

***WELCOME TO THE TROPHY GENERATION:
EXAGGERATION OF YOUR LEGAL EXPERIENCE CAN LEAD TO TROUBLE***

It had been a long T-ball season for the Blue Jays. The team of six year olds had lost all eight games at Carmichael Field. Now having faced the undefeated Orioles, the season came to a merciful ending with the last out. The Orioles walked away with an 11-1 win. Both teams met at home plate and after shaking hands, the players went back to their dugouts. While the game and season were over, the “celebration” was just about to begin. Amid cameras flashing, each player from the Blue Jays was given a trophy. The champion Orioles followed. The recognition was not for games won or lost, or play on the field. There would be no distinction in the size or shape for the trophies given to the Blue Jays versus the Orioles. Rather, everybody who played had to have a trophy. Everybody was an All-Star.

Today, the legal profession has joined the trophy generation. Every facet from client development to law schools to even the judiciary has been affected. Various services now rank the legal profession as if we are vying for the Bowl Championship Series. The temptation for recognition by misrepresenting one’s experience, however, comes with a huge risk. The reality is claims of exaggeration are increasingly the basis of suits for legal malpractice and Bar complaints. Alabama has joined the majority of states which recognize a cause of action against an attorney for misrepresenting credentials. Likewise, Bar complaints now include claims of over-blown descriptions of success. The need to exaggerate is likely a product of the tough economic times which

have led to the increased competition for legal work. Moreover, the Internet has provided an almost unchecked forum for lawyers to describe their legal skills.

In an effort to attract clients, some attorney web sites now read like a John Grisham novel. It is not enough to simply be a litigator but rather, many are self-described as complex litigators. There are no longer routine commercial transactions, only the sophisticated ones. Divorces are only accepted if they are high end. Such descriptions are in keeping with the times. We live in a world where any airport like Birmingham with more than a direct flight to Atlanta now includes the word “International” within its name. There was a certain comic relief if not irony when a recent speaker at CLE jokingly introduced himself to a crowded room of lawyers by saying, “Just like each of you, I am a Superlawyer.”

While self-promotion is allowed within the practice of law, unchecked statements are not good for the profession. Every lawyer is appreciative of recognition. Yet, self-promotion based upon false pretenses can only lead to trouble. Such an observation is not meant to silence well deserved accolades or reputations. Lawyers in fact, are allowed substantial latitude to describe their skills.

Historically, Alabama courts have been reluctant to hold attorneys liable for inflating their experience. In *Lawson v. Cagle*, 504 So.2d 226 (Ala. 1997), a Mississippi attorney found himself the subject of a suit when the client failed to receive a \$1,000,000 recovery which the attorney had allegedly guaranteed. The plaintiff had been injured in an accident in Mississippi and hired an Alabama attorney to file suit in Mississippi. The Mississippi attorney was subsequently retained as co-counsel. There later became a

disagreement among the attorneys as to the direction of the case. In an effort to keep control, the Mississippi attorney purportedly stated he could guarantee the plaintiff a \$1,000,000 recovery if the client would allow the Mississippi attorney to maintain the case. The client selected the Mississippi attorney based upon this representation. The client, however, failed to recover any settlement or verdict, much less the \$1,000,000 allegedly guaranteed.

The client then brought a fraud claim against the Mississippi attorney based upon the \$1,000,000 representation. The case proceeded to trial, where the jury awarded the plaintiff \$2,500,000. On appeal, the verdict was reversed. The Alabama Supreme Court found that even accepting the plaintiff's version of the attorney's statement as having been made, the attorney did nothing more than make a prediction of a future event. The Court observed that the million dollar figure was mere "puffery" which did not constitute actionable fraud. The plaintiff had no right to rely upon the attorney's alleged statements since no one can guarantee the results of a trial.

