

SUPREME COURT OF NEW JERSEY

IN RE OPINION 39 OF THE :
COMMITTEE ON ATTORNEY :
ADVERTISING :
: Civil Action
:
STUART A. HOBERMAN, ESQ., : DOCKET NO. 60,003
:
Petitioner, :
:
v. :
:
COMMITTEE ON ATTORNEY :
ADVERTISING, :
:
Respondent. :
:

REPLY OF INTERVENOR *BEST LAWYERS* AND PETITIONER STUART HOBERMAN,
ESQ. TO THE BRIEF IN OPPOSITION TO PETITIONS FOR REVIEW OF
OPINION 39 ON BEHALF OF RESPONDENT COMMITTEE ON ATTORNEY
ADVERTISING

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TABLE OF CONTENTS

	<u>PAGE</u>
REPLY TO COUNTERSTATEMENT OF THE CASE	1
POINT I	4
OPINION 39'S CONCLUSION THAT THE ADVERTISEMENT OF A LAWYER'S LISTING IN BEST LAWYERS IS LIKELY TO CREATE AN UNJUSTIFIED EXPECTATION OF RESULTS IS WITHOUT FACTUAL OR LEGAL SUPPORT	4
A. The Committee Ignored the Fact that Reference to Inclusion in <i>Best Lawyers</i> Refers to Nothing More Than Inclusion in a Specific Peer-Review Publication	5
B. The Committee Failed to Consider the Readership of <i>Best Lawyers</i> , and to Demonstrate that Consumers Are Likely to be Misled	6
C. The Committee Inappropriately Considered the Objective and Subjective Nature of Peer- Review Publications	7
POINT II	9
THE PROHIBITION OF OPINION 39 ON ADVERTISING INCLUSION IN <i>BEST LAWYERS</i> IS INCONSISTENT WITH THE SUPREME COURT'S HOLDING IN <u>PEEL</u>	9
POINT III	11
BECAUSE THE ADVERTISING BAN EFFECTED IN OPINION 39 IS MORE EXTENSIVE THAN NECESSARY TO SERVE THE ENUNCIATED STATE INTERESTS, IT IS UNCONSTITUTIONAL UNDER THE <u>CENTRAL HUDSON</u> TEST	11
POINT IV	14
OPINION 39 DENIES <i>BEST LAWYERS</i> EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS BECAUSE NO RATIONAL BASIS EXISTS FOR THE DISTINCTION DRAWN BY THE COMMITTEE BETWEEN <i>BEST LAWYERS</i> AND <i>MARTINDALE</i>	

HUBBELL, AND NO RATIONAL BASIS EXISTS FOR THE NON-INCLUSION OF OTHER PEER REVIEW PUBLICATIONS IN THE COMMITTEE'S OPINION	14
A. MH's Selections Are Inherently Comparative and Reached Through a Closed Process	14
B. MH Encourages Attorneys to Advertise Their MH Ratings	16
C. MH's Multi-Tiered Rating System is More Comparative Than the Selection System of Best Lawyers	18
POINT V	19
OPINION 39, AS A DE FACTO ADVERTISING GUIDELINE, DEPRIVES BEST LAWYERS OF DUE PROCESS	19
CONCLUSION	20

TABLE OF AUTHORITIES

PAGE

Cases

Bulger v. Youngs Drug Products Corp.,
463 U.S. 60, N.20, 103 S. Ct. 2875, 2883, N.20, 77
L. Ed. 2d 469 (1983) 8

Central Hudson Gas & Electric Corp. v. Public
Service Commission,
447 U.S. 557, 34 P.U.R.4th 178, 100 S.Ct. 2343, 65
L.Ed.2d 341, 6 Media L. Rep. 1497 (1980) 11, 12, 13

Edenfield v. Fane,
507 U.S. 761, 113 S.Ct. 1792, 61 USLW 4431, 123
L.Ed.2d 543, 21 Media L. Rep. 1321 (1993) 8, 13

Florida Bar v. Went For It, Inc.,
515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541
(1995) 8

In the Matter of Anis,
126 N.J. 448(1992) 11

Peel v. Attorney Disciplinary Comm.,
496 U.S. 91, 110 S.Ct. 2281, 2287, 110 L.Ed.2d 83,
94 (1990) 5, 8, 9, 13

