

Friday

26th

August, 2005.

On March 21, 2003 came the Virginia State Bar, by Bernard J. DiMuro, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10(g), and filed a Petition and Notice of Advisory Opinion Review requesting consideration of Legal Advertising Opinion A-0114.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, now, therefore, upon due consideration of all material submitted to the Court, including the revised version of the opinion filed July 14, 2005, it is ordered that Legal Advertising Opinion No. A-0114 be approved as follows, effective immediately:

Legal Advertising Opinion A-0114: Communications to the Public Involving a Lawyer's Recognition by a Listing in a Publication such as *The Best Lawyers in America*

Question Presented:

The question arises as to whether attorneys may advertise the fact that they are listed in a publication such as *The Best Lawyers in America*, and the extent to which communications containing such information may properly be the subject of characterization.

Answer:

Lawyers may advertise the fact that they are listed in a publication such as *The Best Lawyers in America*. A lawyer may include in the advertising additional statements, claims or characterizations based upon the lawyer's inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1

Analysis:

The appropriate and controlling disciplinary rule relevant to the question presented here is Rule 7.1(a)(3):

Rule 7.1 Communications And Advertising Concerning A Lawyer's Services

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

S.Ct. of Virginia. R., Part Six, § II, Rule 7.1(a)(3).

Accordingly, attorneys may ethically communicate to the public information describing legitimate credentials. In fact, the widespread practice by Virginia attorneys of providing such information via resumes, firm brochures, website listings, print advertising, electronic media, or in-person communication is an example of the type of advertising by lawyers that serves the public interest. When furnished with this type of reliable, objective information, consumers of legal services are better able to make informed decisions concerning available legal services.

The publication *The Best Lawyers in America* is a reference work published biennially since 1983. The publisher is Woodward/White, Inc., of Aiken, South Carolina. The book is divided into lists of attorneys for all 50 states and the District of Columbia. Twenty-seven specialty areas of practice are identified, although listings for all 27 practice areas are not included for every jurisdiction. Within each jurisdiction, lawyers are listed alphabetically by practice specialty, city and last name, in that order. Selection of a lawyer for inclusion in the publication *The Best Lawyers in America* is based upon a peer-review process. Nominations for inclusion come from lawyers currently listed in the publication. All lawyers nominated are then subjected to a confidential peer-review process administered and supervised by the editorial staff of the publication. This process includes a ballot for each practice field and jurisdiction containing all lawyers nominated within that field and jurisdiction. Lawyers are not permitted to vote for themselves or other lawyers in their firm. All lawyers within a jurisdiction and practice area cast their ballots on a jurisdiction-wide basis. Although listed within each jurisdiction by city for

convenience, votes are not cast on a city-by-city basis, but rather by all listed lawyers within that statewide jurisdiction and area of practice. The 9th Edition (2001-2002) listed approximately 14,000 lawyers nationwide. Over 350,000 evaluations were used in compiling the edition. The ballot used to select lawyers for listing in the publication included both a grading scale and blank space for commentary on each nominee.

The grading scale asked each voting lawyer to rate each nominee using the following scale: A-Excellent, B-Above Average, C-Average, D-Below Average, F-Poor, DK-Do Not Know, DKW-Do Not Know Work. Lawyers who did not receive a consensus of positive votes were not included. The editors of *The Best Lawyers in America* direct attorneys casting ballots, in rating the nominees, to be guided by this question: "If you had a close friend or relative who needed a real estate lawyer (for example), and you could not handle the case yourself—for reasons of conflict of interest—to whom would you refer them?" The editors compile the list of lawyers to be included based on this peer review process which is conducted for each and every biennial edition.

