

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

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Author: Colleen Petroni

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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.

Text

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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-

* B.S. 2001, University of Notre Dame; J.D. Candidate 2008, University of Pennsylvania Law School. I am grateful to Lawrence Fox of Drinker Biddle & Reath and Professor Catherine Struve for their thoughtful comments, and to the editors of the University of Pennsylvania Law Review for their careful work on this Comment. A special thanks to Samantha Freedman for her patience in hunting for the state rules. I would also like to thank my wonderful husband and both my Bovich and Petroni families for their constant support throughout law school. All errors are mine alone.

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-

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-

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 *Shapiro 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 Law²² 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-

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](http://www.martindale.com/xp/Martindale/News%20&%20Events/Media%20Room/About%20Martindale-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](http://www.martindale.com/xp/Martindale/Peer%20Review%20Ratings/ratings%20intro.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/AL-prodinfo.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=blogcategory&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 approach³⁴ or the current Model Rules approach.³⁵

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

[*204] The former version of Rule 7.1 of the American Bar Association (ABA) Model Rules of Professional Conduct specifically defines "misleading," expressly listing three ways in which a communication can fall under the restriction: (a) by containing a material misrepresentation of fact (or omission of a fact necessary to avoid the misrepresentation); (2) by creating an unjustified expectation about potential results; or (3) by making a comparison of one lawyer's services with another's, "unless the comparison can be factually substantiated."³⁶ A majority of states still closely follow the former version.³⁷ New Jersey

[*205] follows this approach with a significant modification: it does not allow any comparisons between two lawyers, regardless of whether the comparison can be substantiated.³⁸ Only Alabama and Oregon also make such a per se ban on comparisons.³⁹

The second approach, embodied in the current version of Model Rule 7.1, is similar to the first approach, but it eliminates the second and third prongs of the "misleading" definition; instead, it limits the definition to a material misrepresentation of fact or law.⁴⁰ The Comment to the Rule, however, still explains that a communication may be misleading if it creates an unjustified expectation or if it makes a factually unsubstantiated comparison of lawyers' services and a reasonable consumer is likely to believe that the comparison can actually be substantiated.⁴¹

These 2002 amendments responded to concerns that the former version was too broad, which prompted the ABA delegates to move the two subsections to the Comment as examples of possibly misleading state-

the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services."); Me. Code of Prof'l Responsibility R. 3.9 (2007) ("(a) False Advertising Forbidden. A lawyer shall not, on behalf of the lawyer or any affiliated lawyer, knowingly use, or assist or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. (b) False Advertising Defined. Without limitation, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim that: (1) Contains a material misrepresentation of fact or law; (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading; (3) Is intended or is likely to create an unjustified expectation; (6) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived thereby, or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive."); N.Y. Unified Ct. Sys. Rules Governing Lawyer Adver. § 1200.6 [DR 2-101] (2007) ("(d) An advertisement that complies with subdivision (e) of this section may contain the following: (2) statements that compare the lawyer's services with the services of other lawyers; . (e) It is permissible to provide the information set forth in subdivision (d) of this section provided: (2) it can be factually supported by the lawyer or law firm and (3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome.""); Or. Rules of Prof'l Conduct R. 7.1(a) (2005) ("A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, (3) except upon request of a client or potential client, compares the quality of the lawyer's or the lawyer's firm's services with the quality of the services of other lawyers or law firms .").

³⁶ Model Rules of Prof'l Conduct R. 7.1 (1992).

³⁷ See Ala. Rules of Prof'l Conduct R. 7.1 (2004); Alaska Rules of Prof'l Conduct R. 7.1 (2007); Ark. Rules of Prof'l Conduct R. 7.1 (2007); Colo. Rules of Prof'l Conduct R. 7.1 (2007); D.C. Rules of Prof'l Conduct R. 7.1 (2007); Rules Regulating Fla. Bar R. 4-7.2(c) (2007); Ga. Rules of Prof'l Conduct R. 7.1 (2001); Haw. Rules of Prof'l Conduct R. 7.1 (2005); Idaho Rules of Prof'l Conduct R. 7.1 (2003); Ill. Rules of Prof'l Conduct R. 7.1 (2007); Kan. Rules of Prof'l Conduct R. 7.1 (2007); Ky. Rules of Prof'l Conduct R. 7.15 (2006); La. Rules of Prof'l Conduct R. 7.1 (2006); Md. Rules of Prof'l Conduct R. 7.1 (2007); Mich. Rules of Prof'l Conduct R. 7.1 (2006); Minn. Rules of Prof'l Conduct R. 7.1 (2007); Miss. Rules of Prof'l Conduct R. 7.1 (2005); Mo. Rules of Prof'l Conduct R. 7.1 (2007); Nev. Rules of Prof'l Conduct R. 7.1 (2006); N.H. Rules of Prof'l Conduct R. 7.1 (2007); N.J. Rules of Prof'l Conduct R. 7.1 (2006); N.C. Rules of Prof'l Conduct R. 7.1 (2007); N.D. Rules of Prof'l Conduct R. 7.1 (2006); Okla. Rules of Prof'l Conduct R. 7.1 (1991); S.C. Rules of Prof'l Conduct R. 7.1 (2005); S.D. Rules of Prof'l Responsibility R. 7.1 (2004); Tenn. Rules of Prof'l Conduct R. 7.1 (2004); Tex. Discip. Rules of Prof'l Conduct R. 7.02 (2005); Vt. Rules of Prof'l Conduct R. 7.1 (2006); Va. Rules of Prof'l Conduct R. 7.1 (2007); W. Va. Rules of Prof'l Conduct R. 7.1 (1994); Wis. Rules of Prof'l Conduct R. SCR 20:7.1 (2007); Wyo. Rules of Prof'l Conduct R. 7.1 (2006).

³⁸ N.J. Rules of Prof'l Conduct R. 7.1(a)(3) (2006).

³⁹ See Ala. Rules of Prof'l Conduct R. 7.1 (2004); Or. Rules of Prof'l Conduct R. 7.1 (2006) (permitting a comparison only if a client or potential client requests it).

⁴⁰ Model Rules of Prof'l Conduct R. 7.1 (2003).

⁴¹ See Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2003).

ments, rather than as per se violations.⁴² The ABA found this approach preferable because it allows case-by-case analysis rather than a categorical ban.⁴³ A substantial minority of states have adopted the current form of Model Rule 7.1.⁴⁴

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2. An Overview of the Super Lawyers Process

At least one state has used its professional responsibility rules to strike down an advertisement relating to an independent lawyer rating.⁴⁵ Super Lawyers, the subject of New Jersey Committee on Attorney Advertising Opinion 39, is a concrete example of a type of rating system that can be affected by rules restricting comparative advertising.⁴⁶ Opinion 39 identified several ethical violations regarding lawyer participation in Super Lawyers magazine, including a violation of New Jersey Rule of Professional Conduct 7.1(a)(3), which prohibits any statement that "compares the lawyer's services with other lawyers' services."⁴⁷ Because the Committee found that superlatives, such as "Super," are inherently comparative and may cause an "unwary consumer to believe that the lawyers are, by virtue of [the] manufactured ['Super Lawyers'] title, superior to their colleagues," the Committee held that lawyer advertisements in Super Lawyers magazine are prohibited.⁴⁸ The Committee further held that even lawyer participation in [*207] the selection surveys is inappropriate, because it would lead to a superlative designation that violates the Rules.⁴⁹

Through a multistage process based on, among other criteria, balloting, peer evaluation, and internal research, Super Lawyers designates individuals it deems to be in the top five percent of lawyers in a given

⁴² See ABA Ethics 2000 Comm'n, Reporter's Explanation of Changes: Model Rule 7.1 (2000), available at <http://www.abanet.org/cpr/e2k/e2k-rule71rem.html>.

