

<p>In re OPINION 39 OF THE COMMITTEE ON ATTORNEY ADVERTISING</p> <p>JON-HENRY BARR, Esq., GLENN A BERGENFIELD, Esq., CAREY B. CHEIFETZ, Esq., MARIA DELGAIZO NOTO, Esq., ANDREW J. RENDA, JR., Esq., and JOHN S. VOYNICK, Esq.,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">- and -</p> <p>LEXISNEXIS, a division of REED ELSEVIER INC.,</p> <p style="text-align: center;">Intervenor- Petitioner.</p>	<p>SUPREME COURT OF NEW JERSEY</p> <p>DOCKET NO. 60,003</p> <p style="text-align: center;">CIVIL ACTION</p> <p style="text-align: center;">On Petitions for Review of an Advisory Opinion of the Committee on Attorney Advertising</p>
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BRIEF IN SUPPORT OF
MARTINDALE-HUBBELL'S
MOTION TO INTERVENE

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PROCEDURAL HISTORY

On July 24, 2006, the New Jersey Supreme Court Committee on Attorney Advertising (the "Committee") issued Opinion 39 in which it concluded that advertising which refers to an attorney as a "Super Lawyer" or the "Best Lawyer in America" violates RPC 7.1(a)(3) and RPC 7.1(a)(2). The Committee determined that such advertising is prohibited because it is inherently comparative in nature and is likely to create an unjustified expectation about results. Opinion 39 further states that an attorney may not participate in a survey where the attorney knows or reasonably should know that such a survey is designed to "lead to a descriptive label that is inherently comparative, such as 'super lawyer' or 'best lawyer.'"

On August 8, 2006, a group of aggrieved attorneys filed a Petition for Review with the Supreme Court, pursuant to R. 1:19-8. The Supreme Court granted petitioners' application for an emergent stay of Opinion 39 on August 18, 2006, pending further review by the Court. On behalf of the Committee, the Attorney General's office filed a response to the Petition for Review on November 13, 2006. Subsequently, on December 18, 2006, reply briefs were filed by intervenor Best Lawyers and petitioner Stuart Hoberman, Esq., intervenor Key Professional Media, Inc. (d/b/a "Super Lawyers" and "Law & Politics") and

petitioners Jon-Henry Barr, Esq., et al., and intervenor New Jersey Monthly, LLC.

STATEMENT OF FACTS

LexisNexis, a division of Reed Elsevier Inc., (hereinafter "Martindale-Hubbell") owns the products and services of the Martindale-Hubbell group.¹ The LexisNexis® Martindale-Hubbell® Peer Review Ratings system ("Ratings system") provides an objective method to evaluate an attorney's legal ability and professional ethics. The Ratings system serves as an invaluable tool for referring business among colleagues and for corporate counsel and consumers in selecting an attorney with the appropriate level of experience and expertise. The Peer Review Rating or Certification Mark typically accompanies the attorney's Professional Biography which provides information about the attorney's practice areas, education, bar memberships, and professional affiliations.

Martindale-Hubbell expressly regulates the types of permissive uses of its Rating Icon Marks and Certification Marks. Martindale-Hubbell Certification Marks (AV®, BV®, CV®) may be used only if specific conditions are met. First, the Certification Marks must be accompanied by Icon Marks or, in the

¹ Martindale-Hubbell's Statement of Facts is supported by the attached Certification of Barry Solomon, Esq., Vice President and General Manager of LexisNexis Martindale-Hubbell.

alternative, by the phrase "Peer Review Rated." Failure to include either the Icon Mark or phrase "Peer Review Rated" constitutes a non-permitted use.

Second, the combined Certification Mark and Icon Mark may appear only in certain printed communications and internet applications. Permissive printed applications are limited to an attorney's resume or curricula vitae, law firm brochure, professional announcements, firm or attorney letterhead, or business cards. Use in an attorney listing or legal directory requires prior written consent from Martindale-Hubbell. Permissive internet applications include websites, Martindale-Hubbell® Lawyer Homepages/Lawyer homepages, email communications, and internet banner advertisements.

