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IN RE: OPINION 39 OF THE :
COMMITTEE ON ATTORNEY :
ADVERTISING :
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**COMMENTS OF INTERVENOR WOODWARD-WHITE, INC.
AND PETITIONER STUART A. HOBERMAN, ESQ. IN RESPONSE TO
THE REPORT OF THE SPECIAL MASTER**

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PRELIMINARY STATEMENT

As directed by the Court, these Comments are submitted on behalf of Stuart A. Hoberman, Esq. (“Petitioner” or “Hoberman”) and Woodward-White, Inc., the publishers of *The Best Lawyers in America* and the owner of the BestLawyers.com website (collectively “Best Lawyers”), in response to the June 18, 2008 Report of Special Master Robert A. Fall, J.A.D. (retired) (the “Report”).

On July 24, 2006, the New Jersey Supreme Court Committee on Attorney Advertising (“the Committee”) issued its Opinion 39 (“Opinion 39”) which held, *inter alia*, that “...advertisements in any medium of distribution publicizing certain New Jersey lawyers as...‘Best Lawyers in America’...” are prohibited by the Rules of Professional Conduct, in that such advertising does not comply with RPC 7.1(a)(2) or 7.1(a)(3). The Committee further determined that, by referencing their inclusion in *The Best Lawyers in America*, attorneys, such as Hoberman, are making misleading communications, improperly comparing their services with the services of other lawyers in violation of RPC 7.1(a)(3). Opinion 39 also expressed the view that an attorney’s reference to inclusion in *The Best Lawyers in America* is further misleading in that it “is likely to create an unjustified expectation about the results the lawyer can achieve...” in violation of RPC 7.1(a)(2). The Opinion further stated that even participation by an attorney in the selection process conducted by Best Lawyers was a violation of the Rules.

The New Jersey Supreme Court, in granting the Petition of Best Lawyers for review of Opinion 39, and appointing a Special Master to preside over extensive evidentiary hearings, explicitly sought a recommendation from the Special Master with respect to the validity of Opinion 39, and implicitly sought recommendations from the Special Master

with respect to regulation of advertisements referencing attorney peer review or rating publications and similar attorney distinctions.

Following extensive evidentiary hearings, the Special Master issued the Report, which, in a comprehensive and detailed writing of more than 300 pages, set forth the evidence adduced in the hearings, and thoroughly surveyed the state and federal case law regarding the limitations on governmental restriction of commercial free speech rights under the United States Constitution and the Constitution of the State of New Jersey. Given the thorough summary in Section VI of the Report of the testimony concerning Best Lawyers and the manner in which attorneys are nominated for inclusion, its selection process, the disclosure of its methodology and its strictures on attorney advertisement, Best Lawyers respectfully refers the Court to the Report, together with its own initial Petition, for a description of Best Lawyers and its business practices. Similarly, Best Lawyers will not repeat in detail the constitutional arguments already raised in the initial Petition, as these have already been briefed for the Court, and were thoroughly analyzed in the Report.

These Comments examine whether Opinion 39 is contrary to the public interest; whether it unfairly scrutinizes Best Lawyers while simultaneously ignoring hundreds of publications that review New Jersey lawyers, many overtly ranking them; whether its conclusions regarding supposed violation of RPC 7.1(a)(2) should be rejected; whether its restrictive interpretation of RPC 7.1(a)(3) is sustainable; whether, assuming arguendo that the Committee's interpretation of RPC 7.1(a)(3) is plausible, its application is constitutional or whether the thrust of RPC 7.1(a)(3) should be modified to conform to the vast majority of other jurisdictions. Finally, to the extent that the Court is inclined to permit an attorney's reference to his inclusion in *The Best Lawyers in America*, these Comments

address the appropriateness of various regulatory and disclaimer proposals, as well as the critical need for universality in the application of any such requirements.

COMMENT ONE

**THE REPORT ACCURATELY CONCLUDED THAT A
BLANKET BAN ON ATTORNEY ADVERTISING
REFERENCING INCLUSION IN BEST LAWYERS IS
CONTRARY TO THE PUBLIC INTEREST**

Reaching to the very heart of the policy considerations at issue here, the Special Master, in his comprehensive, painstaking analysis, found that “[r]eason and logic inform us that an important consideration for a consumer searching for legal counsel is information relating to lawyer quality and competence.” (Report, p. 300). Nor is this conclusion solely that of the Special Master; it was this Court’s finding in Petition of Felmeister & Isaacs, 104 N.J. 515, 525-26 (1986), where this Court stated that the public would be served by more, rather than less, information about attorneys in order to assist in the attorney selection process.

