COMMENT: THIRD-PARTY RATINGS AS MODERN REPUTATIONAL INFORMATION: HOW RULES OF PROFESSIONAL CONDUCT COULD BETTER SERVE LOWER-INCOME LEGAL CONSUMERS

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LexisNexis Summary

Based in part on a tradition of professional etiquette and in part on a denial of First Amendment protection for "commercial speech," lawyer advertisements were subject to a wide variety of limitations on content, form, and medium. Likewise, Arizona, which also follows the modern version of the Rules, determined that, even though an inference of superiority based on The Best Lawyers in America designation could not be verified, an advertisement referring to the recognition was not likely to mislead a consumer informed of the selection process because the consumer "reasonably can determine how much value, if any, to afford" the designation. In fact, Justice O'Connor identified the average consumer's inability to verify the underlying meaning of a certification as crucial in finding a statement about that certification inherently misleading. If a court determines that the advertisement is inherently misleading, any restriction, including full prohibition, is constitutional because the statement is not protected commercial speech. Unless a court finds that a disclaimer is not going to be effective, because, for example, the description of the methodology is too long or consumer expectations regarding a "Super" or "Best" designation are too strong to be overcome by a disclaimer, the court will likely strike down a total prohibition on comparative advertising as applied to a legitimate rating system.

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Introduction

During much of the twentieth century, the legality of the professional bar's prohibition on lawyer advertising was noncontroversial. [1] Based in part on a tradition of professional etiquette [2] and in part on a de-

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[1] Prior to 1908, states did not restrict advertising by lawyers. In fact, it was common in the nineteenth century for lawyers to advertise - even Abraham Lincoln advertised his legal services. See ABA Comm'n on Adver., Lawyer Advertising at the Crossroads 29-31 (1995). However, in 1908, the American Bar Association (ABA) developed Canon 27 of the Canons of Professional Ethics, which specifically prohibited lawyer advertising. These Canons were "subsequently adopted in whole or part throughout the United States." Louise L. Hill, Lawyer Advertising 43 (1993). Even though the Model Code of Professional Responsibility re-

nial of First Amendment protection for "commercial speech," [3] lawyer advertisements were subject to a wide variety of limitations on content, form, and medium. [4] Since 1977, however, increased judicial **[*198]** scrutiny of the constitutionality of such restrictions has led to a remarkable growth in lawyer advertising and a simultaneous elimination of nearly all content limitations. [5]

The commercial speech doctrine, which was given constitutional status in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., [6] provides the legal framework for analyzing the remaining restrictions on lawyer advertising. The doctrine is based on the belief that a free flow of information is necessary in competitive markets. As the Supreme Court explained in Virginia Pharmacy,

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [7]

In Bates v. State Bar of Arizona, [8] the Supreme Court used the newly developed commercial speech doctrine to strike down a blanket ban on price advertising by lawyers. [9] The Court rejected the state bar's argument that price advertising would erode the dignity or quality of the profession. [10] Instead, as in Virginia Pharmacy, the Court focused **[*199]** on the benefits of having informed consumers and cited studies showing that some people refrained from seeking legal assistance because of the "feared price of ser-

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placed the Canons in 1969, it adopted the same restrictions on advertising. ABA Comm'n on Adver., supra, at 35; Hill, supra, at 44.

[2] Lawyers generally were expected (and able) to obtain clients based on their reputations within the community. See Lori B. Andrews, Lawyer Advertising and the First Amendment, 6 Am. B. Found. Res. J. 967, 968 (1981) ("The most worthy and effective advertisement possible is the establishment of a well-merited reputation ...") (quoting Model Code of Prof'l Responsibility Canon 27 (1908)). Additionally, advertising was thought to be poor etiquette because it was like "plotting to steal away one another's clients." Henry S. Drinker, Legal Ethics 210-11 (1953).

[3] See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[It is] clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."), overruled by Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[4] See, e.g., Hill, supra note 1, at 45 (citing Model Code of Prof'l Responsibility DR 2-101 (1969)).