Petition of Felmeister & Isaacs,
104 N.J. 515 (1986) 3, 8, 12, 13

Zauderer v. Office of Disciplinary Counsel Supreme
Court of Ohio,
471 U.S. 626, 105 S. Ct. 2265, 2281, 85 L. Ed. 2d
652 (1985) 8, 13

Rules

Rule 1:19A-3 19

Other Authorities

A.B.A. Model Rule 7.1 7

Arizona Ethics Committee Opinion 05-03 10

R.P.C. 7.1 10

R.P.C. 7.1(a)(1) 2
R.P.C. 7.1(a)(3) 2, 6, 7
Rule 1:19A-2(c) 20

REPLY TO COUNTERSTATEMENT OF THE CASE¹

The Committee on Attorney Advertising ("Committee"), both in its Opinion 39 and in the Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising ("OB"), has failed to consider any pertinent facts about *Best Lawyers*. Instead, in the absence even of an independent inquiry about *Best Lawyers*, and without appropriate analysis, and it swept *Best Lawyers* as a hasty afterthought into its investigation of *Super Lawyers*, and unthinkingly penalized *Best Lawyers* based on the flaws and sham methodologies it found with *Super Lawyers*.

Opinion 39 finds *Best Lawyers* "guilty" through the flimsiest and most attenuated of associations² -- the use of a superlative adjective in the title of its publication, considered entirely in the absence of context.³ The Committee,

¹ The within Reply Brief is submitted on behalf of both Petitioner Stuart A. Hoberman, Esq. ("Hoberman") and Intervenor Woodward White, Inc., the publisher of *The Best Lawyers in America* (together "*Best Lawyers*").

² By its own admission, the Committee at no time examined *Best Lawyers'* 25-year history in the State of New Jersey or made any inquiries into its methodology (OB 29, n. 25), despite developing an extensive record on the *Super Lawyers* business methodology. Indeed, the email reproduced at ACa026 is the sole "inquiry" made with regard to *Best Lawyers*. Same was sent by George Kenny, Esq., who was the Chair of the Committee until ten days before the email was written.

³ The Committee probed deeply into the *Super Lawyers* selection process, devoting virtually the entirety of its 344-page appendix to *Super Lawyers*. In stark contrast, the Committee

focusing its aim squarely upon *Super Lawyers*, incidentally and casually declares *Best Lawyers* to be "misleading" under R.P.C. 7.1(a)(1), without any examination of its function and methodology necessary to make that determination. Further, it misconstrues a lawyer's statement of inclusion in a *Best Lawyers* publication to be a *self-descriptor*, which it is not, rather than a statement of inclusion in a well-known peer review publication.

Not surprisingly, the Committee only perfunctorily alludes to R.P.C. 7.1(a)(3), addressing the comparison of a lawyer's services "with other lawyers' services." If subsection (3) is construed as prohibiting *explicit* comparison of a lawyer's services with those of other specified lawyers, it is not even remotely applicable to *Best Lawyers*. If subsection (3) is construed as prohibiting *implicit* comparison of a lawyer's services with other lawyers' services in the most general terms, the Committee's action is similar to issuing someone a driver's license but prohibiting the use of an ignition key. The purpose of legal advertising is to persuade the consumer to select a

devoted only two pages of its appendix to *Best Lawyers'* method of operation, consisting of a note from the editors of *Best Lawyers* about Opinion 39, a document compiled *after* the issuance of Opinion 39, upon which the Committee *could not possibly* have relied.

particular lawyer through a *rational* process of selection.

Petition of Felmeister & Isaacs, 104 N.J. 515, 527 (1986).

Opinion 39 achieves the tour de force of combining over-inclusion and under-inclusion in the same text. Opinion 39 would, for instance, ban an advertisement featuring an award to the lawyer from a professional group, because such information could somehow create (under the Committee's logic), an "impermissible expectation" of "better results." But it *fails* to prohibit advertisement of inclusion in other attorney-review publications, most glaringly, *Chambers USA, America's Leading Lawyers For Business*,⁴ and *Martindale-Hubbell* ("MH").⁵

The Committee's attempt to distinguish *MH* from *Best Lawyers* is an embarrassment of equivocation. Both publications rely on an assessment by peers (though differently implemented and differently disclosed to the public). Yet the Committee's claim that *MH* "places limitations on the advertising of its labels, in stark contrast to... [*Best Lawyers*]" (OB 44) is flat-out wrong. *MH* does not prohibit lawyers from promoting its ratings to the

⁴ The *Chambers* publication is a cornucopia of comparisons compared to *Best Lawyers*, as lawyers and law firms are not merely listed in *Chambers*, but are ranked *first, second, third, fourth* or *fifth* tier. Appendix to the Reply Brief of Hoberman and *Best Lawyers* ("HBLa") 010.

