



NEW JERSEY STATE BAR ASSOCIATION

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August 17, 2006

Stephen W. Townsend, Esq.
Clerk, Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0970

RE: In re Petition on Committee on
Attorney Advertising Opinion 39

Dear Mr. Townsend:

Please accept this letter brief on behalf of the New Jersey State Bar Association (NJSBA) in lieu of a more formal brief pursuant to Rule 2:6-2(b).

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Procedural History and Statement of Facts

On July 24, 2006, the Supreme Court Committee on Attorney Advertising issued Opinion 39 ("the Opinion" or "Opinion 39"),

addressing advertisements touting an attorney's designation as a "Super Lawyer" or a "Best Lawyer in America." ___ N.J.L. ___; ___ N.J.L.J. ___ (2006). The Committee concluded that such advertisements violated the Rules of Professional Conduct and, therefore, any attorney advertising such designation, or participating in conferring such designation, including answering survey questions designed to lead to such a designation, was in violation as well. Specifically, the Committee held that the advertisements violated the prohibition against advertisements that are inherently comparative in nature (R.P.C. 7.1(a)(3)) or that are likely to create an unjustified expectation of results (R.P.C. 7.1(a)(2)).

On July 31, 2006, the NJSBA sought a stay of enforcement of the Opinion directly from the Committee on Attorney Advertising. (See Exhibit A, attached.) That request was denied as being improperly addressed to the Committee. (See Exhibit B, attached.)

On August 8, 2006, a group of aggrieved attorneys filed a Petition for Review with the Supreme Court, and thereafter certain affected businesses filed a request with the Supreme Court to intervene in the matter.

The NJSBA now seeks a relaxation of Rule 1:19A-3(d) to permit the NJSBA to intervene in this matter for the limited

purpose of seeking a stay of enforcement of the Opinion until a final determination is rendered.

Legal Argument

I. The New Jersey State Bar Association should be Permitted to Intervene

Any aggrieved member of the New Jersey bar is permitted to seek review of any final action of the Advertising Committee relating to requests for advisory opinions in accordance with R. 1:19-8 (Petitions for Review of any final action of the Advisory Committee on Professional Ethics). R. 19A-3(d).

While it appears that the procedure for seeking review of an Attorney Advertising Committee opinion was designed to mirror the procedure for seeking review of an opinion issued by the Advisory Committee on Professional Ethics ("ACPE"), the two procedures differ in an important way - that is, the parties that are automatically granted the right to seek review.

Rule 1:19-8 permits not only any aggrieved member of the bar to seek review of a final action of the ACPE, but also any "bar association, or ethics committee".

Since there does not appear to be any rational, substantive reason for the distinction between the two rules, the NJSBA respectfully requests the Court to relax Rule 1:19A-3(d) to permit it to intervene in this matter for the limited purpose of

requesting a stay of enforcement of Opinion 39 in order to protect the interests of its 16,000+ members.

New Jersey courts have often recognized the standing of a non-profit association to vindicate or prosecute the common rights and grievances of its members. See Crescent Park Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971) (tenants' association permitted to maintain an action on behalf of tenants against the tenants' landlord); In re N.J.A.C. 5:91-1, 372 N.J. Super. 61 (App. Div. 2004) (advocacy groups permitted standing to challenge changes to affordable housing regulations); and Quality Health Care v. DOBI, 348 N.J. Super. 272 (App. Div.), certif. denied 174 N.J. 194 (2002) (permitting medical and legal professionals and their associations to challenge insurance plans submitted pursuant to the Automobile Insurance Cost Reduction Act). See also Pressler, Current N.J. Court Rules, comment 3 on R. 4:26-1 (2006).

In this matter, the NJSBA seeks to intervene for the limited purpose of seeking a stay of enforcement on behalf of its members as they grapple with ensuring compliance with the Opinion.

As the largest legal organization in New Jersey, it is appropriate for the Court to permit the NJSBA to represent the interests of New Jersey lawyers, generally.

The NJSBA was founded in 1899 in order to "maintain the honor and dignity of the profession of the law; to cultivate social relations among its members; to suggest and urge reforms in the law; and to aid in the administration of justice." The mission of the NJSBA is to serve, protect, foster and promote the personal and professional interests of its members; to serve as the voice of New Jersey attorneys with regard to the law, legal profession and legal system; to promote access to the justice system and fairness in its administration; to foster professionalism and pride in the practice of law; to provide educational opportunities to New Jersey attorneys so as to enhance the quality of legal services; and to provide education to the public with respect to the legal system and the legal profession.

There are approximately 16,000 attorneys who are members of the NJSBA and whose practices, whether private or public, involve every area of the law.

The NJSBA often plays an active role in the development and enforcement of the Rules of Professional Conduct. For example, NJSBA volunteers help staff district ethics committees, the NJSBA routinely offers comments to the Supreme Court on proposed new rules, and the NJSBA often participates in cases involving the Rules of Professional Conduct, usually as an *amicus curiae* party.