[5] Since the Supreme Court decided Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the ABA has struggled to develop constitutionally permissible restrictions on the content of lawyer advertising. See Hill, supra note 1, at 47 (noting that relevant portions of Model Code of Professional Responsibility underwent six changes in as many years). In its initial Model Code, the ABA took a "laundry list" approach, spelling out the specific information permitted in advertisements. Id. However, when the Model Rules of Professional Conduct replaced the Model Code in 1983, the ABA drafters were "mindful of the position of the Supreme Court regarding restrictions on speech," and consequently took a more liberal approach that "enlarged the sphere of acceptable lawyer advertising." Id. at 50.

[6] 425 U.S. 748, 790 (1976) (holding for the first time that the First Amendment protects commercial speech). Virginia Pharmacy overruled the prior precedent established in Valentine v. Chrestensen, 316 U.S. at 54, which held that purely commercial speech was not entitled to protection.

[7] Va. Pharmacy, 425 U.S. at 765. See also Bates, 433 U.S. at 364 ("Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.").

[8] 433 U.S. 350 (1977).

[9] See id. at 383. In striking down the blanket ban at issue in Bates, the Court expressly acknowledged that other restraints on legal advertising would be permissible. Id. at 383-84.

[10] Id. at 368 (finding the "postulated connection between advertising and the erosion of true professionalism to be severely strained"); id. at 378 ("Restraints on advertising are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising.").

vices." [11] Acknowledging that "advertising does not provide a complete foundation on which to select an attorney," the Court reasoned that consumer access to some relevant information is better than access to none at all, and that advertising might compensate for consumer difficulty in obtaining reputational information as communities grow larger and less personal. [12]

Although commercial speech has been recognized as protected under the First Amendment since Virginia Pharmacy, it does not enjoy the same virtually absolute protection as political speech. [13] Because the commercial speech doctrine is founded on the idea that increased consumer awareness is a desirable goal, speech that either does not further or, to the contrary, harms the goal of an informed public merits no commercial speech protection. [14] Therefore, false, misleading, or deceptive commercial speech can be prohibited altogether, and even truthful speech can be restricted if it is potentially misleading. [15] The Court has recognized that the potential to mislead legal consumers **[*200]** is particularly high "because the public lacks sophistication concerning legal services." [16] Accordingly, lawyers have less "leeway for untruthful [and] misleading expression" than other professionals. [17]

Although the Court has laid out a consistent framework to analyze restrictions on misleading statements, [18] and despite the fact that all states prohibit misleading advertisements, it is not always clear whether a particular kind of statement (such as a comparative or superlative statement) is inherently, potentially, or not at all misleading. This Comment argues that this uncertainty may be harming the promotion of independent, bona fide lawyer rating systems, which in turn may harm the legal profession's goal of increasing access to legal services for lower-income populations. This Comment analyzes the effects and constitutionality of restrictions on comparative statements in lawyer advertisements, as applied to third-party rating systems, focusing in part on a recent opinion by the New Jersey Committee on Attorney Advertising that uses the Rules of Professional Conduct to prohibit lawyers from advertising in Super Lawyers magazine. This Comment then argues that regardless of whether the Rules of Professional Conduct are constitutional, they should be revised for policy reasons.

Part I provides an overview of some of the more popular independent lawyer rating organizations. Part II analyzes the likelihood that modern regulatory approaches restricting comparative advertising will prohibit or restrict advertisements that refer to these rating systems. It also discusses the constitutionality of such re-

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[11] Id. at 370.

[12] Id. at 374 & n.30 ("Although the [referral] system may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy.").

[13] See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances. By contrast, regulation of commercial speech based on content is less problematic." (citations omitted)); see also Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 484 (1988) (O'Connor, J., dissenting) ("We have never held that commercial speech has the same constitutional status as speech on matters of public policy ."). This distinction between political speech and commercial speech is not without controversy. For an interesting argument that the distinction should not exist at all, see Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627 (1990).

[14] See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Stewart, J., concurring) ("The elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection - its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.").

[15] See In re R.M.J., 455 U.S. 191, 202 (1982) ("The Court has made clear that regulation - and imposition of discipline - are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive."); Va. Pharmacy, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). Restrictions on truthful, yet potentially misleading advertisements must meet the three-prong test as laid out in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). See discussion infra Part II.B.

[16] Bates, 433 U.S. at 383.

[17] Id.

[18] For a good summary of the commercial speech analytical framework, see In re R.M.J., 455 U.S. at 203.

strictions using the framework laid out in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York as a guide. Part III discusses solutions for how states could better regulate third-party ratings.