Martindale-Hubbell prohibits the use or mention of its Ratings Marks in: Yellow Page advertisements; newspaper advertisements; outdoor advertisements such as billboards, buses, or benches; political advertisements or campaign promotions; radio or television commercials; or opinion/editorial pieces.

Third, all approved printed communications, professional announcements, and internet applications must include a Certification Mark Reference, which states: "CV, BV and AV are registered certification marks of Reed Elsevier

Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards, and policies.”

Fourth, printed professional announcements and all print and CD-ROM based legal directories must contain the Certification Mark Reference and the “Rating Explanation.” The Rating Explanation must state: “Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the confidential opinions of members of the Bar and the Judiciary. Martindale-Hubbell Ratings fall into two categories - legal ability and general ethical standards.” If displayed on an internet application, the Certification Mark Reference shall be accompanied by either the Rating Explanation or a link to Martindale-Hubbell’s web page which contains the Rating Explanation. All web-based legal directories designed for use by attorneys and law firms, must include a link to Martindale-Hubbell’s web page which provides the Certification Mark Reference and Rating Explanation.

The Peer Review Rating consists of two components: the General Ethical Standards Rating and the Legal Ability Rating. The General Ethical Standards Rating component is the threshold for receiving a Peer Review Rating. Failure to exhibit “very high” ethical standards ends the review process, thereby precluding an attorney from receiving a Rating. An attorney’s ethical standards are measured by his or her ability to fulfill

professional responsibilities, comply with professional standards of conduct and ethics, reliability, and diligence.

If a candidate meets the requisite General Ethical Standards Rating, Martindale-Hubbell next evaluates his or her legal ability. Qualities considered include the number of years the attorney has been admitted to the bar and practicing, standard of professional ability in the specific area in which the attorney practices, and his or her expertise in that area. The Legal Ability Rating ranges from "C" - good to high - "B" high to very high - to "A" - very high to preeminent. An attorney who has been admitted to the bar between three to four years can only receive a maximum rating of "CV". A rating of CV signifies that the attorney has unquestionable ethics and above-average ability. If admitted to the bar between five and nine years, the highest rating an attorney could receive would be "BV". In order to be eligible to receive the highest rating, "AV", the attorney must be admitted to the bar for at least ten years.

Martindale-Hubbell invites members of the Bar and the Judiciary to provide their opinions and reviews of an attorney about whom they have personal knowledge. These survey participants must practice in the same geographic location, industry, or area of law as the attorney whom they are reviewing. In some cases, attorneys being reviewed provide

Martindale-Hubbell with additional references known as Own References ("OR"). ORs practicing outside of the applicant's geographic location may participate in the survey if specifically referred by the applicant.

The evaluation process is confidential, ensuring that participants provide candid feedback about their colleagues. Invitations are sent to survey participants electronically or by regular mail. Martindale-Hubbell typically initiates the Peer Review Ratings process only after an attorney has been admitted to the bar for five years or more. However, an attorney or his or her colleague may request that a Peer Review Rating be performed.

Martindale-Hubbell representatives also conduct interviews with members of the Bar to evaluate attorneys under review. If insufficient response is received from Peer Review Ratings invitations, Martindale-Hubbell requests that the attorney being reviewed provide a list of professional references. However, under no circumstances will these references provide the sole means of evaluating the candidate.

LEGAL ARGUMENT

Martindale-Hubbell seeks to intervene in the Petition to Review Opinion 39 for the limited purpose of submitting a Brief on Appeal to correct misstatements of fact previously alleged by intervenor-petitioners, Super Lawyers and Best Lawyers, regarding Martindale-Hubbell's Peer Review Rating system and policy as to permissive and non-permissive uses of Ratings, and to participate in any oral argument or other hearings that the Court might require, and to have and provide input into any rule-making that may emerge from the Court's review of Opinion 39.² Martindale-Hubbell respectfully submits that it should be allowed to participate in these proceedings either as a matter of right or pursuant to permission granted by the Court.