In the Report, the Special Master recognized that implicit comparison among lawyers is present not only in designated peer review publications, but in numerous other media, including Internet searches, special advertising sections in magazines, and the yellow pages. The Special Master further found that the 21st century consumer “is more sophisticated than ever and actively seeks information prior to making purchase choices, including the selection of legal representation.” (Report, p. 301). See also the Amicus Brief filed by the United States Federal Trade Commission, which the Special Master clearly found persuasive, (Report, pp. 287-291).

Given this Court’s findings in Petition of Felmeister & Isaacs, *supra*, the Amicus Brief filed by the United States Federal Trade Commission and the conclusions of

the Report, the regime of attorney advertisement restrictions imposed by Opinion 39 on Best Lawyers represents an overly paternalistic treatment of today's legal consumers and a supercilious view of the public's ability rationally to understand attorney advertising for what it is. The de facto blanket ban on attorney advertising of legitimate peer rankings does not comport with the constitutional limits on the abridgement of commercial speech, and runs counter to the similar analyses performed in a number of other jurisdictions previously confronted with the issues now before this Court.

Evidence of attorney reputation is among the most important information for a client to discover in searching for an attorney. Petition of Felmeister & Isaacs, supra, at 527. To prohibit or severely limit the use of such publications does an enormous disservice to the very consumers -- potential clients -- whom the Court wishes to protect. Consumers should not be denied truthful information on the presumption that they are ignorant. In abridging informed choice, these prohibitions and constraints limit clients' full access to counsel. Dwyer v. Jung, 133 N.J. Super. 343, 345 (Ch. Div. 1975).

COMMENT TWO

OPINION 39 UNFAIRLY SCRUTINIZES BEST LAWYERS WHILE SIMULTANEOUSLY IGNORING THE HUNDREDS OF OTHER LAWYER RATING PUBLICATIONS THAT RANK NEW JERSEY ATTORNEYS

Opinion 39 is inexcusably flawed in that, without any explanation or rationale whatsoever, it singles out for scrutiny Best Lawyers and one other publication from hundreds of other attorney peer review publications.¹ *The Best Lawyers in America*,

¹ There are *at least* 732 such publications, according to the testimony of Steven Naifeh, President of Woodward-White, Inc., publishers of *The Best Lawyer's in America* (November 19, 2007 Tr. 17 - 1 to 6, and *passim*).

published biennially since 1983 and annually since 2005, is widely regarded, both by the legal profession and by the public, as the preeminent guide to the legal profession in the United States. The Committee has not, and cannot, justify this inequitable treatment of Best Lawyers when hundreds of other publications of inferior pedigree, with selection methodologies plagued by opacity, and inclusion often available for the right price, would be unaffected by Opinion 39's mandate. Other publications purvey their implicit comparisons through the publication of letter grades, or the placement of featured lawyers in "bands" or "tiers" graded according to excellence. Opinion 39 allows these publications to flourish, and by virtue of the fact that they are uncensored, has bestowed upon them a huge competitive advantage over Best Lawyers for more than two years. Best Lawyers' Petition argued that Opinion 39 violates the constitutional guarantee of equal protection. For this reason, *inter alia*, it is respectfully submitted that the Court should overturn Opinion 39.

COMMENT THREE

SINCE THE REPORT CONFIRMED THAT THE COMMITTEE FAILED TO SHOW THAT PROPER ADVERTISEMENT OF SELECTION IN BEST LAWYERS "CREATED AN UNJUSTIFIED EXPECTATION ABOUT RESULTS A LAWYER CAN ACHIEVE," OPINION 39'S CONCLUSIONS CONCERNING VIOLATION OF RPC 7.1(a)(2) SHOULD BE REJECTED

The Committee claims that attorneys who advertise their selection in *The Best Lawyers in America* are "likely to create unjustified expectations about results the lawyer can achieve" in dereliction of RPC 7.1(a)(2). Opinion 39 provided no support for this claim, and no support was presented at the hearing. The Committee, it appears, was operating on speculation. The Report, however, concluded that "the procedures utilized by Woodward-White, Inc. to produce its list of attorneys included within *Best Lawyers*

represents only one survey and rating method of compiling a list of attorneys given recognition by their peers. [*Best Lawyers*] methodology has been clearly detailed and explained and represents a bona fide method of determining quality-of-service opinion.” (Report, p. 249).