I. The Emergence of Bona Fide Rating Systems

In the past twenty years, an increasing number of organizations providing lawyer ratings have emerged. Although Martindale-Hubbell has existed for over 135 years, it has been primarily marketed as a reference for those already involved in the legal profession, rather than **[*201]** as a reference for the general public. [19] In contrast, newer rating organizations such as Super Lawyers, [20] The Best Lawyers in America, [21] and Who's Who in American Law [22] specifically market their magazines and products to consumers. [23] The circulation of these magazines is growing at an astounding rate: Super Lawyers' readership has grown sixty-five percent in just two years and is estimated to top thirteen million readers in 2007. [24]

As a matter of social policy, the increased availability of these magazines to the public is desirable. The shift in the legal field from **[*202]** small legal communities to larger firms has made the former referral system ineffective for many people. [25] "Nonwhites and persons of low and middle socioeconomic status usually have fewer sources of reputation information about legal services" [26] and, consequently, these populations are the ones most likely to rely on lawyer advertisements. [27] This lack of access to reputational information denies these populations one of the most important sources of information for finding a law-

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[19] Martindale.com, http://www.martindale.com (last visited Oct. 15, 2007). Martindale-Hubbell is a legal database containing information on over one million lawyers and law firms in 160 countries. About Martindale-Hubbell, http://www.martindale.com// xp/Martindale/News & Events/Media Room/About Martindale-Hubbell/about.xml (last visited Oct. 15, 2007). The database contains basic biographical and professional credential information, as well as "peer review ratings" that, according to Martindale-Hubbell, provide "third party validation of ethics and legal ability." Martindale.com, Peer Review Ratings, http://www.martindale.com/xp/Martindale/Peer Review Ratings/ ratings intro.xml (last visited Oct. 15, 2007).

[20] Super Lawyers, Homepage, http://www.superlawyers.com (last visited Oct. 15, 2007). For more information on Super Lawyers, see discussion infra Parts II.A.2-3, II.B.1.

[21] The Best Lawyers in America is a lawyer referral guide established in 1983 that uses "exhaustive peer-review surveys" to select the top lawyers by specialty. Best Lawyers, About Us, http://www.bestlawyers.com/aboutus// (last visited Oct. 15, 2007).

[22] Marquis Who's Who in American Law provides biographical information on "the nation's top judges, lawyers, educators, legal theorists, legal writers and editors." Marquis Who's Who in American Law, http://www.marquiswhoswho.com/products// ALprodinfo.asp (last visited Oct. 15, 2007).

[23] It could be argued that it does not matter whether a publication is targeted at other lawyers or at the public, because a lawyer may show the publication to her client. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 55.5, at 55-9 illus. 55-4 (3d ed. Supp. 2005-2) (discussing a brochure directed at other lawyers). Nonetheless, a publication marketed directly to the public will likely result in more consumer exposure than a publication marketed only at lawyers. Additionally, the fact that Super Lawyers and The Best Lawyers in America are marketed at the public has influenced the analysis of state ethics committees. See, e.g., N.J. Comm. on Att'y Adver., Op. 39 (2006) (distinguishing Super Lawyers from Martindale-Hubbell because "the survey results for "Super Lawyer' designation are designed for mass consumption"); Iowa Supreme Court Bd. of Prof'l Ethics and Conduct, Op. 92-36 (1993) (noting that The Best Lawyers in America is "specifically intended and offered to the general public").

[24] Based on the figures provided on its website, Super Lawyers had 5.7 million readers in 2004 and 9.6 million in 2006. Super Lawyers, About, http://www. superlawyers.com/index.php?option=com content&task=blogcate gory&id=4&Itemid=37 (last visited July 21, 2007). Lists claiming "to include the top practitioners in an area of law," such as Super Lawyers, "have become so numerous that American Lawyer Media, a large legal publisher, offers Web conferences to coach law firms and their marketing staffs on how to manage them." Karen Donovan, Some Lawyers Ranked "Super" Are Not the Least Bit Flattered, N.Y. Times, Sept. 15, 2006, at C6 (emphasis added).

[25] Bates v. State Bar of Ariz., 433 U.S. 350, 374 n.30 (1977).