The distinction between puffing versus misrepresentation was again examined in *Valentine v. Watters*, 896 So. 2d 385 (Ala. 2004), wherein the Alabama Supreme Court recognized a cause of action against an attorney for alleged misrepresentation of his skills. The underlying action arose after Valentine suffered complications following bilateral breast implant surgery. Valentine thereafter consulted with Attorney Watters to pursue litigation against the implant manufacturer. According to Valentine, Watters represented he was familiar with and had represented other clients in the breast implant litigation. Based upon these representations, Valentine stated she was "enticed" to retain

the attorney. After Watters was hired to represent Valentine, there was a delay in filing the suit. This delay led to Valentine's dissatisfaction and Watters' termination. Valentine later learned her claims were never filed as part of the Multi-District Litigation. Valentine thereafter brought suit against Watters.

Within her complaint, Valentine alleged in part a breach of the Alabama Legal Services Liability Act, including a specific claim of misrepresentation as to Watters' reference to having counseled other breast implant litigants. Watters, however, stated he held himself out only as having represented clients in product liability actions but not specifically in breast implant litigation. Watters filed a motion for summary judgment relying in part upon his affidavit. Watters argued that he satisfied the standard of care and that Valentine had failed to submit rebuttal evidence in the form of expert testimony. The motion was granted. On appeal, however, the Alabama Supreme Court reversed the trial court's findings.

The Alabama Supreme Court recognized that Valentine did state a cause of action by and through her claim that Watters had allegedly misrepresented his experience. The Court rejected Watters' argument that Valentine's failure to have expert testimony was a sufficient ground for the motion for summary judgment to have been granted. Instead, the Court determined that an attorney's breach of the standard of care by and through a misrepresentation of his qualifications is a matter that does not require expert testimony. A jury of laypersons would be competent to determine by the exercise of common knowledge whether or not the representation was true. Accordingly, the Court held that

Valentine's claim that Watters misrepresented his experience could go forward without Valentine having an obligation to produce expert testimony.

If the Alabama Supreme Court's recognition of a cause of action for an attorney's misrepresentation is not sufficient warning, consider the results in *Baker v. Dorfman*, 239 F.3rd 415 (2d Cir. 2000). In a case filed in New York, the client brought a legal malpractice action against Attorney Dorfman arising out of an underlying suit for personal injury. The attorney had missed a court deadline leading to a dismissal of his client's case. Among the allegations of the malpractice complaint was a claim that Dorfman had misrepresented his legal background and experience.

A review of Dorfman's resume included statements that he engaged in a challenging and highly diversified practice; was a member of multiple state bars; had a strong reputation for excellence; was a founder and editor of a law journal; created a master's of law program in healthcare law at New York University (NYU); had taught at Boston University and NYU School of Law; was regular counsel to multiple public and private companies; engaged extensively in trial and appellate litigation in both state and federal courts; and had been called a "litigator's litigator." The plaintiff claimed she relied upon these representations when she hired Dorfman, only to later determine the representations were not accurate.

Dorfman denied any liability. He characterized his statements to the plaintiff and information included on his resume as mere puffery which did not rise to any material misrepresentation. The jury and appellate court found otherwise. In fact, Dorfman was not an experienced lawyer. Dorfman had only been practicing one month before he was

retained to pursue Baker's personal injury claim. Dorfman was not a member of all the state bars that he claimed membership. Dorfman never represented any healthcare organizations. Dorfman had not created an LLM program at NYU. Dorfman had not taught any courses at any law school. As far as being a "litigator's litigator," the first jury trial that Dorfman ever participated was the case against himself. The jury awarded the plaintiff \$390,000 including punitive damages.

Beyond being sued for civil damages, an attorney's misrepresentation of qualifications may lead to a Bar complaint and disciplinary action. Alabama Rule of Professional Conduct (ARPC) 1.1 outlines the requirement that an attorney provide competent representation. Helpful to attorneys is the provision of ARPC 1.5, which allows an attorney to accept a matter in a wholly novel field if the attorney can gain an understanding of the matter through necessary study. The compliance with Rule 1.5, however, should include an understanding by the client that the attorney will in fact have to become educated on the particular matter. Otherwise, an attorneys stands to violate ARCP 7.1. ARPC 7.1 warns lawyers not to engage in conduct involving representations which create an "unjustified expectation" about the results:

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer

can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or

(d) communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4.

