

# Ethical Advertising – New Challenges

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Boardwalk Seminar

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# Avoiding Ethics Problems



- Committee on Attorney Advertising  
Court Rule 1:19A-1 et seq., 7 members (5 attorneys and 2 lay persons)

## Powers of Committee

Issue advisory opinions

Issue Guidelines

Impose discipline for violation of Rules of Professional Conduct (RPC 7.1, 7.2, 7.3, 7.4 and 7.5)

# What is “Advertising”

“Advertising” includes **all communications** of a lawyer about the lawyer, the lawyer’s services, or the law firm

Includes marketing or promotional materials, letterhead, business cards, websites and social media

Attorneys can advertise in any medium, forum, or format – newspaper, billboards, fliers, giveaway items, bus placards, Internet, mail, Yellow Pages, radio, television, “lectures”

# Rules of Professional Conduct

## Governing Advertising – RPC 7.1

- RPC 7.1(a): “a lawyer shall not make false or misleading communications about the lawyer, the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement;” communication is considered misleading if it omits a necessary fact



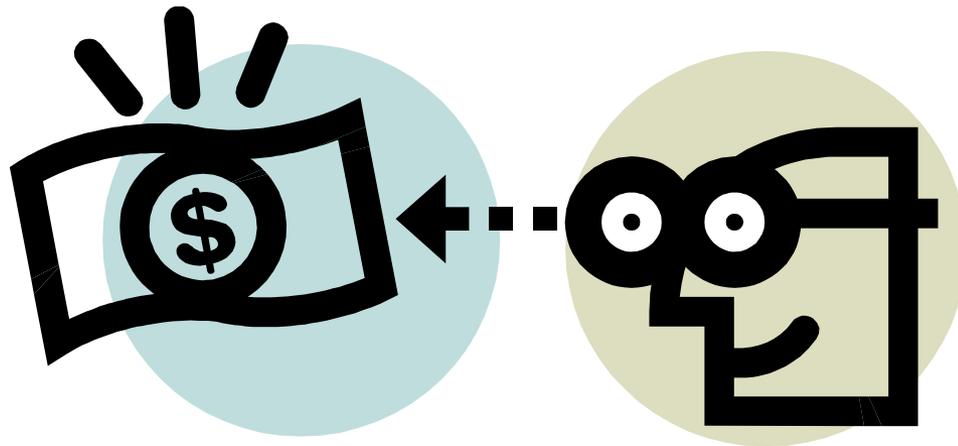
# Inaccurate and Misleading Statements

- Claims to have handled certain kinds of cases (aviation plane crash litigation) (In re Anis, 126 N.J. 448 (1992) (cert. den. 504 U.S. 956 (1992))
- Extent of trial experience (murder trial in Washington DC that resulted in mistrial)
- Years in practice (often inflated with “combined” years)
- Law firm names – “& Associates” when there are no associates, “Group” when there is only a solo practitioner



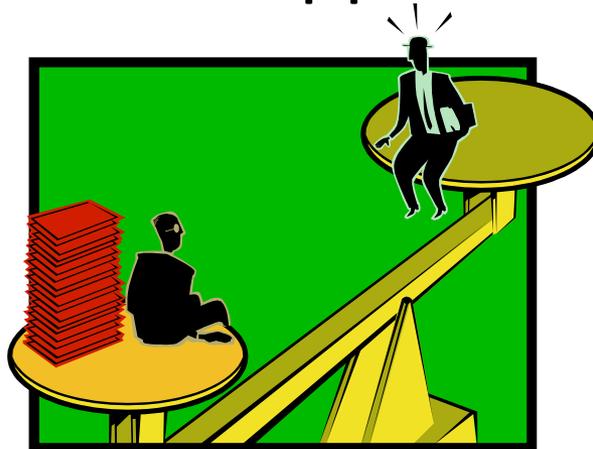
# Communications Deemed to be False or Misleading

- Statements that “are likely to create an unjustified expectation about results the lawyer can achieve” – RPC 7.1(a)(2)



# Statements that Compare the Lawyer's Services to Other Lawyers' Services Are Deemed Misleading, RPC 7.1(a)(3)

- Comparisons of lawyers' services usually are factually unsupportable
- Claims about the QUALITY of legal services generally cannot be supported by objective facts



# Comparative Statements / Quality of Legal Services

- “Unlike other lawyers I have a better method of serving clients ...”
- “I charge less than other lawyers”
- Lawyer is “Super,” “Best,” “Awesome,” “Top Rated” - Opinion 42



## Advertising the receipt of an award, honor, or accolade that compares the lawyer's services to other lawyers' services