Accordingly, the NJSBA asserts that its participation in this case will assist the court in the orderly resolution of an issue of public importance - the proper modes of advertising that can be utilized by attorneys without imposing unreasonable hardships and without subjecting attorneys to unwarranted disciplinary procedures, while also guarding against subjecting the public to misleading information.

Finally, the NJSBA submits that no party to the litigation will be unduly prejudiced in the event it is permitted to intervene in the matter.

For these reasons, the NJSBA respectfully requests that the Court grant the NJSBA's Motion for a Relaxation of Rule 1:19A-3(d) and Permit the NJSBA to Intervene in this Matter for the Limited Purpose of Seeking a Stay.

II. The Issuance of a Stay of the Enforcement of Opinion 39 is Necessary to Prevent Irreparable Harm to Attorneys Acting in Good Faith

The standards governing a stay of judgment in an appellate court are the same as those applicable in a trial court, requiring a balancing of the equities. Specifically, the criteria governing the grant of a stay are: (1) a reasonable probability of success on the merits; (2) a settled legal right supporting the claim; (3) threatened irreparable harm; and (4)

the relative hardship to the parties in granting or denying relief. Crowe v. De Goia, 90 N.J. 126 (1982).

While the NJSBA takes no position on the probability of success on the merits, it does note for the Court the irreparable harm that could be caused to attorneys who acted in good faith prior to the issuance of the Opinion, and those who are currently acting in good faith to comply with the ruling.

Prior to issuance of Opinion 39, there was no indication that the advertising in question, or participation in lawyer surveys, was contrary to the Rules of Professional Conduct. Neither RPC 7.1 nor prior opinions of the Committee on Attorney Advertising provided a clear warning to lawyers regarding the propriety of the advertising in question. As far as the NSJBA is aware, no other state has restricted this type of advertising.

That being said, attorneys who have included "Super Lawyer" or "Best Lawyer" designations as part of advertising campaigns, firm brochures and website content, or who have participated in surveys distributed for the purpose of establishing such designations, may now be at risk of disciplinary action if they are unable to immediately halt or undo all of these activities. Prior to the issuance of the Opinion, attorneys had no reason to believe that completing what appeared to be a harmless survey of their peers might be a violation of the Rules of Professional Conduct. With regard to advertising, in many instances,

advertising campaigns are planned well in advance of their execution, and can take some time to wind down or halt. Printed brochures or other materials could take several months to completely pull out of circulation. While website changes may be made quickly by firms that have an in-house web master, smaller firms utilizing outside web development companies may be at the mercy of those outside companies to change the content of their websites.

Furthermore, many of these actions to halt or wind down advertising campaigns, discard firm brochures and change website content will have a serious financial impact on lawyers and law firms. Printing costs of even a rudimentary firm brochure can easily run into a few thousand dollars, and if color printing is used the cost will increase significantly. Again, it is the smaller firms or solo practitioners that will potentially be hit the hardest.

Given these considerations, as well as the uncertainty about the ultimate outcome of this case, many attorneys are in real turmoil about how to proceed appropriately.

In light of this turmoil, the balancing of equities would seem to tip in favor of permitting attorneys to maintain the *status quo* until a final determination is made by the Court about whether the advertising in question is appropriate or not. Lawyers should not face irreparable harm to their reputations

through possible unwarranted disciplinary actions and should not be forced to discard publicity pieces, redesign websites and halt planned advertising campaigns if there is the possibility that it will all be for naught. Furthermore, the public should not face a greater potential of being even further misled by an unwarranted disciplinary action than by the advertising in question, should the opinion be overturned.

Even the Committee on Attorney Advertising acknowledged the "potential hardships to certain attorneys" and indicated if enforcement of the Opinion was not stayed, the Committee would address the issues raised by the NJSBA in the context of properly presented grievances, giving recognition to good faith efforts taken by affected attorneys. (See Exhibit B, attached.) A stay, however, would address the issues more fairly and effectively in one action rather than on a piecemeal basis.

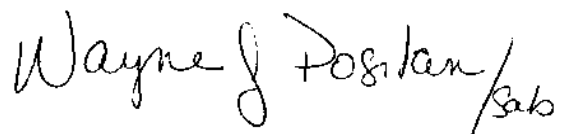
Accordingly, on behalf of the New Jersey State Bar Association, I respectfully request that the Court stay enforcement of Opinion 39 pending final action by the Court.

Conclusion

In light of the above, on behalf of the New Jersey State Bar Association, I respectfully request that the Court grant the Association's Motion for Relaxation of Rule 1:19A-3(d) to Permit the NJSBA to Intervene for the Limited Purpose of Requesting a

Stay, and grant the Association's Motion for a Stay of Enforcement of Opinion 39 pending final adjudication.

Respectfully submitted,



Wayne J. Positan
President, NJSBA

cc: Patrick DeAlmeida, Esq.
John J. Gibbons, Esq.
Bennett J. Wasserman, Esq.
Arnold H. Chait, Esq.
Frederick Dennehy, Esq.