Given the broad perimeters of the ARPC, any misrepresentation of expertise and skill may be a ground for violation.

Like Alabama, other states have universally taken a dim view of attorneys misrepresenting their credentials. In the matter of *Michael Hensley Wells*, Opinion No. 26969 (May 9, 2011), the Supreme Court of South Carolina issued a public reprimand and monetary fine against an attorney for exaggeration of his law firm experience. The attorney had advertised by way of a web site, brochures, telephone book, and even a kiosk in a local shopping mall. The advertisements promoted the attorney as having "worked in the legal environment for over 20 years." In reality, the attorney had only practiced law for seven (7) years. The firm described its associates as "numerous trained and experienced attorneys," "highly skilled" and having a "deep personal knowledge of the courts, judges, and other courthouse personnel." The numerous trained and experienced attorneys were two associates who had each been admitted to practice law for less than one year. The lawyer represented the firm had offices not only in South Carolina, but also Georgia and Florida. The lawyer did have a referral agreement with attorneys in Georgia and Florida but no offices. Moreover, the public was advised that the firm had served clients in the areas of constitutional law, civil rights, professional

responsibility, and toxic torts. It was determined that no lawyer in the firm had ever handled such matters, but only that they were willing to accept those type of cases. The firm's web site even included a section titled "Consumer Protection and Products Liability Lawyer." The description proclaimed the firm had a "history of winning product liability cases," and the lawyers understood "how to deal with both corporations and insurance companies and have a history of winning cases for our clients." It was confirmed, however, that no lawyer in the firm had ever handled a products liability matter.

Likewise, an attorney received a 30 days suspension followed by one year of probation when a Virginia court found the attorney guilty of ethical misconduct. *Virginia State Bar EX REL Second District Committee v. Jason Matthew Head*, CL 10-4043 (Circuit Court of City of Virginia Beach, Virginia). Multiple charges were brought by the Virginia State Bar against the defendant for, among other causes, misrepresenting the size, location of his office, and areas of practice. The firm was referred to as Jason Head & Associates, PLC. The attorney represented the firm had three locations and decades of experience. In fact, the firm was a solo practice. There was only one office and certain practice groups were non-existent. The "decades of experience" was incorrect given the lawyer had only been licensed to practice law for eight years.

In a bizarre case, *Disciplinary Counsel v. Martin Villeneuve* (AC 31841, February 22, 2011), the Connecticut Appellate Court found an attorney not only exaggerated his experience but falsely represented his own identity. In 2008, the lawyer applied for a staff attorney position with the State Worker's Compensation Commission. During the

interview process, the defendant submitted his resume and described his experience. The Commissioner's Human Resources Director became suspicious of the attorney's statements. After further investigation, it was determined the lawyer did not graduate with honors from the law school as he had claimed. The attorney was not the assistant note editor for his law school's review. The law firm for which the attorney said he had worked did not even exist. During the resource director's attempt to speak with the named references by telephone, contact was made with two people who "sounded very similar on the phone" causing her to doubt the legitimacy of the reference information. After the Bar complaint was filed, the defendant denied any knowledge of the application, attending the interview, or even contacting the State Worker's Compensation Commission. Instead, the lawyer claimed that his identity had been stolen. No information, however, was provided to substantiate this defense. The Court observed the attorney refused to even appear at the initial hearing, much less resolve the issue by just meeting with the Human Resource Director so to prove his case of "mistaken identity." The Court affirmed the attorney's suspension to practice law.