⁴³ See *id.* (explaining that "this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection").

⁴⁴ See Ariz. Ethics Rules R. 7.1 (2007); Conn. Rules of Prof'l Conduct R. 7.1 (2007); Del. Rules of Prof'l Conduct R. 7.1 (2005); Mass. Rules of Prof'l Conduct R. 7.1 (2007); Mont. Rules of Prof'l Conduct R. 7.1 (2004); Neb. Rules of Prof'l Conduct R. 7.1 (2005); N.M. Rules of Prof'l Conduct R. 16-701 (2007); Ohio Rules of Prof'l Conduct R. 7.1 (2006); Okla. Rules of Prof'l Conduct R. 7.1 (2007); Pa. Rules of Prof'l Conduct R. 7.1 (2006); R.I. Rules of Prof'l Conduct R. 7.1 (2007); Utah Rules of Prof'l Conduct R. 7.1 (2007); Wash. Rules of Prof'l Conduct R. 7.1 (2006).

⁴⁵ See N.J. Comm. on Att'y Adver., Op. 39 (2006). The New Jersey Supreme Court subsequently issued a stay on Opinion 39, pending further order of the court. *In re* Opinion 39 of the Comm. on Att'y Adver. (N.J. Aug. 18, 2006) (order granting emergent stay of Opinion 39). The New Jersey Supreme Court appointed Retired Judge Fall "to hold fact-finding hearings" to further develop the record. See Henry Gottlieb, Expert Testimony To Be Heard on "Super" and "Best" Lawyer Claims, N.J. L.J., June 18, 2007, at 1, 24. At the fact-finding hearing, Super Lawyers and The Best Lawyers in America will be able to present expert testimony to support their position that the New Jersey rule harms consumers. *Id.* For a news article summarizing the controversy, see David L. Hudson, Jr., Ratings War, ABA J. eReport, Aug. 4, 2006, available at 5 No. 31 ABAJEREP 1 (Westlaw).

⁴⁶ The restrictions discussed in this Comment only affect lawyer advertisements that appear in the Super Lawyer magazine or otherwise reflect the "Super Lawyer" designation. The restrictions do not affect Super Lawyer magazine's First Amendment right to designate lawyers as "Super Lawyers" and publish information about them in its magazine.

⁴⁷ N.J. Rules of Prof'l Conduct R. 7.1(a)(3) (2006). Note that this rule does not include the phrase "unless factually substantiated."

⁴⁸ N.J. Comm. on Att'y Adver., Op. 39. Some of the identified violations rest on a factual basis that is in dispute, such as whether lawyers can pay to be in the magazine. *Id.* Super Lawyers denies that such buying of the designation is possible. The Super Lawyers Selection Process, <http://agencyblog.typepad.com/superlawyers/2006/08//the-super-lawyer.html> (Aug. 14, 2006). The resolution of this issue is immaterial for purposes of this Comment, because it does not change the comparative nature of the designation. This Comment will assume that Super Lawyers does not allow lawyers to pay for recognition and that recognition in no way depends on the advertising activities of a given lawyer.

⁴⁹ See N.J. Comm. on Att'y Adver., Op. 39 (2006) (discussing the similar inappropriateness of attorneys participating in surveys that would lead to the designation of a "Best Lawyer in America").

state as "Super Lawyers."⁵⁰ The system includes several mechanisms designed to protect the integrity of the selection process, such as a rule preventing a lawyer from voting for herself and a weighting scale to discount votes among lawyers in the same firm.⁵¹ Some of the selectees' biographies appear in Super Lawyers magazines, published and distributed in 2006 in forty-eight states to a readership of 9.6 million.⁵² Lawyers designated as "Super Lawyers" can, but are not required to, advertise the honor in Super Lawyers magazine, special advertising inserts in various other publications, or their own private promotional materials.⁵³

3. The Rules As Applied to Super Lawyers

Whether or not a court determines that an advertisement containing a reference to a designation like "Super Lawyer" is misleading will [*208] depend on whether the court is looking only at the face of the advertisement or whether the court is also looking at the possible inferences resulting from it. A statement that "X was selected as a "Super Lawyer" is a true and easily verifiable fact. However, courts will likely also consider the meaning that a consumer may attach to the statement, such as that the terms "Super" or "Best" in the name of the designations imply that the recognized lawyer, like the well-known hero Superman, can do things that no one else can. As part of its analysis, a court will likely look at the validity of the underlying selection process, considering both the objectivity and verifiability of the standards used to make the selection.⁵⁴

A threshold issue under the professional rules when analyzing the restriction on comparative statements, such as ones referring to Super Lawyers, is whether a particular statement is "factually substantiated." If a comparative statement is factually substantiated, then it is not misleading under any state professional responsibility rules, with the exception of New Jersey, Oregon, and Alabama.⁵⁵ If the comparative statement is not factually substantiated, whether it is restricted will depend on whether a state follows the current or former version of Model Rule 7.1. Under the former version, an unsubstantiated comparison is per se impermissible. Under the current version, permissibility will depend on whether the statement is phrased such that it will mislead a consumer to believe that it is factually substantiated.⁵⁶

Whether a statement is factually substantiated is a fact-specific inquiry, making it difficult to predict in practice if and when comparative rules would affect advertisements that refer to independent ratings. When ana-

⁵⁰ See Super Lawyers, Selection Process, [http://www.superlawyers.com/about/selection process.html](http://www.superlawyers.com/about/selection%20process.html) (last visited Oct. 15, 2007).

⁵¹ See *id.* Although a weighting scale may reduce the effectiveness of these practices, it still does not prevent would-be "Super Lawyers" from actively soliciting votes of other attorneys, both within and outside of their firm. The process also involves a background check to ensure that there are no disciplinary proceedings or other "outstanding matters that would reflect adversely" on a selected attorney. *Id.* After the New Jersey Committee on Attorney Advertising issued Opinion 39, which held that attorneys should not participate in the Super Lawyers process, Super Lawyers hired an independent marketing research consulting firm to conduct an assessment of its methodology and the hired consultants concluded that the methodology is highly objective and reliable. See Super Lawyers['] Response to New Jersey AG Opposition Brief, <http://www.superlawyersfacts.com> (Dec. 18, 2006) (containing an excerpt from the consultants' report, which concludes that "the process adopted by Super Lawyers to identify and select its nominees is as scientific and objective as any such model of a complex system could be").

⁵² Super Lawyers, *supra* note 24.