[26] Geoffrey C. Hazard, Jr. et al., Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. Rev. 1084, 1096 (1983).

[27] See ABA Comm'n on Adver., supra note 1, at 92 (noting that "those finding lawyers [through] impersonal ways [such as advertising] are mostly minority and low-income populations").

yer. [28] Insufficient methods of searching for capable lawyers can significantly impede members of lower- and middle-income populations from identifying capable lawyers to represent them. [29] However, reliable and independent ratings can help fill this gap. By utilizing firsthand reputational information provided by lawyers in the field familiar with one another, [30] ratings based on peer-review surveys can serve as a modern reputational reference for those not in a position to obtain such knowledge firsthand. [31]

To provide this social benefit, however, the ratings themselves must be legitimate. Ratings that allow popularity or financial payoffs to influence the outcome may actually be a detriment to those who rely on them as sources of bona fide ratings of a lawyer's services. [32] **[*203]** Therefore, states need a way to differentiate the genuine rating services from the so-called "sham" organizations. [33]

II. The Current Rules of Professional Conduct Are Ill Suited To Regulate Attorney Ratings

The current Rules of Professional Conduct do not adequately account for legitimate, third-party peer ratings. In many cases, advertisements referring to such ratings would be prohibited under the Rules, and such a prohibition may be constitutional. However, these restrictions are unwise from a public policy perspective.

A. Analysis of Current Rules Restricting Comparative Statements

1. Current Rules May Prohibit Advertisements Referring to Third-Party Ratings

Although the Rules of Professional Conduct for lawyers vary by state, most states tend to follow one of two approaches to restricting misleading, and specifically comparative, advertisements: the former Model Rules approach [34] or the current Model Rules approach. [35]

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[28] See Hazard, supra note 26, at 1095-96 (discussing the significance of reputational information).

[29] See ABA Comm'n on Adver., supra note 1, at 91-92 (discussing the current insufficient system of lawyer advertising to low- and middle-income populations).

[30] See Martindale.com, Peer Review Ratings, supra note 19 ("Peer Review Ratings are established by lawyers. The legal community respects the accuracy of Ratings because it knows that its own members - the people best suited to assess their peers - are directly involved in the process.").

[31] It would also be useful for ratings to incorporate the opinions of former clients, rather than relying solely on peer review ratings.

[32] Avvo, a website that assigns lawyers a numerical rating, may be one such questionable ratings service. Avvo, http://www.avvo.com (last visited Oct. 15, 2007) (providing, as its slogan states, "Ratings. Guidance. The Right Lawyer."). After receiving an initial rating from the Avvo site that was lower than the rating given to a deceased lawyer, a Seattle criminal defense lawyer recently filed a class action lawsuit against the website. Adam Liptak, On Second Thought, Let's Just Rate All the Lawyers, N.Y. Times, July 2, 2007, at A9. Lawyers can provide a credit card number to Avvo to add information to their profiles that may increase their ratings. Id. One lawyer claims he raised his rating by adding a softball award. Id. Although Avvo does not disclose how it generates the ratings, it maintains that it periodically checks awards that are not in its database. Id.

[33] Cf. Peel v. Att'y Registration & Discip. Comm'n of Ill., 496 U.S. 91, 109 (1990) (plurality opinion) (discussing states' ability to impose requirements to distinguish "sham" certifications from those issued by qualified organizations).

[34] Model Rules of Prof'l Conduct R. 7.1 (1992).

[35] Model Rules of Prof'l Conduct R. 7.1 (2003). Some states have made minor modifications to the ABA Model Rules, but, with the exception of New Jersey's changes, the differences are insignificant for purposes of this Comment. Six states have rules that do not conform to either approach: California, Indiana, Iowa, Maine, New York, and Oregon. See Cal. Rules of Prof'l Conduct R. 1-400(D) (2007) ("A communication or a solicitation (as defined herein) shall not: (1) Contain any untrue statement; or (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public ."); Ind. Rules of Prof'l Conduct R. 7.2(b) (2007) ("A lawyer shall not use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim . (d) A lawyer shall not use or participate in the use of any form of public communication which: (4) contains a statement or opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services ."); Iowa Rules of Prof'l Conduct R. 32:7.1 (2005) ("(b) A lawyer shall not communicate with