# An Open Letter to Attorneys Listed in *New Jersey Super Lawyers*

As you may know, on July 19th, the New Jersey Committee on Attorney Advertising published its Opinion No. 39 on the *Super Lawyers* process and attorneys' rights to participate in that process. If you have not done so already, I encourage you to read the opinion here.

Not surprisingly, we disagree with every aspect of the Committee's opinion and intend to challenge it with every means at our disposal. While we are still weighing those options, they include a request for the Committee's reconsideration in light of facts that were not before the Committee, a petition for review by the New Jersey Supreme Court, and a civil action in federal court.

Since its creation in 1991, *Super Lawyers* has been successfully introduced in 31 states across the country. In New Jersey, *Super Lawyers* was introduced in 2005 and, as in other states, has proven to be a useful and accessible tool for sophisticated consumers of legal services.

*Super Lawyers* lies well within the body of legal precedent and opinion, beginning with the 1977 U.S. Supreme Court case of *Bates v. State Bar of Arizona*, that severely limits a state's ability to restrict truthful commercial speech by and about attorneys. Our understanding is, quite simply, that a state cannot, without truly compelling justification, restrict lawyers' ability to direct information to consumers of legal services. We believe that the Committee's Opinion No. 39 is an unreasonable attack on our First Amendment rights and on the First Amendment rights of the lawyers who wish to participate in the *Super Lawyers* process.

Further, we believe the process by which the Committee reached its opinion was flawed, largely because it was based upon faulty information about the *Super Lawyers* evaluation process. The Committee's lack of knowledge on this point is simple to understand in that we were never contacted or asked to participate in the Committee's review and deliberations. Had it chosen to do so, we are confident that the factual record would have addressed any concerns or misapprehensions on the part of the Committee.

As you may know, *Super Lawyers* has a very thorough quantitative and qualitative selection process that includes the following:

- An annual ballot to all active attorneys in the relevant state who are licensed for 5 years or more. Parenthetically, we have procedures and systems in place to detect and manage manipulation attempts.
- An annual search during which we seek out candidates who should be considered but have not been identified through the balloting process. This search includes the use of professional databases and sources, the review of local and national legal journals and interviews with managing partners and marketing directors of law firms in each jurisdiction. Heretofore, we have not publicized these interviews in order to protect the participants from politicking.

- A review of candidates by the attorneys with demonstrated expertise in the various areas of law. For example, antitrust candidates are evaluated by attorneys whose primary specialty is antitrust.
- Extensive in-house research during which each candidate is scored on a 12-point evaluation of peer recognition and professional achievement.

For all attorneys selected for inclusion in *Super Lawyers*, we also check their standing with the bar, we obtain from them verification they are not subject to disciplinary proceedings or other legal action. Finally, we do a web search on each attorney to assure there are no outstanding matters that would reflect adversely on them.

Those named in the *Super Lawyers* publications are chosen based entirely on this process and not on the basis of any paid consideration. Lawyers cannot pay to be selected for inclusion in *Super Lawyers*; they cannot pay to be editorially featured. And of course, lawyers cannot vote for themselves.

Further, our marketing of the *Super Lawyers* publication, including the distinction between editorial and advertising content, is direct, transparent and consistent with common practice and professional standards.

*Super Lawyers* rankings, like other rankings in the legal industry and in other professions, provide an important and useful service to the public. Our product provides an objective and qualitative data point for consideration when choosing an attorney, benefiting consumers, attorneys and the profession. In this way, the *Super Lawyers* rankings complement other resources available to consumers, including personal and professional recommendations and referrals.

I invite you to visit our web site - www.superlawyers.com - for more information on our process and updates on this matter. Our intention in this matter is to be forthright, transparent, responsive and adamant in our defense of our rights to conduct our business, consistent with the protections afforded by fundamental constitutional guarantees, and in your rights to participate.

Thank you for your interest in this matter. I would welcome your comments on this topic.

Sincerely,

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Publisher
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and
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P.S. I have taken the liberty of appending an e-mail from Will Hornsby on this subject that was posted yesterday to the Legal Marketing Association's listserv discussion group. As you may know, Mr. Hornsby is one of the most prominent and thoughtful experts anywhere on the subject of legal marketing and his thoughts on this matter make for useful reading.

*Date: Wed, 26 Jul 2006 10:05:02 -0500*
*Conversation: New Jersey Opinion on Directories-Will Hornsby*
*Subject: [lmalistserv] New Jersey Opinion on Directories-Will Hornsby*

*For what they are worth, here are my thoughts on the recent New Jersey opinion on participation in Super Lawyers and Best Lawyers. First, my own disclaimer. These thoughts are my own and not in any way those of the ABA. This is not legal advice. You should consult your own lawyer to provide you with direction on this matter.*

*The first question is what Opinion 39 means to New Jersey lawyers. In most states, ethics opinions are advisory. You could follow the opinion and still be in violation of the rule, or you could fail to follow the opinion and ultimately not be subject to disciplinary proceedings. They merely provide direction. The New Jersey Committee on Attorney Advertising, however, has the authority to issue binding opinions and the failure to follow them is per se unethical conduct.*

*The NJ opinion relies in part on a rule that states a communication is misleading if it "compares the lawyer's services with other lawyers' services." I'll save the constitutionality of such rules for another day, but note, importantly, that this rule is uncommon, if not unique, among the states. Most states have different standards, which I discuss below.*