⁵³ See Super Lawyers, Advertising in Super Lawyers Works, http://www.superlawyers.com/index.php?option=com_content&task=view&id=14&Itemid=51/ (last visited Oct. 15, 2007). The special advertising inserts appear in The New York Times, Philadelphia magazine, and at least twenty-nine other publications. See Super Lawyers, *supra* note 24.

⁵⁴ Cf. *Peel v. Att'y Registration & Discip. Comm'n of Ill.*, 496 U.S. 91, 102 (1990) (plurality opinion) (addressing the underlying process of the certification referenced in the challenged advertisement).

⁵⁵ These states have a per se ban on comparative statements. See Ala. Rules of Prof'l Conduct R. 7.1 (2004); N.J. Rules of Prof'l Conduct R. 7.1(a)(3) (2006). Oregon has the same ban, but allows an exception. Or. Rules of Prof'l Conduct, R. 7.1 (2006) (permitting an exception upon the request of a client or a potential client).

⁵⁶ See, e.g., Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2003) ("An unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.").

lyzing whether an advertisement is misleading, the circuits split as to whether factual substantiation allows only objective criteria or both objective and subjective criteria as the underlying basis for a statement. The Third Circuit permits only statements based on "objective, verifiable terms such as the number of cases handled in a [*209] particular legal field," rather than terms such as "experienced."⁵⁷ In *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, the Eastern District of Pennsylvania upheld a state interpretation of "misleading" that completely banned subjective terms.⁵⁸ In contrast, the Eleventh Circuit, in *Mason v. Florida Bar*,⁵⁹ declined to make a distinction between subjective and objective criteria when determining whether a letterhead was misleading because it contained the lawyer's Martindale-Hubbell rating,⁶⁰ which is based primarily on subjective peer reviews.⁶¹

The Supreme Court has not directly addressed this issue. However, its case law on whether lawyer advertisements that contain professional certifications are misleading under *Central Hudson* can be instructive on the similar issue of whether advertisements that refer to third-party ratings constitute misleading claims about quality.⁶² The leading Supreme Court case on lawyer advertisement of certifications is *Peel v. Attorney Registration & Disciplinary Commission of Illinois*,⁶³ in which the Court prevented the restriction of an advertisement that stated a lawyer had been certified by a nongovernmental organization. [*210] In deciding whether the certification created an implied claim of quality "so likely to mislead as to warrant restriction,"⁶⁴ the plurality opinion emphasized that the "predicate requirements" of the certification were "verifiable facts," such as hours of continuing education and trial experience, and that the underlying standards were "objective and demanding."⁶⁵ However, the Court never went so far as to say that such objectivity was required or whether the introduction of subjective factors would change the analysis.⁶⁶

Even though Super Lawyers considers many objective factors during its selection process, such as pro

⁵⁷ *Spencer v. Honorable Justices of the Supreme Court of Pa.*, 579 F. Supp. 880, 887-88 (E.D. Pa. 1984) (preferring a pilot, in an analogy, provide her number of hours flown or Federal Aviation Administration certification, rather than merely describing herself as "experienced"), *aff'd*, 760 F.2d 261 (3d Cir. 1985).

⁵⁸ *Id.* at 887; cf. *Fla. Bar v. Pape*, 918 So. 2d 240, 247 (Fla. 2005) ("Lawyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified. This thread runs throughout the pertinent United States Supreme Court precedent.").

⁵⁹ 208 F.3d 952 (11th Cir. 2000) (holding unconstitutional a restriction on listing the attorney's Martindale-Hubbell rating).

⁶⁰ See *Mason*, 208 F.3d at 956 ("We fail to see the value in the distinction between objective and subjective criteria in [this] specific context .").

⁶¹ See *Martindale.com*, Peer Review Ratings, *supra* note 19 (describing Martindale-Hubbell's peer-based rating system).

⁶² Certifications differ from third-party rating systems in two significant ways. First, certification is available to anyone who meets the standards set forth by a specific certifying agency, while rating systems recognize only the top portion of eligible persons. Second, unlike third-party rating systems, advertisement of a particular certification may invoke judicial concerns that consumers will mistakenly believe the certification is sponsored or endorsed by the state, rather than a private organization. See, e.g., *Peel v. Att'y Registration & Discip. Comm'n of Ill.*, 496 U.S. 91, 112-14 (1990) (plurality opinion) (Marshall, J., concurring) (stating that the National Board of Trial Advocacy, for example, could be confused with a federal government entity). Despite these differences, advertisements containing certifications and advertisements containing references to third-party rating systems invoke similar concerns that consumers may be misled into believing that the certification or rating implies that the recognized lawyer is of superior quality compared to other lawyers who have not received the recognition.

⁶³ 496 U.S. 91 (1990).

⁶⁴ *Id.* at 101 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

⁶⁵ *Id.* at 95, 101, 109 ("States can require an attorney to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards ."). The rigorous standards, which were "approved by a board of judges, scholars, and practitioners," included being in good standing, practicing in civil trial law at least five years, acting as lead counsel in at least fifteen civil trials, and passing a day-long written examination testing both procedural and substantive aspects of trial law. *Id.* at 95 & n.4.

⁶⁶ See *id.* at 100-03 (discussing such ratings, but omitting an express requirement for objectivity).

bono service, licenses, and certifications,⁶⁷ the decision is undeniably based largely on highly subjective factors. One of the main criteria for "Super Lawyer" selection is the peer review surveys, a clearly subjective factor based on the opinions of other lawyers. Although Super Lawyers takes several steps to protect the integrity of its peer review survey process,⁶⁸ it does not, and cannot, fully eliminate the possibility that peer reviews may be based on factors other than the quality of the lawyer's services, such as popularity or friendship.⁶⁹ Additionally, the "blue ribbon panel" for peer evaluation by practice area is highly subjective on two levels: first, the panel is composed of the lawyers who received the highest point totals in the subjective peer reviews; second, the panel scores and narrows the pool of potential honorees based on the opinions of the panel members.⁷⁰

[*211] New Jersey is the first state to use Rule 7.1 to prohibit attorney participation in Super Lawyers. The few other states that have addressed similar cases regarding advertisement of third-party designations have reached different results. Pennsylvania has held that advertisements in Super Lawyers magazine do not violate its version of Professional Rule 7.1, which is similar to the modern approach described previously.⁷¹ 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.⁷² However, under its previous version of the rules that prohibited factually unsubstantiated comparisons, Arizona struck down a listing in Who's Who in America and The Best Lawyers in America because whether a person was truly the "best" in America was not verifiable.⁷³ Tennessee, relying on the Supreme Court's analysis of certifications in Peel, determined that Super Lawyers' methodology was not indiscriminate and therefore permitted a lawyer to advertise her designation.⁷⁴ Virginia permits its lawyers to [*212] advertise a listing in The Best Lawyers in America, but only allows additional statements

⁶⁷ Super Lawyers, *supra* note 51.

⁶⁸ See *supra* note 51 and accompanying text.

⁶⁹ Moreover, the results of the surveys may be skewed by the fact that they only incorporate the responses and opinions of lawyers who chose to participate in the process. Even if Super Lawyers sends its surveys to a wide range of lawyers, the pool of lawyers who choose to respond may not be a representative sample of attorneys in a given field.

