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Mr. Charles Thell
President
Key Professional Media, Inc.
220 South Sixth Street, Suite 500
Minneapolis, MN 55402

Dear Mr. Thell:

Key Professional Media, Inc. ("Key") publishes "*Super Lawyers*®," a group of magazines that contain articles of interest to lawyers. The magazines also contain lists of attorneys in various fields of practice within the jurisdiction of the particular issue of *Super Lawyers*. The lawyers are listed alphabetically and also by field of practice. The magazines are distributed free to lawyers and may also be included as inserts or special advertising sections in general interest periodicals. You have asked me whether in my opinion New York lawyers listed in *Super Lawyers* may advertise or publicize that fact consistent with the provisions of the New York Code of Professional Responsibility (as recently amended) that address professional advertising. My answer is that they may. My opinion is based on the factual assumptions and subject to the limitations in this letter including its penultimate paragraph. My qualifications to give an opinion on this question are reflected in my resume (attachment A).

Assumptions

Central to my opinion is the four-step method for choosing the lawyers included in *Super Lawyers*. I assume familiarity with the description of that method contained in your letter of August 30, 2006, to Michael Colodner, Counsel in the Office of Court Administration. The relevant paragraphs are annexed as attachment B. I also rely on the evaluation of Key's methodology described by two partners and a senior associate of Global Strategy Group, Inc. ("GSG") in their certification to the Supreme Court of New Jersey dated December 17, 2006. Essentially, these documents describe (and I assume) the following:

- No lawyer can pay for inclusion on the *Super Lawyers* lists.

- No lawyers are included or excluded depending on whether they advertise in *Super Lawyers*. Advertising or failure to advertise carries no weight in the decision of whom to include or exclude.

- Virtually every lawyer in the relevant market, who has been admitted to the state bar for a minimum of five years is sent a ballot.

- The methodology has safeguards (described) against ballot stuffing.

- *Super Lawyers* conducts independent searches for lawyers potentially suitable for inclusion.

- *Super Lawyers* conducts independent reviews of those lawyers who are nominated for inclusion and potentially eligible for inclusion.

- Procedures are in place to ensure that no lawyer is placed on the list if he or she has been disciplined or been the subject of a criminal proceeding or if there are other facts that adversely reflect on the lawyer's fitness.

- Inclusion on the *Super Lawyers* lists is limited to the lawyers who are in the top five percent of the active bar resident in the particular jurisdiction based on point value in accordance with the methodology described.

The methodology for determining eligibility for inclusion on *Super Lawyers*' lists is summarized in issues of the magazine, including in inserts or advertising supplements included in other periodicals. Those on the *Super Lawyers* lists may advertise in an issue of the magazine but, as stated, advertising will not increase chances of inclusion nor will failure to advertise harm those chances. In addition, the methodology for compiling the *Super Lawyers* lists appears on the *Super Lawyers* website (www.superlawyers.com).

The Constitutional Background

Thirty years ago, the Supreme Court held that attorney advertising was commercial speech entitled to First Amendment protection. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Since then, the Supreme Court has significantly strengthened protection for attorney advertising with two notable exceptions, neither of which bears directly on the issue here. First, it has upheld a categorical prohibition of in-person solicitation of a personal injury victim where the victim was not related to the lawyer or a friend of the lawyer and was not previously a client of the lawyer. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Second, the Court has upheld a state ban on contacting accident victims or their survivors by mail for 30 days after the occurrence giving rise to the potential claim. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

Beyond the categorical ban upheld in *Ohralik* and the temporal limitation upheld in *Went For It*, the Court has generally insisted that state regulation must be more discerning and focused. In Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990), a four Justice plurality reversed discipline of a lawyer who had stated the following on his letterhead: "Certified Civil Trial Specialist – By the National Board of Trial Advocacy." The plurality wrote that NBTA certification was "simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Id.* at 101. There was "no evidence that a claim of NBTA certification suggests any greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements." *Id.* at 102. The plurality held that a state was free to "consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty," but it could not "completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA." *Id.* at 110.