⁵ Not only are *MH's* labels A, B and C "comparative" under the Committee's reasoning, but the meaning of the labels is obvious to anyone with a rudimentary understanding of the alphabet.

general public, and *Best Lawyers* does impose limitations on the use of its ratings.⁶

The Committee's failure to even examine *Best Lawyers*, let alone analyze its methodology, distinguish *Best Lawyers* from *Super Lawyers* or accurately compare *Best Lawyers* to other peer review publications, represents an abuse of authority.

Accordingly, Opinion 39 should be vacated as it pertains to *Best Lawyers*.

POINT I

OPINION 39'S CONCLUSION THAT THE ADVERTISEMENT OF A LAWYER'S LISTING IN BEST LAWYERS IS LIKELY TO CREATE AN UNJUSTIFIED EXPECTATION OF RESULTS IS WITHOUT FACTUAL OR LEGAL SUPPORT

The Committee's contentions in Point I of its Opposition Brief demonstrate (1) a total failure to consider the straightforward meaning of a lawyer's inclusion in *Best Lawyers*; (2) wholly unwarranted -- if not contemptuous -- assumptions concerning the readers of *Best Lawyers*; and (3) a confusion in application of the terms "subjective" and "objective."

⁶ While *MH* prohibits the use of its ratings in some venues, such as the Yellow Pages, newspaper advertisements, billboard advertisements and television commercials, it actively promotes and encourages the use of its ratings in more key public venues such as websites, lawyer home pages and internet banner ads. Although *MH* may have once been used primarily by the legal profession, *MH*'s ratings are now easily available to a vast audience through, inter alia, *MH*'s non-subscription website, <http://www.lawyers.com>. Moreover, *MH* actively encourages lawyers to advertise their ratings to the general public. (HBLa01-03).

A. The Committee Ignored the Fact that Reference to Inclusion in *Best Lawyers* Refers to Nothing More Than Inclusion in a Specific Peer-Review Publication

In its eagerness to dissect the survey methodology and business plan of *Super Lawyers*, a wholly unrelated and markedly different publication, the Committee ignored what "best" means in the context of *Best Lawyers*, as evidenced by the registered trademarks of both "*The Best Lawyers in America*," and "*Best Lawyers*." (Appendix to Hoberman's Petition for Review of Opinion 39, 60-62). Both of these terms have been determined to have acquired *secondary meaning*; that is, the public identifies *Best Lawyers* with a single source. Thus, "best lawyer" is meant to be understood, and according to the United States Patent and Trademark Protection Office *is* understood, to refer to the fact that specified attorney peers, as shown by a transparent peer review methodology, have selected the lawyer in question to be outstanding in his or her field of discipline. A peer review selection -- just like an award or a certification -- "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, *but is simply a fact*, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work..." Peel v. Attorney Disciplinary Comm., 496 U.S. 91, 101, 110 S.Ct. 2281, 2287, 110 L.Ed.2d 83, 94 (1990) (emphasis added) (citation omitted).

Moreover, in the introduction to its publication and on its website, *Best Lawyers* carefully explains what it is, what it is not and how the results of its survey are reached. It requires contractually that this information be published wherever its results appear. No one who reads the publication can be misled.

B. The Committee Failed to Consider the Readership of *Best Lawyers*, and to Demonstrate that Consumers Are Likely to be Misled

Despite *Best Lawyers*' painstaking, unambiguous and unequivocal description of itself and its methodology, it was found by the Committee to be "misleading," or to "create unjustified expectations."⁷ The Committee's conclusion that selection as a "*Best Lawyer*" "necessarily seeks to 'trumpet' that the lawyer in question is a better lawyer than one of his or her peers" (OB 16) is totally inaccurate, as the introduction to the publication states precisely the opposite.⁸

⁷ There is no indication that the Committee ever read the introduction to *Best Lawyers*.