RPC 7.1(a)(2) states that a communication is misleading if it “is likely to create an unjustified expectation about the results the lawyer can achieve...” Under Ibanez v. Florida Dept. Bus. & Prof. Reg., 512 U.S. 136, at 146, 114 S.Ct. 2084, 62 USLW 4503, 129 L.Ed.2d 118 (1994), the State has the burden to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” Neither in Opinion 39 nor in the hearings did the Committee produce evidence that any person had incurred an unjustified expectation about results that could be achieved by a lawyer who advertised his or her selection in *The Best Lawyers in America*. The only attempt made by the Committee to demonstrate the violation of this section was its introduction of two reports by “experts,” whose conclusions about “unjustified expectations” were, among their other deficiencies, net opinions based upon no study, no survey and no empirical evidence. The Special Master clearly gave them short shrift (Report, pp. 250-268).

The Committee in Opinion 39 offered only scant and concededly uncertain commentary regarding Best Lawyers, focusing instead on *Super Lawyers*. Opinion 39 nevertheless holds that an attorney’s advertisements referencing his or her inclusion in Best Lawyers violated of RPC 7.1(a)(2). Opinion 39 failed to recognize the obvious -- that the advertisement of one’s selection in Best Lawyers is simply indicative of a transparently derived review by one’s peers, compiled through an exhaustive survey in which nearly two million assessments are sifted, and provides the evidence of “reputation” that the New

Jersey Supreme Court, in In re Felmeister & Isaacs, supra, stated was the kind of information a client wants and needs -- “how he is regarded by his peers.” 104 N.J. at 527.

No advertisement in a bona fide attorney peer review or ratings publication should be prohibited if the advertisement is phrased in such a way (as Best Lawyers specifically mandates) that the attorney in question is not advertising himself or herself as “the best” attorney in a specific location or specific field of practice, but rather that he or she has been selected by his or her peers according to a clearly articulated protocol.

Given the Report’s conclusion that Best Lawyers employs a bona fide methodology producing a credible and meaningful list of attorneys who have received recognition from their peers, the Committee’s findings with regard to RPC 7.1(a)(2) cannot be upheld.

COMMENT FOUR

THE COMMITTEE’S INTERPRETATION OF RPC 7.1(a)(3) CANNOT BE SUSTAINED

The Committee misconstrued RPC 7.1(a)(3) by confusing a *reference* to inclusion in a *peer review publication* (the selection methodology for which is made transparent to the reader) with a *comparison of “the lawyer’s service with other lawyers’ services.”* As a result, Opinion 39 distorts the meaning of this subparagraph to such a degree that, in order to credit the Committee’s interpretation, one would have to believe that the New Jersey Supreme Court, when it adopted RPC 7.1(a)(3) in 1984, and on the subsequent occasions when it revisited this rule, was unaware not only of *The Best Lawyers in America*, but of the tiered rating system employed for decades by *Martindale Hubbell* -- a publication which was not only widely known to the public but pervaded the entire legal

community. It was common knowledge that attorneys were regularly referring to their “AV” or “BV” ratings from *Martindale Hubbell* in public communications.

Opinion 39 ignores the only interpretation of RPC 7.1(a)(3) that makes sense given the Supreme Court’s obvious awareness of *Martindale Hubbell*, *i.e.*, that the Rule prohibits only advertisements that *explicitly* compare a lawyer’s service with the services of *other identified lawyers*.² Best Lawyers does not make such explicit comparisons, nor does Best Lawyers permit any advertisements where attorneys refer to themselves as the “best” or “among the best” in a geographic region or a field of practice. Best Lawyers does not permit attorneys to do more than reference the fact of their selection in the peer review publication Best Lawyers.

Reference by New Jersey lawyers to certain certifications they have earned is permitted by this Court, despite the fact that such reference has an inherently “comparative” component to it. See RPC 7.4(d). Indeed, all rational advertising that seeks to persuade the consumer to avail herself of the advertiser’s service as opposed to another’s is inherently comparative. Accordingly, RPC 7.1(a)(3), which seeks to prohibit comparison of a lawyer’s services “with other lawyers’ services,” should be not construed any further (assuming arguendo that any such prohibition is permissible) than to prohibit *explicit* comparisons, *i.e.* advertising claiming that Lawyer A is better than Lawyer B, or that a lawyer included in Best Lawyers is for that reason alone superior to a lawyer not selected to be included in the publication. In this vein, the Report suggested that RPC 7.1(a)(3) should be interpreted so as to permit *implied* comparative advertising with an appropriate disclaimer, noting that such advertising “could be permitted if the basis for same can be verified through adequate