Justice Marshall concurred in the judgment. (Justice Brennan joined both the plurality opinion and the Marshall concurrence.) Justice Marshall concluded that Peel's letterhead was "neither actually nor inherently misleading" and that therefore the state could not prevent him from "holding himself out as a civil trial specialist certified by [the NBTA]." He concurred in the judgment, however, in order to add that the state could "enact regulations other than a total ban to ensure that the public is not misled by such representations." On the other hand, a ban would be constitutionally permissible only if the banned information "is inherently conducive to deception and coercion," which Peel's letterhead was not. *Id.* at 111 (citing *Ohralik*).

Thereafter, the Court reversed discipline of a lawyer whose letterhead included the fact that she was a certified financial planner (CFP). Quoting the plurality opinion in *Peel* to the effect that a state "may not . . . completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA," the Court held that Florida offered "nothing to support a different conclusion with respect to the CFP designation." Ibanez v. Florida Dep't of Business and Prof. Reg., 512 U.S. 136, 145 (1994). Responding to Justice O'Connor's dissent that the "average consumer has no way to verify the accuracy or value of . . . the CFP designation," the Court said that "a consumer could call the CFP Board of Standards or make inquiry of Ibanez herself." *Id.* at n.9.

Perhaps of greatest relevance here, the *Ibanez* Court held that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* at 142. The state has the burden of demonstrating the need for its restriction, the Court wrote, and its "burden is not slight." *Id.* at 142-43.

From this history, I conclude that a state may not categorically prohibit a lawyer from referring to his or her inclusion in *Super Lawyers* so long as the *Super Lawyers* lists are compiled with the safeguards and protocols identified above and the methodology is available to potential clients, which allows them to decide what weight to give to the fact of inclusion.

However, as discussed below, I believe that in certain circumstances, a lawyer should take precautions to ensure that reference to his or her presence on a *Super Lawyers* list is not misleading. Before I turn to these precautions, I will next analyze the New York advertising rules. I conclude that entirely apart from the First Amendment, those rules textually permit a lawyer to publicize his or her inclusion on the *Super Lawyers* list. Of course, the rules have to be construed against the backdrop of the Supreme Court's decisions in the area.

The New York Advertising Rules

The New York advertising rules bear on the question addressed in several ways.

First, I assume that a lawyer's reference to his or her inclusion in *Super Lawyers* will occur in an "advertisement," as that term is defined in Section 1200.1(k). When the message is directed toward persons other than existing clients or other lawyers, it is an advertisement if its "primary purpose" will be to encourage retention of the lawyer or the lawyer's firm.

Second, an advertisement may not contain "statements or claims that are false, deceptive or misleading" or otherwise violate a disciplinary rule. Section 1200.6(a).

Third, an advertisement may not "utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter." Section 1200.6(c)(7).

Fourth, Section 1200.6(d) permits statements "reasonably likely to create an expectation about results the lawyer can achieve," that "compare the lawyer's services with the services of other lawyers," or "describing or characterizing the quality of the lawyer's or law firm's services," but only if these do not violate Section 1200.6(a), "can be factually supported," and are "accompanied by [a] disclaimer: 'Prior results do not guarantee a similar outcome.'"

Finally, the new rules permit a lawyer to include "bona fide professional ratings" so long as the inclusion does not violate section 1200.6(a). Section 1200.6(b)(1).

"Bona fide" is a term well known in the law and in fact the Supreme Court used it in both *Peel* and *Ibanez*. It is defined in Black's Law Dictionary (8th ed. 2004) as "made in good faith; without fraud or deceit;" and as "sincere; genuine."

In *Peel* and *Ibanez*, the Court concluded that the two organizations whose credentials were used in legal advertisements were "bona fide." Although *Peel* was decided by a plurality of four Justices, Justice Marshall agreed that Peel's use of the NBTA designation was not "actually nor inherently misleading." 496 U.S. at 111. Further, the plurality's reference to the "bona fide" nature of the NBTA designation in *Peel* was later endorsed by the *Ibanez* majority, which reversed discipline of a lawyer who had put the CFP designation on her letterhead.