⁸ Tellingly, the Opposition Brief is bereft of any substantive discussion of R.P.C. 7.1(a)(3), which prohibits the comparison of a lawyer's services "with other lawyers' services." As discussed above, all advertising of any nature is in some sense inherently comparative. The purpose of advertising in general is to attract business, and to encourage potential clients or customers to contact the advertiser over his or her competitors. The Committee's application of R.P.C. 7.1(a)(3) cannot be sustained with regard to an attorney's simple reference to his inclusion in *Best Lawyers*. Such a statement is markedly different than the explicit comparisons (i.e. claims by one attorney that he possesses superior lawyering skills over other attorneys) that R.P.C. 7.1(a)(3) was designed to prevent. The

The Committee has made no showing that any reader of an advertisement of inclusion in *Best Lawyers* would make the childish inference that a peer review selection necessarily implies that the lawyer in question will achieve the best results.

C. The Committee Inappropriately Considered the Objective and Subjective Nature of Peer-Review Publications

Advertising is not hard science. A statement concerning the quality of a professional is not subject to scientific verification like the "ph" content of a water sample. Any advertisement for a lawyer necessarily seeks to set off that lawyer in some way from the rest of his or her profession. A legal advertisement does not imply that lawyering can be weighed, measured or quantified. The "protection" that the Committee seeks to give to consumers from "*Best Lawyers*" is a protection from chimeras.

Nonetheless, there is an element of *Best Lawyers* that is verifiable: its peer review methodology. Only a reader or a Committee that neglects or refuses to read the explanation of the peer review methodology could possibly be misled.

Committee has essentially acknowledged that R.P.C. 7.1(a)(3)'s proscription on comparative advertising is outdated and inappropriate, and refers the Court to the fact that A.B.A. Model Rule 7.1 has done away with the prohibition on comparative advertising (OB 23-25).

The Committee relies heavily upon Felmeister & Isaacs, where this Court recognized that information on reputation is "the most important information a consumer would need."⁹ Supra, 104 N.J. at 527. While this Court acknowledged the "inordinate difficulty of assuring the accuracy" of certain allegations, id., it was not addressing the totally transparent and rigorous peer review methodology employed by *Best Lawyers*, that manifestly *can be verified as to accuracy*. Plainly, the language of *this Court* in Felmeister & Isaacs was not intended to impose a per se proscription on the use of all peer review publications, as the Court was fully cognizant of the extensive use of *MH* when the Opinion was written. Moreover, the Court's decision was, in its own words, "tentative and subject to change." Id. at 518.¹⁰

⁹ It can hardly be doubted that a patient needing to undergo an operation would welcome a transparent peer review of surgeons as an element in making his choice. The same is surely true of a client seeking a lawyer.

¹⁰ Similarly, the United States Supreme Court has been adamant that where there is no deception by the advertiser, attorney advertisement cannot be prohibited. Peel, supra, 496 U.S. 91; Edenfield v. Fane, 507 U.S. 761, 770-771, 113 S.Ct. 1792, 61 USLW 4431, 123 L.Ed.2d 543, 21 Media L. Rep. 1321 (1993); Zauderer v. Office of Disciplinary Counsel Supreme Court of Ohio, 471 U.S. 626, 648-49, 105 S. Ct. 2265, 2281, 85 L. Ed. 2d 652 (1985) (broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force); Florida Bar v. Went For It, Inc., 515 U.S. 618, 641, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); Bulger v. Youngs Drug Products Corp., 463 U.S. 60, 71, N.20, 103 S. Ct. 2875, 2883, N.20, 77 L. Ed. 2d 469 (1983).

As such, the Committee's conclusion that an attorney's reference to his inclusion in *Best Lawyers* is likely to create an unjustified expectation of results was without an adequate foundation.

POINT II

THE PROHIBITION OF OPINION 39 ON ADVERTISING INCLUSION IN *BEST LAWYERS* IS INCONSISTENT WITH THE SUPREME COURT'S HOLDING IN PEEL

Point II of the Opposition Brief does not even address *Best Lawyers* in its heading, but focuses exclusively on *Super Lawyers*. The omission here is once again telling. The United States Supreme Court in Peel was concerned with "sham" designations, holding that if the designation 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 [of inclusion], even if true, could be misleading." Peel, supra, 496 U.S. at 102.

Peel posits as a determinative factor the methodology actually employed by the publication in question. The methodology employed by *Best Lawyers* is fully explained to its readers and is the most rigorous peer review publication serving New Jersey. Moreover, Peel is adamant that any state regulation of attorney advertising must be appropriately tailored to a substantial government interest. Id. at 111. The requirement of "a disclaimer" about the advertisement constitutes an example

of tailoring that would be permissible, while to "completely ban statements that are not actually or inherently misleading," is not permissible. Id. at 110.

