

In re OPINION 39 OF THE  
COMMITTEE ON ATTORNEY  
ADVERTISING

JON-HENRY BARR, Esq., et al.

Petitioners,

- and -

KEY PROFESSIONAL MEDIA, INC.,  
(d/b/a "Super Lawyers" and "Law  
and Politics").

Intervenor-  
Petitioner.

-----  
NEW JERSEY MONTHLY, LLC,

Petitioner.

-----  
STUART A. HOBERMAN, ESQ.,  
Petitioner,

- and -

BEST LAWYERS,

Intervenor.

-----  
LEXISNEXIS, a division of REED  
ELSEVIER INC.,

Intervenor.

-----  
v.

COMMITTEE ON ATTORNEY  
ADVERTISING,

Respondent.

SUPREME COURT OF NEW JERSEY

DOCKET NO. 60,003

CIVIL ACTION

**COMMENTS OF INTERVENOR  
MARTINDALE-HUBBELL  
REGARDING THE REPORT OF  
SPECIAL MASTER  
ROBERT A. FALL, J.A.D. (ret.)**

Thomas R. Curtin, Esq.  
Jennifer L. Schoenberg, Esq.  
GRAHAM CURTIN, P.A.  
4 Headquarters Plaza  
P.O. Box 1991  
Morristown, New Jersey 07962-1991  
(973) 292-1700  
Attorneys for Intervenor  
Martindale-Hubbell

Intervenor LexisNexis Martindale-Hubbell ("Martindale-Hubbell") respectfully submits the following comments in response to the Report of Special Master Robert A. Fall, J.A.D. (ret.) (the "Special Master's Report").

As a threshold matter, the methodology and utilization of Martindale-Hubbell's Peer Review Rating System is not the subject of review of Opinion 39, and Opinion 39 does not conclude or suggest that Martindale-Hubbell's methodology or system violates the New Jersey Rules of Professional Conduct. (R 251). Martindale-Hubbell intervened in this matter for the purpose of protecting its interests and the right to modify or expand its current Peer Review Rating System. Based on the evidentiary record established in connection with the hearings conducted before Special Master Fall, the Special Master's Report concludes that Martindale-Hubbell's "methodology is straightforward, transparent and represents a bona fide method of determining the subjective quality-of-service opinion of lawyers' peers." (R 268).

Martindale-Hubbell leaves it to the Court's discretion to determine, in light of the Special Master's finding that RPC 7.1 creates a *per se* ban on comparative attorney advertising, whether RPC 7.1 should be revised. However, to the extent that this Court concludes that amendments are necessary, Martindale-Hubbell respectfully requests that RPC 7.1 be amended to

prohibit only false and misleading attorney advertising. This approach is recommended by the Federal Trade Commission and followed by approximately forty-seven States. (See R 290). As aptly observed by the Federal Trade Commission:

Every state prohibits false and misleading advertising but, with the exception of New Jersey, Alabama and Oregon, every state either expressly allows comparative advertising that may be substantiated or evaluates comparative advertising on a case-by-case basis to determine if it is misleading or deceptive.

(Id. (citing FTC 16)).

Alternatively, if the Court finds that RPC 7.1(a)(3) does not impose a *per se* ban on comparative attorney advertising but that regulations should be implemented to prevent false or misleading comparative advertising, such regulations should not be unduly burdensome or impractical so as to effectively stifle the free flow of information to consumers. As emphasized throughout the Special Master's Report, ultimately an appropriate balance must be found between the State's interest in protecting the public from false and misleading information contained in attorney advertising and protecting the peer review rating entities' right of commercial free speech. (R11, 84, 123, 295, 304).

In furtherance of this goal, the Special Master's Report provides numerous guidelines for restricting comparative

attorney advertising. If the Court requires advertisements of attorney ratings to provide an explanation of the methodology used to determine a rating, however, this may result in the forced disclosure of proprietary business information to the public. Accordingly, in determining the level of detail required in the proposed disclaimer of a company's methodology, a company's right to protect such proprietary information is an important factor that should be considered.

Additionally, the Report's tenth proposed condition for regulating comparative attorney advertising raises some concern regarding the eligibility requirements to participate in the Peer Review Rating process. (R 303 ("The peer-review or certification methodology must be open to all members of the Bar.")). If regulations relating to eligibility requirements are imposed, these regulations should permit entities to continue to take into account the number of years an attorney has been admitted to the Bar in determining the extent to which an attorney may participate in the peer review rating process.

GRAHAM CURTIN, P.A.  
Attorneys for Intervenor  
Martindale-Hubbell

By: 

Thomas R. Curtin

Dated: September 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, the original and nine (9) copies of the attached Comments of Intervenor Martindale-Hubbell regarding the Report of Special Master Robert A. Fall, J.A.D. (ret.) (the "Special Master's Report") were served by hand delivery upon the Clerk of the Supreme Court of New Jersey, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625.

I further certify that on this date two (2) copies of the attached Comments of Intervenor Martindale-Hubbell regarding the Special Master's Report were served by first-class mail upon:

Steven N. Flanzman, S.D.A.G.  
Office of the Attorney General  
124 Halsey Street - 5th Floor  
Newark, New Jersey 07101

Anne Marie Kelly, D.A.G.  
Office of the Attorney General  
124 Halsey Street - 5th Floor  
Newark, New Jersey 07101

and one copy was sent by first-class mail to:

Hon. Robert A. Fall, J.A.D., (ret.)  
1844 Bay Boulevard  
Point Pleasant, New Jersey 08742

Arnold H. Chait, Esq.  
Vogel, Chait, Collins and Schneider, PC  
25 Lindsley Drive, Suite 200  
Morristown, New Jersey 07960-3800

Kevin McNulty, Esq.  
Gibbons DelDeo Dolan Griffinger & Vecchione, PC  
One Riverfront Plaza  
Newark, New Jersey 07105

Bennett J. Wasserman, Esq.  
Stryker, Tams & Dill, LLP  
2 Penn Plaza East  
Newark, New Jersey 07105

Frederick J. Dennehy, Esq.  
Wilentz, Goldman & Spitzer, P.A.  
90 Woodbridge Center Drive  
Suite 900, Box 10  
Woodbridge, NJ 07095-0958

GRAHAM CURTIN, P.A.  
Attorneys for Intervenor  
Martindale-Hubbell

By: Jennifer L. Schoenberg  
Jennifer L. Schoenberg, Esq.

Dated: September 15, 2008