- **Rule of Professional Conduct 7.1 and Official Comment.**
- **In re Opinion 39, 197 N.J. 66 (2008).**
- **Committee on Attorney Advertising Opinion 42 (December 2010).**
- **Notice to the Bar (May 7, 2016).**

# 2016 Notice to the Bar

## A. Nothing New.

## B. First Step – The Conferring Organization.

1. Lawyer must ascertain whether the organization conferring the award has **made “inquiry into the attorney’s fitness.”** Official Comment to Rule of Professional Conduct 7.1.
2. “The rating or certifying methodology must have **included inquiry into the lawyer’s qualifications** and **considered those qualifications** in selecting the lawyer for inclusion.” In re Opinion 39, 197 N.J. 66, 76 (2008); see also Committee on Attorney Advertising Opinion 42 (December 2010).
3. This **inquiry into the lawyer’s fitness** must be more rigorous than a simple tally of the lawyer’s years of practice and lack of disciplinary history.
4. Pursuant to Rule of Professional Conduct 7.1(a)(3)(ii), the basis for the comparison must be **substantiated**, **bona fide**, and verifiable.

5. Examples of awards, honors, and accolades that do not include a bona fide inquiry into the fitness of the lawyer.
  - a. Awards that are the result of **popularity contests** – the lawyer “wins” the award when enough people email, telephone, or text their vote.
  - b. Awards are **issued for a price**.
  - c. Awards that are generated based in large part on the **participation of the lawyer with the conferring organization’s website**. For example, a lawyer can enhance his or her “rating” with the organization by endorsing other lawyers, becoming endorsed in return, responding to questions from the public about legal matters on the organization’s website, and the like.

## C. Second Step – Advertising The Award.

1. Provide a **description of the standard or methodology** on which the award, honor, or accolade is based, either in the advertising itself or by reference to a “convenient, publicly available source.” Official Comment to RPC 7.1.
2. Include the **name of the comparing organization** that issued the award (note that the name of the organization is often different from the name of the award or the name of the magazine in which the award results were published). RPC 7.1(a)(3)(i). For example, Martindale-Hubbell (“AV Preeminent”), Thomson Reuters (“Rising Stars” and “Super Lawyers”), Woodward-White (“Best Lawyers”), and US News & World Report (“Top-Rated Lawyers”).
3. Include **this disclaimer “in a readily discernible manner: ‘No aspect of this advertisement has been approved by the Supreme Court of New Jersey.’”** RPC 7.1(a)(3)(iii).
4. All of this additional, accompanying language must be presented **in proximity** to the reference to the award, honor, or accolade. On a website, this additional information must be presented on the **same screenshot**. Only the description of the standard or methodology may be presented via a hyperlink; the *Rule* Official Comment permits this to be presented “by reference.”

## D. Additional Guidance.

1. When the name of an award, honor, or accolade contains a superlative, such as “super,” “best,” “superior,” “leading,” “top-rated,” or the like, the advertising must **state only that the lawyer was included in the list with that name**, and not suggest that the lawyer has that attribute. Hence, a lawyer may state that he or she was included in the list called “Super Lawyers” or “The Best Lawyers in America,” and must not describe the lawyer as being a “Super Lawyer” or the “Best Lawyer.”
2. If the lawyer displays, in advertising, **badges or logos of comparative awards** (such as the yellow “Super Lawyers” badge), the lawyer must also include the required additional information (description of standard or methodology; name of comparing organization; disclaimer sentence) in a discernible manner in proximity to the reference to the award. The accompanying information cannot be buried at the bottom of a page, or in tiny print, or placed outside the screen shot on a website.

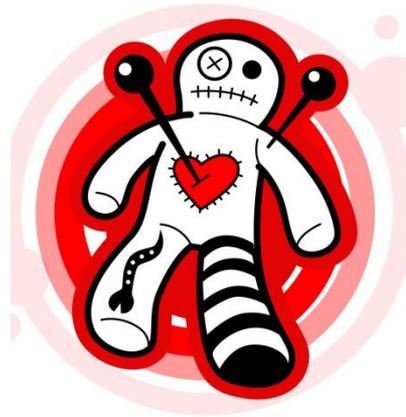
# Rule of Professional Conduct 7.2(a)

- “All advertisements shall be predominantly informational.”
- “No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising.”



# RPC 7.2(a) - continued

- “No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel . . . .”



# Issues to Watch

- RPC 7.2(a) – Retention of all advertisements for three years
- RPC 7.3(a)(b) – Personal Contact with Prospective Clients
- RPC 7.3(c) – Improper Referral Services
- RPC 7.4 – Specialists/Certified Attorneys
- RPC 7.5 – Firm Names-Recent Changes Permitting Trade Name