The Committee, in attempting to come to grips with the United States Supreme Court's repeated warnings against over-restriction and per se prohibition on attorney advertising, as well as the logic of Arizona Ethics Committee Opinion 05-03, appears to concede that this Court might enunciate its own requirements for qualifications and disclosure to ensure that an advertisement concerning an attorney's inclusion in *Best Lawyers* could render any concerns about the "misleading" nature of the advertisements moot. (OB 24-25, n. 21).¹¹

Best Lawyers maintains that, given the extensive and open circulation of its methodology, any further restrictions than those *it already requires* (such as the contractual prohibition on using "best" as a self-descriptor) are unnecessary. Nevertheless a further disclaimer upon advertisements referencing inclusions in *Best Lawyers* would at least not suffer the constitutional infirmities that surround the outright prohibition promulgated by the Committee in Opinion 39.

¹¹ Indeed, the Committee goes further, and suggests that the Court might choose to reexamine the entire text of R.P.C. 7.1 or refer the matter to the Professional Responsibility Rules Committee for review of the issues being raised.

POINT III

BECAUSE THE ADVERTISING BAN EFFECTED IN
OPINION 39 IS MORE EXTENSIVE THAN NECESSARY
TO SERVE THE ENUNCIATED STATE INTERESTS, IT
IS UNCONSTITUTIONAL UNDER THE CENTRAL HUDSON
TEST

Contrary to the unsupported assertions raised in the Opposition Brief, the prohibitions contained in Opinion 39 do not satisfy the four-part analysis to be applied in commercial speech cases, as set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 34 P.U.R.4th 178, 100 S.Ct. 2343, 65 L.Ed.2d 341, 6 Media L. Rep. 1497 (1980). The Committee inappropriately cites In the Matter of Anis, 126 N.J. 448, 447 (1992), a case in which this Court prohibited a grotesquely undignified advertisement capitalizing on a national tragedy. It claims that the State has a "substantial interest" in preventing advertising that will "tarnish the dignified public image of the legal profession", and asserts that "claims of superiority such as claims that one is a 'super' or 'best' lawyer" do just that. (OB 34). Once again, the Committee, no doubt due to its *total failure* to investigate *Best Lawyers*, haphazardly classifies an

advertisement of an attorney's inclusion in *Best Lawyers* as a self-descriptor (e.g., "She is the best lawyer in Trenton").¹²

The Committee goes on to claim that *Best Lawyers* has a "corrosive effect" on citizens' decisions about their selection of counsel because it induces such decisions to be made as an "emotional" rather than a "rational" matter. (OB 35). But the Committee cites Felmeister & Isaacs, which says *precisely* the opposite, *i.e.*, that advertising directed to the *quality* of the attorney is *rational*, and is sharply contrasted with the "emotional, non-rational appeals that have absolutely nothing to do with the attorney's qualifications." Felmeister & Isaacs, *supra*, 104 N.J. at 527-28.

Importantly, the final prong of the Central Hudson test requires that any regulation utilized by the State in achieving its legitimate interest be "narrowly tailored" to accomplish its purpose. Central Hudson, *supra*, 447 U.S. at 566. Yet the Committee contends that nothing short of a total ban on advertisement of inclusion in *Best Lawyers* can assuage the State's concerns. The Committee again relies on Felmeister & Isaacs, notwithstanding the fact that the holding therein was "tentative and subject to change based on future experience."

¹² Even a cursory look at *Best Lawyers* business model would have made it clear to the Committee that such a use of the phrase is neither contemplated nor permitted by *Best Lawyers*.

Supra, 104 N.J. at 518. Moreover, the Court in Felmeister & Isaacs was crystal clear its concern was that advertising be primarily "rational" as opposed to "non-rational" or "emotional." Id. at 529.¹³ *Best Lawyers* meets those criteria exactly.

It is the State, not the advertising lawyer, that bears the burden of establishing that a regulation satisfies each prong of the Central Hudson test. Edenfield, supra, 507 U.S. at 769. The State did not meet its burden with respect to *Best Lawyers* in Opinion 39; indeed, the Committee did not even take the trouble to examine an advertisement of inclusion in *Best Lawyers* or to analyze the *Best Lawyers* selection process. The Committee, assuming solely arguendo it had found something in an advertisement potentially misleading, should have tailored its "solution" only to require the advertiser to include further information in its advertising material. Peel, supra, 496 U.S. at 110; Zauderer, supra, 471 U.S. at 651-652; Felmeister and Isaacs, supra, 104 N.J. at 527 (directing the Advertising Committee's attention to its power to require additional disclosure in attorney advertising in order to minimize the possibility of consumer confusion). No such attempt to elicit information or data was made in Opinion 39.