⁷⁰ See Super Lawyers, *supra* note 51 (explaining the "blue ribbon panel" stage of the selection process).

⁷¹ See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2005-125 (2005) (advising a law firm that the advertisement of its lawyers' Super Lawyers designations, with an explanation of the process and criteria used for such a designation, does not violate Pennsylvania Rule 7.1). The Committee did note that it may be misleading to advertise the designation without "disclaimer information, or at least further explanation as to the process and criteria employed by the publication." *Id.* In an earlier opinion, the Philadelphia Bar Association expressed a similar view, finding that a lawyer may only advertise a Super Lawyers designation if "the advertisement contains sufficiently detailed information about that process and criteria for the reader to whom the advertisement is directed, to determine the manner and context within which the designation was made." Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2004-10 (2004).

⁷² Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 05-03 (2005) (finding that a reference to a lawyer's listing in The Best Lawyers in America is not unethical, as long as it is truthful and includes the year of the designation). Ariz. Comm. on Rules of Prof'l Conduct, Op. 91-08 (1991), overruled by Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 05-03 (2005). Even though the latter opinion is no longer valid in Arizona, it does indicate that states that still follow the former version of Model Rule 7.1 might prohibit similar references.

⁷³ However, under its previous version of the rules that prohibited factually unsubstantiated comparisons, Arizona struck down a listing in Who's Who in America and The Best Lawyers in America because whether a person was truly the "best" in America was not verifiable.

⁷⁴ See Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Advisory Ethics Op. 2006-A-841 (2006) (citing Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Op. 2004-F-149 (2004) (allowing attorneys to advertise their selection for listing as a "Super Lawyer" or a "Best Lawyer in America," but prohibiting use of the terms "super" or "best" on the basis of such designations)).

based on the rating if they are "objective and not misleading."⁷⁵ Under a previous version of its rules, the Iowa Board of Professional Ethics and Conduct determined that even allowing a listing of one's name in *The Best Lawyers in America* violated the rule prohibiting quality and self-laudatory statements,⁷⁶ but the Iowa Supreme Court declined to accept that determination.⁷⁷ Based on these varied results, there is a reasonable possibility that other states, especially those following the former version of Model Rule 7.1, may strike down advertisements that refer to independent peer ratings such as *Super Lawyers*.

B. It May Be Constitutional Under *Central Hudson* for States To Use the Rules Restricting Comparative Statements To Prohibit Advertising References to Third-Party Ratings

Any restriction on truthful commercial speech, regardless of whether the speech is inherently, potentially, or not at all misleading, must satisfy the test presented in *Central Hudson*.⁷⁸ The Supreme Court has consistently applied this test when it analyzes restrictions on [*213] lawyer advertising.⁷⁹ The burden of meeting the test falls on the party seeking to restrict the commercial speech.⁸⁰ As discussed below, it may be constitutional for states to use the current rules restricting comparative advertising to prohibit advertising references to peer ratings.

In order to qualify for protection, the restricted commercial speech must fall within the scope of the First Amendment. If this threshold requirement is met, any restriction on that commercial speech must satisfy the three prongs of the *Central Hudson* test in order to be constitutional: first, the state must assert a substantial interest; second, the restriction must actually advance the asserted interest; and third, the restriction must not be "more extensive than is necessary."⁸¹ Although it is possible for a court to find that the Professional Rules, as applied to third-party rating systems, fail to satisfy the first or third prongs of the *Central Hudson* test, it is nearly as likely that a court would find that all of the prongs are satisfied or that the speech fails to meet the threshold requirement for First Amendment protection. Because the analysis is very context specific, it is difficult to predict with certainty how a particular court will come out.

1. Threshold Inquiry: Are References to the Ratings Misleading?

Before a court applies the *Central Hudson* test, it must determine that the speech falls within the First Amendment's protections, meaning "it at least must concern lawful activity and not be misleading."⁸² Factually un-substantiated comparative statements may fall outside of this protection because the statements may improperly mislead consumers to think that the statements are based on fact, and therefore that the services of one lawyer are actually superior to those of another.⁸³ This false inference would result in an improperly informed consumer, a consequence that directly conflicts with the goals of the [*214] commercial speech doctrine. The resulting disparity between expected and actual quality could also "undermine

⁷⁵ Va. Standing Comm. on Legal Ethics, *Legal Ethics Op.* 1750 (Apr. 4, 2006), available at <http://www.vacle.org/opinions/1750.htm>. The opinion further states that

⁷⁶ See Iowa Supreme Court Bd. of Prof'l Ethics and Conduct, *Op.* 92-36 (1993) (prohibiting a lawyer from allowing her name to be included in *The Best Lawyers in America*, publicizing that her firm has been included in any way, or participating in the directory in any way, including through lawyer surveys).

⁷⁷ See Iowa Supreme Court Bd. of Prof'l Ethics and Conduct, *Op.* 05-03 (2005) (noting that the Iowa Supreme Court rejected the earlier ethics opinion and allowed listing of attorneys in *The Best Lawyers in America* and other similar publications as of December 22, 1993).

⁷⁸ 447 U.S. 557, 566 (1980).

⁷⁹ For examples of the Court using the *Central Hudson* analysis, see *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-31 (1995); *Zauderer v. Office of Discip. Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638-53 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982).

⁸⁰ *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)).

⁸¹ *Central Hudson*, 447 U.S. at 566.

⁸² *Id.*

⁸³ See Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2003) ("An 'unsubstantiated' comparison may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.").

public confidence in our legal system.”⁸⁴

One factor that courts use to determine the likelihood that an advertisement will mislead consumers is whether consumers can easily verify the statement.⁸⁵ A statement should be “something capable of being confirmed before a member of the public retains the advertising lawyer.”⁸⁶ The importance of verification has been emphasized several times by the Supreme Court.⁸⁷ 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.⁸⁸ However, the Court has implied that consumers’ ability to directly verify the underlying standards is less important when a certification is made by a credible organization that “has made [an] inquiry into petitioner’s fitness . . .”⁸⁹

The ability of consumers to verify the Super Lawyers selection process weighs against a finding that a reference to it is misleading. The Super Lawyers selection process is easily accessible on its website, providing clear descriptions of each stage in the process, including the factors it considered.⁹⁰ Even though a consumer cannot access or [*215] verify the opinions contained in the peer reviews, a court will likely discount this because Super Lawyers performs an independent background check into the lawyer’s fitness.⁹¹

However, because the Super Lawyers designation makes a clear judgment about quality, a court may nonetheless determine that the advertisement is misleading. As recognized by the New Jersey Committee, the plain meaning of the superlative “super” indicates that the person has superior status or exceeds the norm.⁹² Consequently, unlike a Martindale-Hubbell “AV” rating, consumers are familiar with the plain meaning of the title and naturally will have very high - perhaps unattainable - expectations about what it means to be a “Super” (or the “Best”) lawyer. Additionally, if a consumer were to visit the Super Lawyers website, perhaps to investigate the methodology, she would see that Super Lawyers makes an explicit quality claim about its selectees: “Seriously Outstanding - The Top 5 Percent.”⁹³ Unlike Peel, in which the certification was a fact “from which a consumer may or may not draw an inference of the likely quality of an attorney’s work,”⁹⁴ Super Lawyers extends one step further and asserts that its selectees are at the top

⁸⁴ Va. State Bar Standing Comm. on Lawyer Adver. & Solicitation, Legal Adver. Op. A-0114, reprinted in 51 Va. Law. Reg. 28 (2002), available at <http://www.vsb.org/publications/valawyer/AugSept02/legaladv.opinionA114.pdf>.

