation[.]" and that restrictions placed upon the advertising of professional services where there is a potential for deception "may be no broader than reasonably necessary to prevent the deception."

[Special Master Report, pages 81-82; full citations supplied.]

Our New Jersey rule was adopted in 1984 substantially in conformance with the then ABA Model Rule. However, the ABA revisited its rule in 2002 (as part of its Ethics 2000 revisions) and readopted it simply as follows:

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.

The ABA augmented the rule, however, with substantive comments that provide guidelines enabling the regulators to evaluate advertisements:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. 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.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Prior to the 2002 ABA Model Rule revision, ABA Model Rule 7.1 provided:

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:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The CAA determined that a revised Rule should permit substantiated comparison advertising with disclaimers and qualifications to address misleading advertising. The CAA discussed various formulations and proposed revisions and initially agreed on this proposal:

RPC 7.1

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services[;], unless the comparison can be factually substantiated with information available to consumers; or

* * *

Official Comment by Supreme Court:

The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that the communication is likely to create unjustified expectations or otherwise mislead a prospective client.

The CAA reasoned that a requirement that comparisons of lawyers' services be factually substantiated with information that is available to consumers will protect consumers. The CAA acknowledged that consumers are sophisticated and, when there is adequate information available to them, consumers should be able to differentiate between accurate puffery and unsupported claims. The CAA further decided the "unjustified expectations" language in RPC 7.1(a)(2) should be retained, as it highlights a type of inherently misleading statement that should remain specifically prohibited.

After reviewing the ACPE proposal and discussions with an ACPE delegation, the CAA agreed to modify its proposed language in RPC 7.3(a)(3) to state:

(3) compares the lawyer's services with other lawyers' services[;],
unless the comparison can be factually substantiated [with information
available to consumers]; or . . .

The CAA declined to expand the Official Comments as recommended by the ACPE, finding them unduly lengthy and repetitive, as the proposed Rule would specifically address factual substantiation and unjust expectations.

The ACPE also determined that a revised Rule should permit comparison advertising with disclaimers and qualifications to address misleading advertising. The ACPE noted that the CAA would be able to issue advisory opinions or guidelines to address specific comparative advertisements and would be guided by official comments in its review of advertisements.

After discussing various formulations and proposed revisions, the ACPE decided to recommend a revision that deletes RPC 7.1(a)(3) from the current New Jersey Rule and includes the first three ABA official comments (but not the fourth comment).

The ACPE initial recommended revision provides:

RPC 7.1

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

[(3) compares the lawyer's services with other lawyer's services; or]

* * *

Official Comment by Supreme Court:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. 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.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

The ACPE decided that factual substantiation of comparisons of lawyers' services is adequately addressed in the Official Comments and so it was not necessary to include the language in the text of the Rule. See Comment 2 ("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") and Comment 3 ("Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated"). The ACPE further decided the "unjustified expectations" language in RPC

7.1(a)(2) should be retained, as it highlights a type of inherently misleading statement that should remain specifically prohibited.

The ACPE, after reviewing the CAA proposal and discussions with a CAA delegation, considered a modification that reinserts paragraph (a)(3) in the Rule and adds a requirement of "factual substantiation." The ACPE further considered paring down the Official Comments to include only the limited Comment regarding disclaimers proposed by the CAA. The modified language considered by the ACPE after discussions with the CAA would state:

(3) compares the lawyer's services with other lawyers' services[;],
unless the comparison can be factually substantiated; or

* * *

After further internal discussion, the ACPE decided that it preferred its initial recommendation as the best response to the Supreme Court referral. As noted above, the ACPE initial recommendation omitted RPC 7.3(a)(3). The ACPE, however, notes the modification of its recommendation, that would reinsert an expanded RPC 7.3(a)(3) with the full three comments, also would be an appropriate and useful response to the issues discussed in the Supreme Court's opinion.

Please do not hesitate to telephone if the Committee on Attorney Advertising or Advisory Committee on Professional Ethics can be of further assistance.

C.J.

CJ/hsr

c: Stephen W. Townsend, Clerk, New Jersey Supreme Court
Holly Barbera Freed, Secretary, Professional Responsibility Rules Committee
Cynthia A. Cappell, Chair, CAA
Steven C. Mannion, Chair, ACPE
Committee on Attorney Advertising Members
Advisory Committee on Professional Ethics Members