¹³ The Court said that "the communication of factual information rationally related to the consumer's need for and choice of counsel predominates." Felmeister & Isaacs, supra, at 516, n.1.

POINT IV

OPINION 39 DENIES BEST LAWYERS EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS BECAUSE NO RATIONAL BASIS EXISTS FOR THE DISTINCTION DRAWN BY THE COMMITTEE BETWEEN BEST LAWYERS AND MARTINDALE HUBBELL, AND NO RATIONAL BASIS EXISTS FOR THE NON-INCLUSION OF OTHER PEER REVIEW PUBLICATIONS IN THE COMMITTEE'S OPINION

The Committee contends that it had a "rational basis" to distinguish *Best Lawyers* from *MH* and other peer review organizations other than *Super Lawyers*. (OB 40). The Committee's "reasons" for exempting *MH* are (1) that the *Best Lawyers* label was more likely to mislead the public than *MH's* labels; (2) *Best Lawyers* imposes no limitations on the advertising of its rankings while *MH* does so; and (3) *MH's* multi-tiered rating system is "reasonably more discriminating" than that of *Best Lawyers*. (OB 40). These grounds have no basis at all in fact or logic, and are *themselves misleading*.

A. *MH's* Selections Are Inherently Comparative and Reached Through a Closed Process

MH's "labels" AV, BV and CV are comparative; moreover, the explanation of those labels, as supplied by *MH*, is even more comparative, explicitly contrasting the skills and abilities of rated attorneys. (HBLa04). If, as the Committee contends, advertising claims "that speak to the quality of services provided by an attorney are particularly suspect" (OB 14), then *MH's* AV, BV and CV ratings speak far more loudly than an

attorney's inclusion in *Best Lawyers*. There is no rational distinction that can be drawn between "the highest level of professional excellence" and "best." To pretend there is one is disingenuous.¹⁴

Both *Best Lawyers* and *MH* are "peer review" publications based primarily on qualitative ratings by other lawyers. While *Best Lawyers* contends that the Committee's continued use of the word "subjective" is hopelessly muddled, if *Best Lawyers* is a "subjective" peer review publication, it is a positive falsehood to maintain that *MH* is not.¹⁵

The irrationality of the Committee's "distinction" between *Best Lawyers* and *MH* appears most glaringly in its comparison of *Best Lawyers'* ratings to a claim by a talk show host that one New Jersey lawyer was "the best divorce lawyer in the country." (OB 21). The Committee's failure to recognize the significant

¹⁴ Moreover, given the Committee's (disputed) logic with respect to *Best Lawyers*, it is irrational to argue that a member of the public would not assume that a lawyer who is "peer review rated" by *MH* is not deemed better than a lawyer who is not, and even more irrational to argue that a member of the public would not assume that a lawyer with a "A" rating is more likely to secure a favorable result than a lawyer with a "B" rating.

¹⁵ The *MH* ratings are far less transparent than the selections in *Best Lawyers*. Unlike *Best Lawyers*, *MH* does not release the number of lawyers who are interviewed or surveyed to procure the A, B and C tiers, nor are their names in anyway ascertainable. The *MH* selection process is conducted in secret. *Best Lawyers'* pool of rating attorneys is just the opposite, openly consisting primarily of the lawyers listed in the previous edition of the publication. (HBLa05-07).

difference between these two "assessments" of a lawyer's ability -- a single, off the cuff remark of a talk show host and the result of a meticulous year-long survey involving more than two million evaluations conducted by a company that has been polling lawyers for 25 years and has earned encomiums from both within and outside the legal profession -- wanders into the farther realms of irrationality.

The Committee attempts to foist off the *MH* ratings as "objective" because *MH* appears to impose a single specific "experience requirement" that an attorney must supposedly satisfy before he or she can receive a given rating. (OB 44). Yet *Best Lawyers* contacts the Bar Associations of every state to make sure a selected lawyer is in good standing -- plainly an "objective" requirement. (HBLa06-07). Moreover, a minimum experience requirement does not in any way alter *the anonymous peer judgment component* of the *MH* published ratings. A lawyer who has practiced more than ten years may be eligible for an AV rating, but does not receive one unless he or she receives a "consensus" of positive opinions from a variety of unnamed sources. (HBLa05).