⁸⁵ See, e.g., *Spencer v. Honorable Justices of the Supreme Court of Pa.*, 579 F. Supp. 880, 887 (E.D. Pa. 1984) (upholding the constitutionality of the restriction because the claims were “difficult for a layman to confirm, measure, or verify”).

⁸⁶ Hill, *supra* note 1, at 99 (quoting an opinion from the District of Columbia ethics committee, D.C. Bar Legal Ethics Comm., Op. 117 (1982), that defines “reasonable verification”).

⁸⁷ See, e.g., *Peel v. Att’y Registration & Discip. Comm’n of Ill.*, 496 U.S. 91, 100-01 (1990) (plurality opinion) (emphasizing that the statement in question, from a lawyer’s letterhead, was “true and verifiable”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (“Advertising claims as to the quality of services are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.”).

⁸⁸ See Peel, 496 U.S. at 122 (O’Connor, J., dissenting) (“There can be little doubt that the meaning underlying a claim of [National Board of Trial Advocacy] certification is neither common knowledge nor readily verifiable by the ordinary consumer. And nothing in petitioner’s letterhead reveals how one might attempt to verify the claim of certification by the NBTA.”); see also *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 150 (1994) (O’Connor, J., concurring) (emphasizing the importance of verifiability to the plurality’s decision in Peel).

⁸⁹ Peel, 496 U.S. at 102 (plurality opinion).

⁹⁰ See Super Lawyers, *supra* note 51 (detailing the five-step process behind the selection).

⁹¹ Super Lawyers, *supra* note 51; cf. Peel, 496 U.S. at 102 (“Thus if the certification had been issued by an organization that had made no inquiry into petitioner’s fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading.”).

⁹² Webster’s Ninth New Collegiate Dictionary 1183 (9th ed. 1988) (defining “super” as “higher in quality than,” “surpassing all or most others of its kind,” and “superior in status or position”).

⁹³ Super Lawyers, *supra* note 20.

⁹⁴ Peel, 496 U.S. at 101.

of their fields.⁹⁵ In contrast to a certification, which is awarded to any lawyer who can meet the specified criteria, the designation of "Super Lawyer" is expressly reserved for a limited percentage of lawyers within a given state. This limitation of designees to only five percent of attorneys is an arbitrary designation and may be under-or overinclusive: in a given year, more or less than five percent of lawyers within a state may be worthy of the recognition.

Nonetheless, despite the explicit conclusion of quality that Super Lawyers draws for consumers, courts may still decline to find a Super Lawyers advertisement to be misleading. Instead, the court may [*216] choose to have confidence in a consumer's ability to decide for herself how much weight to give the selection process.⁹⁶ Although the Court has acknowledged that the public "lacks sophistication concerning legal services,"⁹⁷ it has generally advised against being too paternalistic with consumers.⁹⁸ This is particularly true for determining how much weight to give to a rating system based on peer reviews and other subjective criteria, which involves judgments that are as much about human nature as the law.⁹⁹

It is also important to remember that a reference to quality is only misleading if the lawyer does not deserve it - it is not misleading if it is true that the lawyer is actually superior to her peers. In the context of certifications, the Supreme Court inferred that a National Board of Trial Advocacy (NBTA) certification was not misleading, in part because the Court felt that someone who met the qualifications was, on average, actually of high quality.¹⁰⁰ How a court evaluates a rating like "Super Lawyer" will depend on the weight that court accords peer reviews. If a court believes the peer review system is an accurate and reliable [*217] measure of a lawyer's services, the court will probably not find the designation misleading at all.

If the court does not find the "Super Lawyer" status to be factually substantiated, it is difficult to predict with certainty whether the court will find a reference to the designation to be inherently, potentially, or not at all misleading. The Court has acknowledged that such a determination is very fact-intensive and case-specific,¹⁰¹ changing based on the particular judge's perceptions and the overall advertisement itself.¹⁰² For example, if the advertisement omits an important fact, such as the fact that the designation is several

⁹⁵ Cf. Strang v. Satz, 884 F. Supp. 504, 509 (S.D. Fla. 1995) (distinguishing a case that involved degrees from unaccredited universities from Peel because "'Ph.D.' or 'Dr.' are not merely terms from which a listener could draw an inference of qualification. Rather, they are in and of themselves assertions of significant academic achievement. Use of these terms thus does more than give rise to an inference about the user's qualifications, it is a declaration of a very distinguished level of qualification.").

⁹⁶ See, e.g., Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 05-03 (2005) (finding that if a consumer knows that the selection process includes specific subjective criteria, she "reasonably can determine how much value, if any, to afford the advertised listing").

⁹⁷ Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

⁹⁸ Peel, 496 U.S. at 105 ("We reject the paternalistic assumption that the recipients [of allegedly misleading] letterhead are no more discriminating than the audience for children's television."); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 79 (1983) (Rehnquist, J., concurring) (declining to prevent parents from receiving controversial birth control information in the mail, because that information may help them make a more informed decision); Bates, 433 U.S. at 374-75 (declaring as "an underestimation of the public" an argument that "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("There is, of course, an alternative to [a] highly paternalistic approach. That alternative is to assume that information is not itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

⁹⁹ Cf. Peel, 496 U.S. at 106 n.13 (assuming that consumers, "with or without knowledge of the legal profession," are able to understand the meaning of, and give proper weight to, a national certification, as opposed to certification by a state).

¹⁰⁰ Id. at 102 ("There is no evidence that a claim of NBTA certification suggests any greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements."); id. at 114 (Marshall, J., concurring) (observing that the plurality opinion "suggests that any inference of superiority that a consumer draws from a reference is justified, apparently because [the plurality] believes that anyone who passes the NBTA's 'rigorous and exacting' standards possesses exceptional qualifications" (citations omitted)).

¹⁰¹ Potts v. Hamilton, 334 F. Supp. 2d 1206, 1213 (E.D. Cal. 2004) ("The Court has cautioned that the determination of whether an advertisement or credential is inherently or potentially misleading is necessarily fact-intensive and case-specific.") (cit-

years old, a court may find the advertisement to be inherently misleading.¹⁰³ Additionally, a [*218] failure to adequately explain the meaning or significance of a designation may be inherently misleading.¹⁰⁴ 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. If the court determines that the advertisement is either potentially misleading or not at all misleading, the advertisement may still be restricted, but the government must meet the three prongs of the Central Hudson test.

