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## Appellate Watch

### Court Likely To Ease, Not Lift, Its Ban On Comparative Lawyer Advertising

By Michael Booth

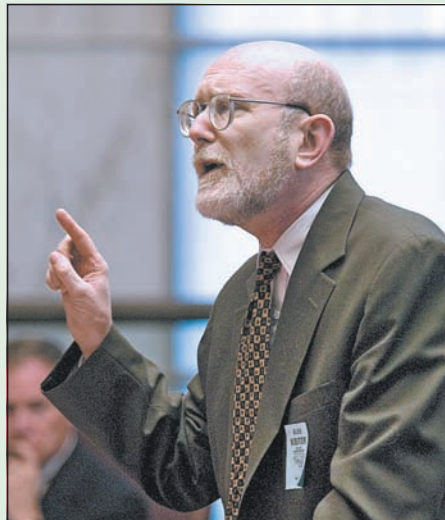
New Jersey's Supreme Court seems poised to alter its current outright prohibition on advertising in which lawyers compare their abilities to others, probably by requiring that such ads include caveats to potential clients.

The Court wants to create a "sensibly balanced rule," Chief Justice Stuart Rabner said Wednesday at a hearing on whether lawyers should be able, within limits, to tout their ratings in publications like Super Lawyers or Best Lawyers.

Five lawyers argued, with some reservations, in favor of the Court adopting a revision of Rule of Professional Conduct 7.1, proposed by the Professional Responsibility Rules Committee, which would allow comparisons if the "basis" for them "can be substantiated."

But it was clear from the tenor of the arguments and the justices' occasional remarks that comparative advertisements will likely have to be accompanied by some form of disclaimer that "super lawyer" or "best lawyer" designations do not have the Court's blessing.

The PRRC suggested adding a comment to RPC 7.1, saying lawyers can use an "appropriate disclaimer or qualifying language" to shield themselves from "a finding that the communication is likely to create unjustified



**KEEP IT SIMPLE: Best Lawyers' attorney Frederick Dennehy said he hopes the revision of RPC 7.1 does not lead to broadcast ads like those for pharmaceuticals, with rapid-fire disclaimers.**

expectations or otherwise mislead a prospective client."

Wednesday's session was less like routine oral arguments but rather more like a public hearing, with the justices appearing without robes and generally allowing the attorneys to state their cases without engaging in back-and-forth questioning and answering.

First to speak was Thomas Curtin, representing Martindale-Hubbell, which publishes the AV-BV-CV lawyer rating system. He said that Martindale-Hubbell has a complex ratings system that is distributed worldwide and that its publisher "doesn't want to modify

its practices any more than what is necessary." Curtin, of Morristown's Graham Curtin, said it is enough that lawyers are ethically barred from making false or misleading statements in their advertisements.

Justice Roberto Rivera-Soto wanted to know if Martindale-Hubbell would be changing its methodology if the rule were adopted.

Curtin said not to any great extent. The company will collect some new additional data, but "there will be no pay-to-play requirement. ... There will no change in the peer review system."

Arnold Chaite, representing *New Jersey Monthly* magazine, said advertisers are unsure of where they are going to stand with the new rule.

"The magazine does not want to launch an investigation" if a lawyer wants to buy an ad touting his awards or accomplishments, said Chaite, of Morristown's Chait Collins & Schneider.

"The consumer is capable of deciding for themselves what information is useful," he said. "Also, any disclaimer or disclosure language should not obscure the magazine and not make it above the reach of the average attorney because of costs."

Justice Helen Hoens asked what level of detail should be mandated to be included in advertisements.

"It should be left to the consumer to determine if something is totally bogus," Chaite said. Attorneys should take it upon themselves to determine if an accolade is coming from a trustworthy source. "I use my discretion," he said. "I get these all the time."

Rabner asked how the "super lawyer" and "best lawyer" claims could be differentiated from the Court's own

certified lawyer ratings.

The Court really doesn't need to do anything, Chait said. "Don't discount the ability of the consumer to digest all the information," he said.

Frederick Dennehy, representing Woodward-White Inc., which publishes *Best Lawyers in America*, said there has to be closure to the issue of comparative advertising. He pointed out that it's been three years since the Committee on Attorney Advertising had disapproved of advertising Best Lawyers ratings in its Opinion 39. And though that ruling was later vacated, the controversy persists.

Dennehy, of Woodbridge's Wilentz, Goldman & Spitzer, said he hopes that revised RPC 7.1 does not lead to broadcast ads like those for pharmaceuticals, with rapid-fire disclaimers about possible dangers.

"The message should get through," he said. "They should not be drowned in a tsunami of prose. A frantic pace at three times speed is understood by few and cared about by fewer still."

Kevin McNulty, representing Key Professional Media, which publishes *New Jersey Super Lawyers Magazine*, said a minimal disclosure — acknowledging that one attorney is not comparing himself to another — is sufficient.

"Do we have a duty to ensure the consumer is not misled?" asked Justice Jaynee LaVecchia.

"Disclosure is enough," replied McNulty, of Gibbons in Newark. "I don't think the consumer gives them much thought."

"Should we just leave it to the consumer?" LaVecchia asked.

"Sure, as long as the consumer

has a reasonable amount of information," McNulty said. "Really, all these ads are saying is, 'Hire me.'"

The last speaker was Metuchen solo David Rubin, who represented a law firm that successfully challenged prior versions of advertising rules that prohibited the "use of drawings, animations, dramatizations, music or lyrics" and required that all ads "be presented in a dignified manner."

The ruling, in *In the Matter of the Petition of Felmeister & Isaacs*, 104 N.J. 515 (1986), narrowed the prohibitions to television ads only, struck the "dignified" requirement and led to the creation of the Committee on Attorney Advertising.

More information about lawyers is better than less," he said. "Advertising is necessarily comparative, if it is any good." ■