The lists contained in the book change with each edition as lawyers are added or deleted. The 9th Edition contained over 480 Virginia lawyers listed in 20 practice areas. In the personal injury practice area, 96 Virginia lawyers were included, from 24 different cities. Lawyers pay no fee for inclusion in this publication and are under no obligation to purchase the book as a condition for inclusion. There is no financial benefit or *quid pro quo* of any kind between the listed lawyer and the publisher of *The Best Lawyers in America*. The publication enjoys respect from bar leaders and can be found in most law school libraries, and in numerous city, county and court libraries and libraries maintained by private law firms.

Based upon the foregoing, the Committee concludes that a lawyer may advertise the truthful fact that he or she or other members in his or her firm are listed in a publication such as *The Best Lawyers in America*. If, for whatever reason, a lawyer is de-listed by a publication such as *The Best Lawyers in America*, the statements or claims in the advertisement must accurately state the year(s) and/or edition(s) in which the lawyer was listed.

However, attorneys may not ethically communicate to the public credentials that are not legitimate. For example, if a particular credential or certification is based not upon objective criteria or a legitimate peer review process, but instead is available to any attorney who is willing to pay a fee, then the advertising of such

credential or certification is misleading to the public and is therefore prohibited.

Similarly, characterizations that explain, and do not exaggerate the meaning or significance of specific credentials, or that merely provide descriptions of professional credentials in laymen's terms, or communicate a lawyer's credentials in a more effective or memorable manner, are permissible. Accurate, truthful characterizations of this type merely duplicate the same type of descriptions that attorneys commonly use when discussing their credentials with prospective clients in the course of in-person communication.

For example, in communicating the credential of an "A.V." rating by Martindale-Hubbell, an attorney may properly include the descriptive characterization that "A.V." represents "the highest rating" that particular service assigns. Similarly, an attorney recognized by the reference book *The Best Lawyers in America* may properly note that their inclusion means that they are among those lawyers "whom other lawyers have called the best." In referring to their membership in recognized organizations which utilize a legitimate process of peer review, such as The American College or The International Academy of Trial Lawyers, attorneys may properly include characterizations or descriptive phrases such as "it means a lot, when the recognition that you receive comes from your peers."

When including such characterizations or descriptions in brochures or other forms of public communication, attorneys should exercise discretion in their choice of language to make certain that the communication of objective information is not misleading by the manner in which the information is characterized. For example, as noted above, although an attorney may properly characterize inclusion in the reference work *The Best Lawyers in America* by stating that he or she is among those lawyers "whom other lawyers have called the best," an attorney may not properly characterize their inclusion with such statements as "since I am included in the book, that means that I am in fact the best lawyer in America." Attorneys must also use care in crafting language for advertising so as not to impute the credentials bestowed upon individual attorneys to the entire firm. For example, a law firm cannot make statements or claims that imply or suggest that the law firm has been rated "the best" in a practice area simply because some lawyers in the firm have been included in the publication *The Best Lawyers in America*. Such a statement or claim is also prohibited because *The Best Lawyers in America* only rates and lists individual lawyers, not law firms.

Rule 7.1(a)(3) prohibits communications that compare a lawyer's services with other lawyers, "unless the comparison can be factually substantiated." This provision is intended to prohibit misleading, unsubstantiated claims by lawyers that they are "the greatest" or "the best," or that their firm is the "premier" firm in Virginia. Any advertisement which makes statements or claims beyond the fact that the lawyer is listed in such a publication must comply with Rule 7.1.

Accordingly, lawyers who choose to communicate information to the public concerning their services are not merely permitted, but indeed are encouraged, to base their communications upon accurate, factual information describing legitimate credentials. This type of information is likely to assist consumers in making decisions with regard to available legal services. Descriptive characterizations of objective credentials are permissible, so long as the characterizations are accurate and truthful. Attorneys must take care that an otherwise permissible communication is not rendered unethical due to mischaracterization. Finally, although qualitative statements are permissible within a context that demonstrates their factual basis, the same types of qualitative statements when made in the absence of such context, may be prohibited as unsubstantiated comparisons of one lawyer's services with the services provided by other lawyers.

A Copy,

Teste:

Clerk