2. The First Prong: Substantial Governmental Interest

In order to satisfy the first prong of the Central Hudson test, the state must assert a governmental interest sufficient to overcome the restriction on protected commercial speech.¹⁰⁵ The Court has found that this prong is met if an advertisement is potentially misleading because the government has both an interest in protecting consumers and a special responsibility to regulate lawyers.¹⁰⁶ However, a truthful, nonmisleading statement can also be restricted if the governmental interest is substantial enough and "the interference with speech [is] in [*219] proportion to the interest served."¹⁰⁷ Regardless of whether a court deems an advertisement containing a third-party rating to be potentially misleading, this prong is probably met so long as the state asserts its interest in protecting the public from harmful advertising.

3. The Second Prong: The Regulation Must Advance the Interest

The second prong of the Central Hudson test requires that the restriction on commercial speech directly ad-

ing Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146 (1994), rev'd on other grounds sub nom. Potts v. Zettel, 220 Fed. Appx. 559 (9th Cir. 2007).

¹⁰² For an example of the possible variation in judicial perceptions about a particular advertisement, look at Peel, in which the Court split 5-4 and issued four separate opinions. Three justices found the material to be inherently misleading, two found it to be potentially misleading, and four found it to be not misleading at all. Peel, 496 U.S. at 118 (White, J., dissenting) (summarizing the votes). This divergence in views is not surprising, given the lack of clarity in Supreme Court precedent as to how a party must prove that an advertisement is misleading. R. Michael Hoefges notes, for example, that even though the principle that

¹⁰³ Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 05-03 (2005) (noting that it would also be misleading to omit the specialty, if any, for which a lawyer is recognized, thereby implying that a lawyer was recognized for having "unlimited legal expertise"); see also Peel, 496 U.S. at 115 (Marshall, J., concurring) (imagining inferences a consumer could mistakenly draw from incomplete information regarding a certification); Letter from Stephen Gillers, Emily Kempin Professor of Law, New York Univ. Sch. of Law, to Charles Thell, President, Key Prof'l Media, Inc. (Feb. 26, 2007), available at http://agencyblog.typepad.com/superlawyers/Stephen_Gillers_NYU_Letter_re_NY_Guidelines_22607.pdf (providing several recommendations for lawyers to follow when advertising their inclusion in Super Lawyers magazine, in order to avoid creating a misleading reference).

¹⁰⁴ See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2005-125 (2005) (explaining that "there is some question whether providing a designation without some supporting explanation" violates the professional rules, and recommending that publications provide "disclaimer information, or at least further explanation as to the process and criteria employed"); Wash. State Bar Ass'n, Rules of Prof'l Conduct Comm., Informal Op. 2008 (2003) (explaining that logos and designations "may be inherently misleading" when circulated "without further explanation of the meaning, nature or significance of the various affirmations").

¹⁰⁵ Unlike in a rational basis test, courts will not supplement the interests actually asserted with hypothetical interests of their own. Edenfield v. Fane, 507 U.S. 761, 768 (1993).

¹⁰⁶ Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978); see also Edenfield, 507 U.S. at 769 ("There is no question that [the State's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); In re R.M.J., 455 U.S. 191, 202 (1982) ("The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling."); Potts, 334 F. Supp. 2d at 1218-19 ("The Supreme Court and the Ninth Circuit have long recognized that states have a substantial interest in regulating advertising by professionals to prevent deception of the general public."). However, if "truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech," a state must meet the same burden of showing a substantial interest, as if all of the speech were truthful. Edenfield, 507 U.S. at 768-69.

¹⁰⁷ In re R.M.J., 455 U.S. at 203.

vance the asserted state interest.¹⁰⁸ Although the government may satisfy the first prong of the test by asserting a general or abstract interest, in order to satisfy the second prong it must “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁰⁹ The harm can be demonstrated by anecdotal data or studies, rather than formal empirical evidence related to the specific advertisement in question.¹¹⁰

Therefore, in order for a state to be able to restrict references to third-party ratings, it will have to demonstrate that the public is being harmed by the specific independent rating system that the state is attempting to restrict. It is difficult to determine what evidence would be available for the government to present on this issue. Possibilities include a general survey of the public’s perceptions about the advertisements or testimony from a consumer who was actually misled by a similar advertisement.¹¹¹ If the government can show through these or other means that actual harm exists, it will easily be able to show that a prohibition of the advertisement furthers the substantial state [*220] interest¹¹² - after all, if the public is no longer exposed to the advertisement, it cannot be improperly influenced by it.

4. The Third Prong: The Restriction Must Be No More Extensive Than Necessary

In order to satisfy the third and final prong of the Central Hudson test, the restriction cannot be “more extensive than is necessary” to serve the asserted substantial interest.¹¹³

What [the] decisions require is a “fit” between the legislature’s ends and the means chosen to accomplish those ends” - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served,” a means narrowly tailored to achieve the desired objective.¹¹⁴

Although this prong does not require a strict “least restrictive means” test, the availability of “less-burdensome alternatives” is a factor in determining the reasonableness of the chosen restriction.¹¹⁵

The simplest alternative to a total ban on advertising references to third-party ratings is a requirement that such advertisements contain a disclaimer or other supplemental information. Disclaimers, as a form

¹⁰⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“The restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”).

¹⁰⁹ *Edenfield*, 507 U.S. at 771; see also *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994) (“If the “protections afforded commercial speech are to retain their force,” we cannot allow rote invocation of the words “potentially misleading” to supplant the Board’s burden to “demonstrate that the harms it recites are real . . .” (citations omitted)).

¹¹⁰ See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (emphasizing that several means for demonstrating harm exist within current case law).

¹¹¹ Evidence could also include public perceptions and expectations about the meaning of the title “Super Lawyer.”

¹¹² Cf. *Potts v. Hamilton*, 334 F. Supp. 2d 1206, 1219 (E.D. Cal. 2004) (finding the second prong of Central Hudson met because a prohibition on credentials from specialty boards not recognized by the American Dental Association (ADA) materially advanced the state interest in “preventing the general public from being misled that a credential awarded by a non-ADA-recognized dental specialty board has the same requirements as a credential awarded by an ADA-recognized” one), rev’d on other grounds sub nom. *Potts v. Zettel*, 220 Fed. Appx. 559 (9th Cir. 2007). The second prong is concerned only with how effective the measure is at furthering the substantial interest. It does not consider at all whether the measure taken is too broad, which is considered under the third prong of the test.

¹¹³ *Cent. Hudson*, 447 U.S. at 566.

¹¹⁴ *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted); see also *Potts*, 334 F. Supp. 2d at 1219 (“It is within the legislature’s discretion to choose between narrowly tailored means of regulating commercial speech, and a court will not second-guess such a choice.” (citing *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1111 (9th Cir. 2004))).