The *Peel* plurality did not define "bona fide" but its understanding of the meaning of the term is inescapable. The "certification" Peel advertised was not "issued by an organization that had made no inquiry into petitioner's fitness, or by one that issued certificates indiscriminately for a price." If that were so, then the statement "even if true, could be misleading." 496 U.S. at 101. But it was not so. The NBTA "standards [were] objectively clear." *Id.* at 102. (They are summarized in the opinion. *Id.* at 95 n.4.) "[C]ertification as a specialist by bona fide organizations such as NBTA," the Court therefore held, could not be "completely banned." *Id.* at 110.

The Court also held that the lower court's identification of a "degree of uncertainty" about the meaning of the designation did not make the letterhead "inherently misleading to a consumer." *Id.* at 102. The Court later wrote in *Ibanez*, with reference to both cases, that a consumer who wanted to ascertain the standards for designation as a Certified Financial Planner "could call the CFP Board of Standards," just as a consumer could inquire of the "certifying organization in *Peel*, the National Board of Trial Advocacy." 512 U.S. at 145 n.9. A consumer could do this, the Court wrote, even though the letterhead of neither Peel nor Ibanez provided contact information for the certifying organization.

Using the conventional definition of "bona fide" and the Supreme Court's use of the term in the context of the facts of *Peel* and *Ibanez*, I conclude that *Super Lawyers* magazines confer a designation that is a "bona fide professional rating[]," within the plain meaning of the New York rules. Inclusion in the lists cannot be bought outright or in exchange for advertising. It is bestowed on five percent of a jurisdiction's lawyers following a rigorous selection process. The magazine's methodology is easy to investigate. It appears in the magazine itself and on the *Super Lawyers* website.

I now turn to the word "super" in the magazine's title. One common definition of "super" in dictionaries I have consulted is "superior" or "higher in quality." Webster's Ninth New Collegiate Dictionary (1988). This is how I think consumers would understand the term in the context of the phrase "super lawyer," i.e., a lawyer of superior quality. If a lawyer were to use the term "super" or "superior" in this sense (e.g., "I am a superior [or super] lawyer"), the lawyer could of course be seen as comparing the quality of the lawyer's services with those of other lawyers. In some contexts, use of the term

"super" might also be deemed a nickname or moniker (as in, for example, "Doe & Poe, The Super Lawyers").

But, as described below and as I assume for purposes of this opinion, the term "*Super Lawyers*" will not be used in this way by those lawyers who may choose to advertise their inclusion in the publication *Super Lawyers*. The lawyer will instead be referring to the true fact that he or she has been chosen for inclusion in the publication *Super Lawyers*. Consequently, the advertisement that includes this reference may say the following (or words to this effect): "Included in *Super Lawyers*." The lawyer is here describing his or her listing in a publication called "*Super Lawyers*," not that the lawyer is claiming to be superior to other lawyers. Nor would the description constitute an improper "nickname" or "moniker" in violation of Section 1200.6(c)(7).

A claim of inclusion in the publication, if true, is not misleading or deceptive. It "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101. (I note in this regard that the magazines break out the lawyers listed by area of practice.) Because reference to listing in *Super Lawyers* is a verifiable fact, as is the methodology for inclusion, and not a prediction of future results or a statement of comparison by the lawyer with the work of other lawyers, the disclaimer of Section 1200.6(e)(3) is not required.

Remaining is the question whether the *Super Lawyers* methodology yields a group of lawyers who can legitimately be designated as "superior" or of "higher in quality," the meanings implied by the word "super." My answer is it does because the lists are restricted to the top five percent of lawyers in the particular jurisdiction measured by a point system that is objectively applied. By contrast, if the cut off for inclusion on the lists were, for example, the top two-thirds of lawyers in a jurisdiction, my answer would be different. Then, while one might still argue that the lawyers in the top two-thirds were superior – at least superior to the lawyers in the bottom third – in my opinion denominating the list as containing *Super Lawyers* would be misleading given the ratio of inclusion to exclusion. But a five percent inclusion means that the lawyers on the list represent the top twentieth of the lawyers in the jurisdiction as determined by the revealed methodology and so they can fairly be identified as superior.