The temptation to exaggerate qualifications is not limited to just a lawyer trying to impress a client or obtain a new position. Unfortunately, such misrepresentations and exaggerations have permeated the entire landscape of the legal profession from students to law schools to the judiciary. In 2010, the Illinois Supreme Court issued a three year suspension to a then practicing attorney (*ABA Journal*, May 20, 2010). The suspension arose out of a finding that the attorney, while a student at the University of Chicago Law School, had changed his grades for approximately 20 classes. The alterations included

“whiting out” his transcript and changing certain grades from Cs and Bs to Bs and As. The changes were part of his effort to gain a summer clerkship position at a large firm. The law student was hired based upon the false transcript. After graduation and passing the bar, the associate worked for several firms. The misrepresentations were discovered when the associate’s resume containing his real grades was circulated by a head hunter to other firms including the hiring partner at the firm where the lawyer had worked as a summer clerk. Notably, the three year suspension by the Court exceeded the eighteen month recommendation by the Disciplinary Panel.

The pressure to exaggerate credentials has touched the very institutions in which lawyers are trained. Law schools have now become the subject of scrutiny for representations as to the percentage of graduates who find employment and the actual starting salaries. During the past year, suits have been filed against New York Law School, Thomas Jefferson School of Law, and Thomas Cooley School of Law on behalf of disgruntled students who find themselves burdened with debt but no job as promised. Within the complaint against New York Law School, the plaintiffs allege:

Unfortunately, NYLS’s false and fraudulent representations and omissions are endemic in the law school industry, as nearly every school to a certain degree blatantly manipulates their employment data to make themselves more attractive to prospective students. It is a dirty industry secret that law schools employ a variety of deceptive practices and accounting legerdemain to “pretty up” or “cook” the job numbers, including, among other things, hiring recent unemployed graduates as “research assistants” or providing them with “public interest” stipends so as to classify them as employed, excluding graduates who not supply employment information from employment surveys, refusing to categorize unemployed graduates who are not “actively” seeking

employment as unemployed, and classifying graduates who have only secured temporary, part-time employment as being “fully” employed.

Alexander Gomez-Jimenez, et al. v. New York Law School, Supreme Court of New York, County of New York Index No. 652226/2011. The defendant law schools have denied the allegations.

Compounding the problem of the need to exaggerate one’s experience may even extend to the judiciary. In New Orleans, questions have been raised about the number of jury trials handled by certain judges. (*ABA Journal*, March 2, 2011). In February, 2011, the sitting District Attorney challenged 12 judges of the criminal court division to complete 600 jury trials a year among themselves. The District Attorney himself had previously served on the bench for 17 years. He was reported to have described himself as a “trial machine.” As a judge, he had allegedly tried an average of 100 cases a year beginning in 1986 until he left the trial bench. That number, however, was challenged by others as being inflated. According to the investigation, certain judges orchestrated a “pick-and-plea” deal in the courtroom. The judges would allow attorneys to pick a jury even though all parties and the judge knew the defendant wanted to plead guilty and enter a plea. Once the jury was selected, the matter would officially be credited as a trial. The defendant would then plead guilty and case dismissed. The judge and lawyers would receive credit for a trial and increased experience. There was even a trophy given to the judge who tried the most cases. The District Attorney denied the claims. The investigation could not be completed given the pertinent records were destroyed by Hurricane Katrina.

Suffice it to say, the problem of misrepresentation cannot go unchecked. Our profession is one of self-government. The Rules of Professional Conduct require an attorney to act with candor, honesty, and integrity. These rules do not allow an attorney to create an unjustified expectation by the client concerning the potential success of a legal matter, or the attorney's credentials. These are rules of reason and common sense. Clients come to lawyers seeking sound, honest advice. Clients are entitled to know exactly who will represent them, and the attorney's true background and experience. If an attorney cannot be truthful about his or herself, it is unlikely the attorney can be completely honest about the client's situation. Ultimately, the client who experiences an unfavorable result will question the outcome and certainly any issues with the lawyer's own training and experience. If there is proof of misrepresentation, a civil action and Bar investigation could follow. The results may be not only embarrassing but costly.