*Curiously the NJ committee does not apply its own rule on its face and conclude that a comparison of one lawyer's services to those of another is misleading. Instead, it takes issue with the use of superlatives and concludes that use of words such as "best" and "super" violates this rule. Under this interpretation, Martindale-Hubbell's ratings, which, as I understand it, are based on peer review, much like admissions in Best Lawyers and Super Lawyers, are spared. Since the public is unfamiliar with the rating system, the public is unharmed, according to the logic of the opinion. This leads to the conclusion that if you participate in a directory with a rating system that people do not understand, then you do not violate this rule. But, if you participate in a directory that uses terms that people do understand and those terms are superlatives, that is misleading.*

*The NJ opinion also concludes that participation in Super Lawyers or Best Lawyers is misleading because it is likely to create an unjustified expectation about the results the lawyer can achieve. This rule is identical to one that the ABA shed in 2002. The rule existed, I believe, to prevent lawyers from implying that prospective clients would get results similar to past clients*

*even though the circumstances of every client is different. In 2002, the ABA amended its rules and suggested that lawyers use disclaimers to avoid someone from drawing a conclusion that he or she would obtain the same result as a prior client. Applying this provision to a listing in one of these directories seems to go far beyond the intent of the rule, resulting in a limitation that is more restrictive then necessary to achieve the desired consumer protection.*

*Despite my criticism of the analysis, the NJ committee has spoken and as noted has the direction of the state supreme court to do so with authority. Until the rules are changed, the committee revises its opinion or the publishers otherwise work something out, lawyers should recognize the limitations imposed on them by this opinion.*

*Now, what does this mean for other states? First, as noted, other states do not have the absolute prohibition against the comparison of one lawyer's services to that of another. Most states have the earlier (pre-2002) version of ABA Model Rule 7.1, which prohibits comparisons unless they are "factually substantiated." Under this rule, we have to look at the meaning of "factually substantiated." One case that has ruled on this states, "...[A] lawyer may describe the quality of his legal services only through the use of objective, verifiable terms such as the number of cases handled in a particular legal field or the number of years in practice."*

*If "objective, verifiable terms" becomes the standard, does the process for inclusion in a directory or achievement of a rating meet that standard? One could argue that peer view, which is the method of inclusion in these directories, as well as for ratings in MH, goes either way. Unlike a purely quantified criterion where something is measured and has only one outcome, e.g. number of CLE hours, number of jury trials, percent of time dedicated to a field of practice (Although they change over time, there are no two outcomes at any particular point), a peer review is likely to vary according to who submits their review. Ask 20 people and you will get one result. Ask 20 others and chances are you may get another result.*

*Can something be factually substantiated even if it is not limited to a purely objective, verifiable term? Perhaps so. An honest and rigorous scrutiny of competence, which is what is measured by the peer view processes of these directories, seems likely to me to result in an outcome that indicates a group of lawyers who are better, if not necessarily the best, than the general pool of lawyers in any particular field. That seems to me to be a benefit to those who are selecting lawyers to meet their legal needs.*

*So, a state with the rule that prohibits unsubstantiated comparisons may or may not find that peer review meets that standard. (I am sorry to say there is just insufficient direction to draw a sound conclusion.) However, some states have adopted the current version of ABA Model Rule 7.1, which omits the prohibition of an unsubstantiated comparison. This rule simply prohibits material misrepresentations and the comment alerts lawyers that an unsubstantiated comparison could violate the rule if it were presented as if it were substantiated. It suggests that a disclaimer can be used to clarify any confusion. Consequently, I think it is very unlikely that a state that has adopted the current ABA Model Rule would come to the conclusion that participation in directories that use peer review would be a violation. If you're uncertain of the rules in your state, you can link to them from [www.abanet.org/adrules](www.abanet.org/adrules).*

*Remember that the NJ opinion was also based on a violation of the old Model Rule provision that prohibits the creation of unjustified expectations. This rule is in effect in most states as it is in New Jersey. It is certainly possible that states with this rule could follow the NJ logic, but as I note above, this limitation is simply not the intent or spirit of this rule. Also, for states that have adopted the current rule, note that this provision has been deleted.*

*There is one more issue to examine here. Being listed or ranked in the directories is different than advertising you are listed or ranked. In other words, if it is acceptable to be listed or ranked, it is not necessarily acceptable to tout that fact. This depends on the choice of language used. If you do nothing more than identify the fact that the lawyers are listed or congratulate those lawyers who are, then that may be acceptable. However, if you draw any implications that the listing or ranking means that the lawyer is better then other lawyers - for example including in a press release a statement that these are top lawyers - than you are going from the factually substantiated-based listing to a subjective personal assessment that is more likely to be deemed a violation in states that have this rule. A subtle, but perhaps important difference.*

*I appreciate that many marketers find participating in directories to be a burdensome process and the rules governing that participation to be capricious. Perhaps some of you will celebrate the day that all directories are banned. However, it is likely that some directories help potential clients identify lawyers and firms to go on the short list and to that extent prove an effective tool. I personally believe the real evil here is arcane rules that limit the ability of lawyers to provide potential clients with information that helps them reach a decision about selecting a lawyer. If we can convince the states to adopt the current ABA Model Rules much of this discussion will be unnecessary. As you probably know, LMA is on record as supporting these rules. If every member of LMA encouraged their firms to advance these changes, they would become the standard everywhere.*

*Hope this helps.*

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