The results of no reasonable methodology for identifying superior lawyers can claim mathematical accuracy. Reasonable methodologies will produce lists that differ from each other to some extent. This is not an exact science and no one can expect it to be one. Further, the *Super Lawyers* methodology makes clear that the final lists are a product of judgments – *many* judgments, which is one reason that the determination is objective (in the sense of not being influenced by extraneous considerations) even as it is also, and must be, subjective.

Words of Caution

Some words of caution are necessary. As stated, the word "super" before "lawyer," standing alone, implies that the lawyer is superior to other lawyers. That is why the use of the phrase "super lawyer" or "superior lawyer" apart from inclusion in the magazine may be subject to the claim that lawyer so using the phrase is comparing his or her services with other lawyers or, depending on context, is using a moniker, trade name, or nickname. This is not so, however, when a lawyer is referencing the magazine's name and his or her inclusion in it. Then the reference is a "bona fide professional rating," as explained above. However, a designation like "Included in *Super Lawyers*" or words to that effect can be ambiguous in certain contexts, particularly where it is not readily apparent that *Super Lawyers* is a magazine and where the objective methodology it uses to determine inclusion does not accompany the designation.

Where the lawyer places an advertisement in a *Super Lawyers* magazine itself, I understand and assume that editorial content will describe the methodology for inclusion and state the publication's web site, where a reader can obtain greater detail and view frequently asked questions. This will not be so where the lawyer advertises in other venues – say on a website for the lawyer or the lawyer's firm or in a print advertisement in other publications. In those instances, the lawyer must avoid any allegation of ambiguity, and a possible claim that the reference is misleading, by doing three (and possibly four) simple things.

First, the lawyer should make it clear that the lawyer is included or listed in *Super Lawyers*, not that the lawyer is presenting himself or herself as a super lawyer. Second, the lawyer should ensure that the appearance of the reference conveys that *Super Lawyers* is a publication. That can be done with typeface (as by putting *Super Lawyers* in italics or using the same typeface as the magazine uses for its name). Third, the lawyer's reference should include the *Super Lawyers* website where readers can ascertain the standards for inclusion. So for example, the lawyer might frame the reference this way:

Included in *Super Lawyers*
See www.superlawyers.com for criteria

This is just by way of example. It would seem to me that the reference to the website can only enhance the value of the inclusion because of the rigorous standards the publication uses for inclusion.

I add one further caveat. A lawyer may be listed in *Super Lawyers* one year but not the next. A lawyer whose listing is not current must, to avoid a misleading reference, indicate the year of the listing.

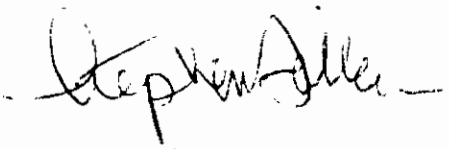
Among other authorities I have read is Opinion 39 of the Committee on Attorney Advertising of the New Jersey Supreme Court, whose contrary conclusion has since been stayed by the Court. The opinion does not change my conclusion here. Philadelphia Bar Association Opinion 2004-10 would allow reference to inclusion in *Super Lawyers* if accompanied by "sufficiently detailed information...to determine the manner and context within which the designation was made." An April 20, 2006 letter to William C. White of *Super Lawyers* from Ruth A. Smith, Assistant Ethics Counsel of The Florida Bar, is in accord. I have concluded, for the reasons given above, that the context is adequate when the reference is included in an advertisement in the magazine itself. Where it is included elsewhere, I have described the context that I think is adequate to avoid a deceptive or misleading reference.

Additional Limitations on Opinion

I am giving this opinion to Key only. I recognize that Key may choose to share it with others including lawyers listed in *Super Lawyers*. It is, of course, free to do so, but no recipient of this letter is my client and I am making no representation and giving no advice to anyone other than Key. Any recipients of this letter who wish to publicize their inclusion in *Super Lawyers* must conduct independent research and reach their own conclusions on the propriety of doing so in the particular way they intend. Furthermore, my opinion, while based on my experience in the field of lawyer regulation and the product of my research and judgment, is no guarantee that a court or other tribunal or enforcement agency will agree with me. Any such body may reach a contrary opinion.

If you have further questions, please feel free to call me.

Sincerely,



Stephen Gillers

cc: Joshua Rosenkranz, Esq. ✓