

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No: 0701

Date:

Topic: Publicity and advertising; professional notices, letterheads and signs.

Digest: If a lawyer complies with the applicable code requirements, the lawyer may publicize bar association positions, former offices held, and bona fide professional ratings.

Code: DR 2-101 (22 N.Y.C.R.R. 1200.6)
DR 2-102 (22 N.Y.C.R.R. 1200.7)

QUESTION

May an attorney list the following: Membership in Bar Association; Membership on Bar Association Committees; Officer status held in Bar Associations; former status as ADA, Town/Village/City Prosecutor, Judge/Administrative Law Judge, Trooper/Police Officer, Investigator for SLA/OPD; Martindale Hubbell rating; Selection to New York Areas Best Lawyers (ALM Media, Inc.), "Best Lawyers in America" (Woodward/White, Inc.), Who's Who in Law" (Business First/Buffalo Law Journal) in the attorney's:

letterhead, web page profile, advertisement, resume, e-mail correspondence and/or business card?

OPINION

An attorney may include such information in the aforementioned publications provided the balance of the requisites for attorney advertising found at DR 2-101 (22 N.Y.C.R.R. 1200.6) are followed.

At first blush, it would appear as though a separate analysis would be needed with regard to those aspects of the inquiry that pertained to advertisements and web page profiles (which, essentially, are "advertisements" which would be covered by Disciplinary Rule 2-101 (22 N.Y.C.R.R. 1200.6) and those other categories of publications such as letterhead, resumes, e-mail correspondence and business cards which would be governed by Disciplinary Rule 2-102 (22 N.Y.C.R.R. 1200.7).

An examination of the rule with regard to web sites, professional cards, professional announcements, office signs and letterheads (DR 2-102 or 22 N.Y.C.R.R. 1200.7) reveals that it allows information on such materials, provided the information is allowed in the rule pertaining to attorney advertising (DR 2-101 or 22 N.Y.C.R.R. 1200.6).

DR 2-102 (22 N.Y.C.R.R. 1200.7), specifically provides as follows:

A. A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101 [22 N.Y.C.R.R. 1200.6] . . .

DR 2-101 (22 N.Y.C.R.R. 1200.6) allows dissemination of information pertaining to:

- Legal and non-legal education
- Degrees and other scholastic distinctions
- Dates of admission to any bar
- Areas of the law in which the lawyer or law firm practices (as authorized by the Code of Professional Responsibility)
- Public offices and teaching positions held
- Publications of law related matters authored by the lawyer
- Memberships in bar associations or other professional societies or organizations including offices and committee assignments
- Foreign language fluency
- Bona fide professional ratings

Therefore, the following information, since it is specifically mentioned in DR 2-101 (22 N.Y.C.R.R. 1200.6) would be allowed, whether contained in an advertisement, letterhead, resume, e-mail correspondence, business card or web page profile:

- Membership in bar associations, including offices held
- Membership in bar association committees
- Professional associations
- Former offices held as Assistant District Attorney, town/village/city prosecutor, judge/administrative judge

Some of the positions referenced by the inquiring attorney (former police officer, trooper, investigator for the State Liquor authority) are not expressly covered but should be allowed as providing “biographical data” about the lawyer. See DR 2-102(A)(2).

The allowance of truthful disclosures concerning “bona fide professional ratings,” which was added to DR 2-101 in February 2007, is also the subject of a new Ethical Consideration (EC

2-11), which was added to the Code of Professional Responsibility by the New York State Bar Association in November 2007. EC 2-11 provides as follows:

Bona Fide Professional Ratings

EC 2-11 An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the “past results” disclaimer as required by DR 2-101(D)-(E). However, a rating is not “bona fide” unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Factual disclosures concerning the following appear to fall within the rule’s reference to “bona fide professional ratings”:

- Martindale-Hubbell ratings
- New York Areas Best Lawyers
- Best Lawyers in America
- Who’s Who in Law

It must, however, be noted that such listings raise special issues that have not yet been fully resolved.

There does not appear to be any court decision in New York concerning the permissibility of advertising the fact that a lawyer has been listed in publications such as “Best Lawyers” or “Who’s Who.” Authorities from other jurisdictions appear to be in conflict. The Committee on Attorney Advertising appointed by the New Jersey Supreme Court has stated in its Opinion # 39 (July 26, 2006) that

[A]dvertisements describing attorneys as “Super Lawyers,” “Best Lawyers in America,” or similar comparative titles, violate the prohibition against advertisements that are inherently comparative

in nature or that are likely to create an unjustified expectation about results [citations omitted].

However, Opinion # 39 has been challenged in the New Jersey courts and that challenge has not yet been resolved.^a

Opinions from Michigan and Tennessee are on the other side of the issue. See Michigan Opinion RI-341, dated June 8, 2007, and Tennessee Advisory Ethics Opinion 2006-A-841, dated September 21, 2006. Professor Roy Simon, the author of Simon's New York Code of Professional Responsibility Annotated (2007 Edition), states (at p. 206) that "Rating services such as Super Lawyers, Best Lawyers, and Martindale Hubbell would appear to qualify as bona fide," *so long as the publication continues to use these criteria.*

This committee similarly concludes that lawyers should be permitted to publicize their Martindale Hubbell rating, or that they have been selected by Best Lawyers or Super Lawyers, on the ground that each of them should be considered a "bona fide professional rating" (DR 2-101). Based on information obtained about the manner of selecting lawyers for listing in "Who's Who in Law," as published by Business First/Buffalo Law Journal, the committee believes that this rating is also "bona fide" within the meaning of DR 2-101 and EC 2-11.

We further note that DR 2-101(D)(2) permits an "advertisement" to include "statements that compare the lawyer's services with the services of other lawyers" if, among other things, the advertisement also includes the disclaimer that "prior results do not guarantee a similar outcome." The requirement of a disclaimer is also referenced in EC 2-11. This opinion does not attempt to address the issue of when the information included in a lawyer's letterhead, professional card, etc. requires that it be treated as an "advertisement" under the Code's new definition of that term (22 NYCRR § 1200.1(k)), except to note that the term applies to communications where "the primary purpose of [the communication] is for the retention of the lawyer or law firm." For communications that do qualify as "advertisements," the lawyer must be careful to comply with the specific requirements of DR 2-101.

If the information that is included is used to support an assertion about the lawyer's specialty or specialties, the lawyer must also be careful to adhere to the additional requirements of DR 2-105 (22 NYCRR § 1200.10).

^a Materials relating to the pending court challenges can be found at www.superlawyersfacts.com.