I. Martindale-Hubbell's Motion for Leave to Intervene as of Right Should be Granted

Martindale-Hubbell seeks an order granting it leave to intervene as of right pursuant to Rule 4:33-1. Motions for leave to intervene should be construed liberally. Atlantic Employers v. Tots & Toddlers, 239 N.J. Super 276, 280 (App. Div.), certif. den., 122 N.J. 147 (1990). In order to intervene as of right, the applicant must (1) "claim an interest relating

² Because Martindale-Hubbell seeks to intervene for the primary purpose of clarifying the record and participating in the Court's further review of Opinion 39, it does not attach a pleading as R. 4:33-3 otherwise might require.

to the property or transaction which is the subject of the action[;]" (2) establish that the disposition of the action may impair or impede its ability to protect that interest; (3) show that its interest is not adequately represented by the existing parties; and (4) file a timely application to intervene. ACLU of New Jersey, Inc. v. County of Hudson, 352 N.J. Super. 44, 67 (App. Div.), certif. den., 174 N.J. 191 (2002). If the applicant meets these four requirements, the court must grant the application for intervention as of right. Id.; see also Vicendese v. J-Fad, Inc., 160 N.J. Super. 373 (Ch. Div. 1978) ("Unlike permissive intervention, intervention as of right is not discretionary.")

As to the first requirement, Martindale-Hubbell's Peer Review Rating system has been placed into issue by Opinion 39 and mischaracterized by Best Lawyers and Super Lawyers. Martindale-Hubbell has an interest in the outcome of this Court's review of Opinion 39 as it likely will impact Martindale-Hubbell's right to continue its Peer Review Rating system. Though Opinion 39 approved of Martindale-Hubbell's current Rating system, Martindale-Hubbell seeks to protect its interests and rights to expand or modify its Rating system.

Second, this Court's review of Opinion 39 may impede or impair Martindale-Hubbell's interest by limiting its flexibility to change the services it provides and manner in

which it markets these services, and locking it into its current Rating system. For these important reasons, Martindale-Hubbell seeks clarification of Opinion 39.

Third, Martindale-Hubbell's interests are not adequately represented by any of the current parties. This applicant seeks an opportunity to respond to unfounded criticisms lodged against it primarily by Best Lawyers and, to some extent, by Super Lawyers. In an effort to advance their own self-serving arguments, Best Lawyers and Super Lawyers present a misleading and inaccurate discussion of Martindale-Hubbell's use restriction policies.

Martindale-Hubbell would like to respond to Best Lawyers' statement that "MH does not prohibit lawyers from promoting their ratings to the general public, and *Best Lawyers* does impose limitations on the use of its selection of a lawyer." Super Lawyers similarly criticized Martindale-Hubbell's policy against consumer advertising. Such criticisms are unfounded. Martindale-Hubbell's Peer Review Rating system was designed by and for use by attorneys; it is not a consumer rating system. Martindale-Hubbell sets guidelines for limiting the medium in which its Peer Review Ratings may be displayed. However, if a firm or attorney chooses to promote its ratings to its clients - whether corporate, legal or consumer - the burden

rests with the firm or attorney to use the Peer Review Rating in a manner consistent with Martindale-Hubbell's guidelines.

Permissive printed applications are limited to an attorney's resume or curricula vitae, law firm brochures, professional announcements, firm or attorney letterhead, or business cards. Martindale-Hubbell prohibits the use or mention of its Ratings Marks in: Yellow Page advertisements; newspaper advertisements; outdoor advertisements such as billboards, buses, or benches; political advertisements or campaign promotions; radio or television commercials; and opinion/editorial pieces. In addition, Martindale-Hubbell does not encourage the inclusion of peer review ratings in legal directories and requires its prior written consent for inclusion in such directories.