¹¹⁵ *Went For It*, 515 U.S. at 632.

of a regulation rather than a complete prohibition, are heavily favored in judicial precedent.¹¹⁶ This preference exists in part because the [*221] free market system favors disclosure over concealment.¹¹⁷ Nonetheless, courts have recognized that if a disclaimer would not be effective in overcoming the misleading nature of the advertisement or if adding the disclaimer is not practical, then a total prohibition may be permissible.¹¹⁸

In the context of third-party ratings, a disclaimer noting that no representation is made about the quality of the lawyer's services and/or providing a brief explanation of the selection process may be sufficient to prevent a consumer from being misled.¹¹⁹ However, when an advertisement references a designation whose title clearly implies quality, such as "Super" or "Best," it is disingenuous then to state that no claim is being made about the superiority or merits of a lawyer's services. Unless a court finds that a disclaimer is not going to [*222] 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.¹²⁰ Although a state has some leeway in choosing the best means by which to serve its interest, it cannot choose means that are "substantially excessive" and "disregard[]" "far less restrictive and more precise means."¹²¹ A disclaimer requirement is far less of an intrusion on protected speech than a total ban is.¹²²

III. A Better Solution: ABA or State Approval of Bona Fide Rating Systems

¹¹⁶ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976) (discussing how disclaimers may sometimes be appropriate to prevent deception); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375, 384 (1977) (stating that "although the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less," and discussing the role that warnings or disclaimers can play in preventing misleading advertising); *Mezrano v. Ala. State Bar*, 434 So. 2d 732, 735 (Ala. 1983) (enforcing a state disclaimer requirement on an advertisement making claims about quality); Model Rules of Prof'l Conduct R. 7.1 cmt. 3 (2003) ("The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."). But see *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari) (noting that in some cases a poorly-worded disclaimer may create "more confusion"). Because a disclosure is less of an intrusion on First Amendment interests, the standard for analyzing a disclosure requirement under the third prong is less stringent: the restriction must be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Discip. Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 & n.14 (1985).

¹¹⁷ *Peel v. Att'y Registration & Discip. Comm'n of Ill.*, 496 U.S. 91, 111 (1990) (rejecting concerns about the possibility of deception in hypothetical cases and explaining that "disclosure of information both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys"). For further discussion of the benefits of information remedies, see Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 513-31 (1981). The authors note that "remedies which simply adjust the information available to consumers still leave consumers free to make their own choices, thus introducing less rigidity into the market. Such remedies leave the market free to respond as consumer preferences and production technologies change over time." *Id.* at 513; see also *id.* at 521 ("Prohibiting the advertiser's statement, though it may stop some consumers from drawing a false inference, may also deprive the other consumers of the useful information that they received.").

¹¹⁸ See *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 445 (M.D.N.C. 2001) (finding that a disclaimer could not change the advertisement's misleading nature or counteract the advertisement's brightness, and concluding that "it would defeat the purpose of Rule 7.1 and other advertising regulations if the advertiser could employ deceptive and misleading methods so long as the ad included a disclaimer of what was portrayed"); *JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 128 F. Supp. 2d 926, 936-37 (E.D. Va. 2001) (finding a disclaimer to be ineffective due to its size and color).

¹¹⁹ Alternatively, the advertisement could inform the consumer where to locate the selection criteria.

¹²⁰ Cf. *Potts v. Hamilton*, 334 F. Supp. 2d 1206, 1220 (E.D. Cal. 2004) ("At least in the context of a legitimate professional organization and genuine credentials as opposed to a sham arrangement, disclaimers should suffice to protect the State's interests."), *rev'd* on other grounds sub nom. *Potts v. Zettel*, 220 Fed. Appx. 559 (9th Cir. 2007).

¹²¹ *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479 (1989) (quoting *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988)); see also *Strang v. Satz*, 884 F. Supp. 504, 510 (S.D. Fla. 1995) (finding that a total ban on advertising degrees from unaccredited universities was not sufficiently narrowly tailored to meet the Central Hudson test because a disclosure requirement would have been sufficient).

¹²² See *Peel*, 496 U.S. at 111 (Marshall, J., concurring) (noting that a state may not "ban potentially misleading commercial speech if narrower limitations could be crafted to ensure that the information is presented in a nonmisleading manner").

At worst, courts applying the current Professional Rules will find advertisements containing legitimate, bona fide third-party ratings to be misleading, and therefore prohibited. At best, the Professional Rules provide a case-by-case analysis of advertisements that will sort out bona fide rating systems from less reliable ones. Neither of these situations is ideal. Because of the benefits that bona fide rating systems can provide to society, bar associations should create a new Rule to evaluate third-party rating systems, and that Rule should expressly permit references to ratings that have been approved by the state.¹²³

[*223] As discussed in Part I, legitimate third-party rating systems can provide important and useful reputational information to consumers. However, if the rating systems are shams based on improper and irrelevant factors, then the misinformation they propagate will harm the commercial speech doctrine's goal of well-informed and intelligent consumer decisions. This result is particularly troubling because lower-income and minority populations are most in need of reputational information and therefore most likely to be deceived by references to illegitimate or misleading third-party ratings. States should employ a middle-ground approach, somewhere between the overly-severe Rules that allow the prohibition of all advertisements containing third-party ratings, including legitimate ones, and the overly-lenient alternative of allowing advertisement of any third-party rating, including illegitimate ones.

The current case-by-case analysis is an inefficient and ineffective way of analyzing advertisements that contain references to independent third-party rating systems. As shown in Part II, whether a given committee or court will find that a particular reference in an advertisement is permitted under the Rules, or whether they will find that the restriction is constitutional under *Central Hudson*, depends heavily on the perceptions of the individual judges. This high level of judicial discretion may result in prohibition of advertising references to bona fide ratings that could be useful to populations who do not otherwise have access to reputational information. Additionally, even though a lawyer's decision to advertise in the third-party publication may not affect her eligibility for recognition by the magazine, those lawyers who do choose to advertise provide a significant source of revenue for the magazine.¹²⁴ The uncertainty over whether a lawyer will be permitted to advertise in a particular magazine, or a lack of lawyer advertisements due to a state prohibition such as the one in New Jersey, [*224] may result in independent rating organizations being reluctant or financially unable to continue to provide the referral service.¹²⁵

In place of the case-by-case approach, states should permit lawyers to advertise third-party ratings from organizations that have been approved by either the ABA or an appropriate state authority.¹²⁶ Although states should have autonomy to implement the system as they see best, certain core requirements should

¹²³ The recently revised New York Rules Governing Lawyer Advertising, effective February 1, 2007, permit advertisement of bona fide ratings. However, the Rules do not define the meaning of "bona fide" in that context or explain how a lawyer can determine whether ratings fall within this subsection. N.Y. State Unified Court Sys. Rules Governing Lawyer Adver. § 1200.6(b) [DR 2-101(b)] (2007) ("Subject to the provisions of subdivision (a), an advertisement may include information as to: (1) bona fide professional ratings . . ."); see also Stephanie Francis Ward, *New York Revises Ad Rules*, ABA J. eReport, Jan. 19, 2007, available at 6 No. 3 ABAJERP 2 (Westlaw) (discussing new advertising rules for lawyers in New York, which permit attorneys to advertise their inclusion in "bona fide professional ratings" publications, but maintain most other prior restrictions on advertising); Henry Gottlieb, *Super Lawyers/Best Lawyers Buoyed by N.Y. Advertising Rule*, N.J. L.J., Jan. 19, 2007, available at <http://www.wlaw.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id==1169114542108> (arguing that New Jersey "could be out of step" if it enacts a proposed ban on attorney advertising, which would prohibit even references to "bona fide professional ratings," in light of New York's loosening its attorney advertising restrictions). Professor Stephen Gillers opines that an advertisement referring to inclusion in *Super Lawyers* magazine is probably permissible under the revised New York laws, although he cautions that the determination is context specific. Letter from Stephen Gillers, *supra* note 103.