EXHIBITS

NEW JERSEY STATE BAR ASSOCIATION

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July 31, 2006

Cynthia A. Cappell, Esq.
Thurber Cappell LLC
Ste 306
21 Main Street, Ste 306
Hackensack, NJ 07601-7054

Re: Opinion 39

Dear Ms. Cappell:

I am writing on behalf of the Board of Trustees of the New Jersey State Bar Association (NJSBA) to respectfully request the Committee on Attorney Advertising stay the enforcement and effect of Opinion 39 until such time as the appropriateness of the rule is decided by the New Jersey Supreme Court, or the federal courts.

I am fully aware that challenges to a committee opinion are addressed by way of a petition for review pursuant to R. 1:19A-3, referencing the R. 1:19-8 procedures followed by the Advisory Committee on Professional Ethics. However, at this time the NJSBA will not be filing a petition for review challenging the substance of the opinion.

Instead, we want to bring to the committee's attention the fact that the opinion, if not stayed, will have a serious financial impact on lawyers and law firms that used "Super Lawyer" and "Best Lawyer" designations as part of advertising campaigns, firm brochures, and website content. Printing costs of even a rudimentary firm brochure can easily run into a few thousand dollars, and if color printing is used the cost will increase significantly. Although I cannot provide any precise data on this point, my estimate is that many firms are now facing the prospect of trashing brochures and other materials, and having them redone minus any "Super Lawyer/Best Lawyer" designation. Website revisions can also be costly, particularly for smaller firms that have no capability of handling this process in-house. Further, there are law firms that have contracted for advertising campaigns that now have to be halted and revised because of Opinion 39.

Given these financial considerations, I can also tell you that I have personally received a considerable number of inquiries, as has NJSBA staff, about what steps lawyers should take immediately to comply with the Opinion. There is real uncertainty among many members of the bar about what to do.

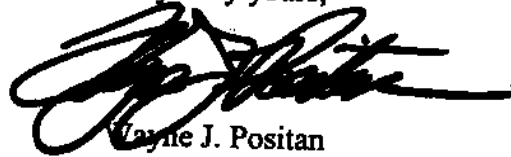
Exhibit A

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Prior to issuance of Opinion 39, there was no indication that the advertising in question, or participation in lawyer surveys, was contrary to the Rules of Professional Conduct. Neither RPC 7.1 nor prior opinions of the Committee on Attorney Advertising provided a clear warning to lawyers regarding the propriety of the advertising in question. As far as I am aware, no other state has restricted this type of advertising. That being the case, it seems unfair that lawyers should now face considerable uncertainty and suffer financial loss before the process of reviewing the opinion has even commenced. Accordingly, on behalf of the New Jersey State Bar Association, I ask that the Committee stay enforcement of Opinion 39 pending further review by either your Committee or the New Jersey Supreme Court.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Wayne J. Positan", written in a cursive style.

Wayne J. Positan
President

C: Carol Johnston
Lynn F. Newsome
Harold L. Rubenstein

SUPREME COURT OF NEW JERSEY
COMMITTEE ON ATTORNEY ADVERTISING

CYNTHIA A. CAPELL, ESQ.
ROBERT P. BECKER, JR., ESQ.
JEANNE ACHILLE
PROFESSOR ROGER COHEN
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August 4, 2006

CAROL JOHNSTON, ESQ.
SECRETARY

Via Telecopy

Wayne J. Positan, Esq., President
New Jersey State Bar Association
New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901-1500

Dear Mr. Positan:

The Committee on Attorney Advertising received and reviewed the request of the Board of Trustees of the New Jersey State Bar Association to stay the enforcement and effect of Opinion 39 pending review by the New Jersey Supreme Court or a federal court. Let me say at the outset that the Committee appreciates your thoughtful expression of concerns and is cognizant of the impact the Opinion is likely to have on members of the bar, including members of your organization.


That being said, however, the Committee does not believe a request for a general stay is properly addressed to the Committee. Rule 1:19A-3(c) provides that Opinion 39 is binding once issued and until revised or reconsidered. Your letter correctly identifies the procedure any aggrieved attorney may follow to seek review of the opinion. It appears that requests for review by the Supreme Court are likely to be filed, albeit not by the State Bar Association. Presumably one of the parties intending to seek Supreme Court review of the opinion will request the Court to issue a stay. The Committee will follow the Court's direction.

Be assured the Committee is not insensitive to the potential hardships to certain attorneys outlined in your letter. If enforcement of the Opinion is not stayed by the Supreme Court, the Committee will address the issues you raise only in the context of properly presented grievances. In that event the Committee will no doubt take into account, on an individual basis, factors such as those recited in your letter, and will of course give recognition to good faith efforts taken by affected attorneys to comply with our Opinion.

Exhibit B

Thank you again for sharing your concerns with the Committee.

Very truly yours,


Cynthia A. Cappel, Chair
Committee on Attorney Advertising

cc: Carol Johnson, Committee Secretary (via telecopy)
Harold L. Rubenstein, Esq. (via telecopy)
Lynne F. Newsome, Esq. (via telecopy)