Contrary to representations made to this Court, the website lawyers.com does not display the actual Martindale-Hubbell rating received by an attorney or firm. This website merely indicates whether an attorney or firm has been rated by Martindale-Hubbell's Peer Review Rating system.

As discussed above, all approved printed communications, professional announcements, and internet applications must include a Certification Mark Reference and Rating Explanation or a link to a webpage maintained by Martindale-Hubbell which contains the Certification Mark

Reference and Rating Explanation. The purpose of introducing the Ratings Toolkit was to provide attorneys and firms with the tools to properly comply with the requirement of including a Certification Mark Reference and Rating Explanation.

Martindale-Hubbell also respectfully disagrees with Best Lawyers' contention that "a minimum experience requirement does not in any way alter the anonymous peer judgment of the MH published ratings." The basic premise of Martindale-Hubbell's Peer Review Ratings system is to achieve accurate ratings for attorneys. In order to encourage survey participants to provide candid and honest evaluations of candidates, the identity of survey participants and number of surveys completed on Martindale-Hubbell's eConfidential form and paper surveys remain confidential. There is no secret as to how survey participants are selected; surveyors must have personal knowledge about the attorney whom they are reviewing, and must either practice in the same geographic location and practice area as the attorney being reviewed or be specifically referred to Martindale-Hubbell by the attorney being reviewed. If insufficient response is received, Martindale-Hubbell requests that an applicant provide a list of professional references. Unlike other companies offering attorney rating systems, Martindale-Hubbell does not require that survey participants have been prior recipients of

its Peer Review Ratings or that recipients purchase listings in its Law Directory.

Fourth, Martindale-Hubbell's application is timely because it seeks to clarify the record prior to oral argument or other hearings and to respond to the arguments raised in intervenor-petitioners' reply briefs filed on December 18, 2006.

In sum, the Court should grant Martindale-Hubbell's motion for leave to intervene as of right to protect the accuracy of the record and prevent distorting of its time-tested Ratings system.

II. Martindale-Hubbell is Entitled to Intervene Pursuant to Permissive Intervention under Rule 4:33-2

If the Court denies Martindale-Hubbell's motion to intervene as of right, this applicant alternatively seeks an order granting permissive intervention pursuant to Rule 4:33-2. See Atlantic Employers, 239 N.J. Super. at 280 ("Where intervention of right is not allowed, one may obtain permissive intervention under R. 4:33-2.") According to Rule 4:33-2, "[u]pon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common." As observed by the Atlantic Employers court, "the test is whether 'the intervention will unduly delay or prejudice the adjudication of the rights of the

original parties.'" 239 N.J. Super. at 280 (citing R. 4:33-2).

The Court also may consider:

the promptness of the application, whether or not the granting thereof will result in further undue delay, whether or not the granting thereof will eliminate the probability of subsequent litigation, and the extent to which the grant thereof may further complicate litigation which is already complex.

Pressler, Current N.J. Court Rules, Comment on R. 4:33-2 (2007).

Intervention is proper where an important public issue is presented to the court. Evesham Twp. Bd. of Adj. v. Evesham Twp., 86 N.J. 295, 299 (1981). In Evesham, a member of the Evesham Township Zoning Board of Adjustment (the "Board") was permitted to intervene individually as a taxpayer and resident of the municipality eight months after the Board filed a complaint appealing a zoning decision and after the parties executed a stipulation of dismissal. 86 N.J. at 297-98. The Court concluded that in the absence of legal prejudice and "in view of the important public issue involved," the trial court properly exercised its authority in granting permissive intervention to the Board member.

In Ocean Cablevision Associates v. Hovbilt, Inc., 210 N.J. Super. 626, 633 (Law Div. 1986), a condominium complex unlawfully refused access to a state-licensed cable television company. 210 N.J. Super. at 628. During oral argument on a