¹²⁴ For example, *Super Lawyers* claims that it has already lost more than one million dollars in revenue due to the ban in New Jersey. Gottlieb, *supra* note 45, at 24.

¹²⁵ Given that professional rules vary by state, unclear advertising rules may also result in lower-income populations in certain states having no access to the information, while similar populations in other states do. In contrast, positive treatment of rating systems may encourage more rating systems. Cf. *Peel*, 496 U.S. at 111 (plurality opinion) ("Disclosure of information [about certifications in advertisements] both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.").

¹²⁶ This approach is very similar to the Model Rules approach to advertising certifications. See Model Rules of Prof'l Conduct R. 7.4(d) (2003) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

be prerequisites to finding an organization or rating system to be "bona fide."¹²⁷ First, as suggested by the Supreme Court in its discussion of "sham" certifications in *Peel*, an organization should make an "inquiry into the [selectee's] fitness" and not award ratings "indiscriminately for a price."¹²⁸ In the context of third-party ratings, in addition to prohibiting direct payments for a rating, an organization should also not require an honoree to purchase advertisements or participate in other mandatory, revenue-generating [*225] activity for the organization.¹²⁹ Second, if the rating relies on peer reviews, an organization should take steps to ensure that the review process is as objective and fair as possible. At a minimum, an organization should use objective criteria for choosing who is eligible to participate in the surveys or voting, maintain confidentiality of the reviews, and limit reviewers to those who have actual knowledge of the party they are reviewing.¹³⁰ Finally, organizations should make their methodology readily available - and understandable - to the general public.

Reviewing and approving third-party rating systems in order to weed out the bona fide systems from the "shams" would not impose an unrealistic burden upon states.¹³¹ Some states already have systems in place to approve nongovernmental certifications¹³² and could utilize something similar to approve rating systems. Additionally, the gained benefits justify any increased burden: by having a process that allows lawyers to advertise recognitions from approved, bona fide rating services, both lawyers and independent rating services would have sufficient notice regarding the ethical permissibility of their actions and the basic standards that ratings must meet; consumers would also be more confident in the reliability of the independent ratings and less likely to be misled by deceptive ratings.¹³³ Finally, the Court has held that making an effort to separate harmful commercial speech [*226] from harmless commercial speech is one

(1) the lawyer has been certified by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association .").

¹²⁷ Black's Law Dictionary defines "bona fide" as "made in good faith; without fraud or deceit." Black's Law Dictionary 186 (8th ed. 2004). States should keep this general definition in mind when analyzing whether a particular organization is legitimate. States could also look to the standards the ABA uses to accredit certifying organizations. These certification requirements include substantial involvement in the specialty area, peer review, written examination, educational experience, and good standing. ABA Standards for Specialty Certification Programs for Lawyers, <http://www.abanet.org/legalservices/specialization/standard.html#4#> (last visited Oct. 15, 2007) (listing the requirements for an organization to obtain ABA accreditation to issue certifications).

¹²⁸ *Peel*, 496 U.S. at 102, 109; see also Va. Standing Comm. on Lawyer Adver. & Solicitation, Legal Ethics Op. 1750 (2006), available at <http://www.vacle.org/opinions/1750.htm> ("[A] lawyer may not ethically communicate to the public credentials that are not legitimate, such as[] one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is misleading to the public and therefore prohibited."). During their inquiries into the fitness of honorees, organizations should render lawyers with serious ethical or disciplinary infractions ineligible for recognition.

¹²⁹ However, it would be legitimate for a ratings organization to allow an honoree to have the option of purchasing advertisements.

¹³⁰ For example, an organization could require that lawyers work in the same legal or geographic area as the person they are reviewing. Additionally, organizations could require a minimum time in the field before a lawyer can participate in the surveys. Super Lawyers, for example, only sends surveys to those who have worked a minimum of five years. Super Lawyers, *supra* note 51.

¹³¹ Cf. *Peel*, 496 U.S. at 109 ("There has been no showing that the burden of distinguishing between certifying boards that are bona fide and those that are bogus would be significant, or that bar associations and official disciplinary committees cannot police deceptive practices effectively.").

¹³² See, e.g., Ala. Rules of Prof'l Conduct R. 7.4 (2004) (implementing Model Rules of Prof'l Conduct R. 7.4(d) (2003)); Del. Rules of Prof'l Conduct R. 7.4 (2005) (same). Similarly, the British Market Research Bureau has approved the methodology used by "Chambers and Partners," a British lawyer rating system, and the Bureau audits the ratings annually. Chambers and Partners, Research & Rankings Explained, <http://www.chambersandpartners.com/usa/research-ranking.aspx> (last visited Oct. 15, 2007).

¹³³ Cf. *Peel*, 496 U.S. at 123 (O'Connor, J., dissenting) (concluding that "facilitation of access to legal services is hardly achieved where the consumer neither knows the organization nor can readily verify its criteria for membership").

of the state's responsibilities.¹³⁴

Disclaimers may also play a role in the revised Rules. In some cases, it would be wise for states to require that advertisements referencing ratings include additional information.¹³⁵ However, although disclaimers can help prevent consumers from drawing inaccurate inferences from a reference to a rating, disclaimers cannot provide positive inferences about a rating, such as that the rating organization uses a genuine methodology that has been approved by the state. This positive inference, which can best be achieved if a state or bar association approved the rating system, is a necessary element for ensuring that third-party ratings serve as reliable reputational information for consumers.¹³⁶

Conclusion

Currently, many people do not have access to firsthand referrals to assist them in finding a lawyer. However, the importance of reputational information in selecting a competent lawyer has not diminished.

[*227] Because bona fide independent ratings can serve as an important tool to provide consumers, particularly those in lower-income and minority populations, with reliable "reputational information," rules of professional conduct should be revised in order to allow states to better evaluate and promote legitimate third-party rating systems.

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¹³⁴ *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) ("The 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" (quoting *Zauderer v. Office of Discip. Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646 (1985))); *Peel*, 496 U.S. at 110 (plurality opinion) ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations."); cf. *Zauderer*, 471 U.S. at 649 (holding that the task of determining whether certain uses of visual media in advertisements are misleading is not "so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations").

¹³⁵ For example, a state may wish to require the year of the designation or information on where a consumer can obtain more information on the methodology underlying the rating.

¹³⁶ A recent study from the United Kingdom's Department of Constitutional Affairs reached a similar conclusion about the usefulness of "quality marks," which are ratings awarded by law society panels based on "a combination of relevant knowledge, minimum experience, and evidence of competence variously shown in examinations, worked cases, interviews and references." Dep't of Constitutional Affairs, *Quality in the Legal Services Industry: A Scoping Study* 38-39 (2005), available at <http://www.dca.gov.uk/pubs/reports/legalservicesmarketstudy.pdf> ("Among a range of sources of information that may inform choice, quality marks ought to offer some reassurance [to inexperienced legal consumers] about the likely quality of legal advice, and quality assurance marks some guidance about the quality of service potential consumers might expect. How far marks can perform such roles in practice will, however, depend crucially on how widely they are known and understood.").