B. *MH* Encourages Attorneys to Advertise Their *MH* Ratings

MH does not prohibit lawyers from promoting their ratings to the general public, and *Best Lawyers* does impose limitations on the use of its selection of a lawyer. While *MH* prohibits the

use of its ratings in some media, it actively promotes the use of its ratings in key public venues such as websites, home pages and internet banner ads. (HBLa01-03). Moreover, *MH*'s ratings are easily available to a vast international audience through *MH*'s non-subscription website. Further, *MH* contracts to place its ratings on popular websites, including aol.com, cnn.com, askjeeves.com and switchboard.com. These sites are visited annually by tens of millions of consumers.

Not only does *MH* aggressively place its ratings in front of the general public, but its website offers lawyers a "sophisticated toolkit" for promotion of its multi-tiered ratings. (HBLa03). While the Committee criticizes *Best Lawyers* for "touting" its "moniker," (OB 44) it ignores the *MH* "toolkit," which encourages lawyers to promote their firm's collective ratings strength, provides side-by-side comparison tools and gives rated lawyers "featured placements" in search results. (HBLa03).

Moreover, contrary to the unsupported conclusions of Opinion 39, robotically repeated in the Opposition Brief, *Best Lawyers* imposes clear limitations not only on the venues in which the ratings may be mentioned, but on the content of the statements in question. *Best Lawyers* prohibits lawyers from advertising their ratings in *all* the same venues as *MH* with the exception of newspaper and magazine advertisements. (HBLa08-

09). Further, *Best Lawyers* exercises stringent controls in its openly published guidelines, emphasizing that listed lawyers are permitted to advertise that they are included in *Best Lawyers*; but not that they are "the best" and cannot suggest that a listing in *Best Lawyers* means that they are necessarily more skilled than lawyers not listed. *All advertisements must be pre-approved by the publishers of Best Lawyers.* (HBLa08-09).

C. *MH's Multi-Tiered Rating System is More Comparative Than the Selection System of Best Lawyers*

The idea that the Committee could rationally have considered *MH's* multi-tiered rating system to be "reasonably more discriminating" than *Best Lawyers'* system takes legal argument itself back into the miasmal mists of confusion and subterfuge. Plainly, a "multi-tiered" ratings system is more comparative than one that is not; a ratings system that refuses to identify the raters is *less* transparent than one, like *Best Lawyers*, that does make such an identification. The Committee, for reasons only known to itself, chose to exempt *MH* from its prohibition, but provided no grounds that even resemble rationality. Indeed, every "misgiving" expressed by the Committee about *Best Lawyers* is magnified with respect to *MH*.¹⁶

¹⁶ The "misgivings" expressed by the Committee about *Best Lawyers* are in fact virtually non-existent. Opinion 39 is about *Super Lawyers*, and *Best Lawyers*, as stated above, was included as an afterthought following no investigation.

POINT V

OPINION 39, AS A DE FACTO ADVERTISING GUIDELINE, DEPRIVES BEST LAWYERS OF DUE PROCESS

While the Committee is empowered to issue opinions where it receives an inquiry questioning the propriety of a particular advertisement under Rule 1:19A-3, there is no authority for the Committee's ban against advertisements of inclusion in a publication (that has existed in New Jersey for over twenty years) which has *not been* the subject of any independent inquiry. Even if the Committee were privileged to do so, due process requires that the Committee must at least consider that which it condemns.

Nevertheless, the Committee chose to proceed against *Best Lawyers* by closing its eyes to fact and opening its ears to rumor. It based its "decision" solely on the use of a superlative adjective in the title of a publication, wantonly dismissing the fact that that title has been trademarked, and refusing to acknowledge the fact that lawyers are permitted only to advertise their selection by their peers in *Best Lawyers*, and are explicitly prohibited from using their selection in a way that would create an expectation of better results. But the Committee has indeed opened its ears, because it relies, as a reason for attempting to annihilate a publication that has been in business in New Jersey every year since the Rules of

Professional Conduct have been in effect, on unidentified hearsay to the effect that *Best Lawyers* "seems to be 'trending' toward a Super Lawyer business plan."

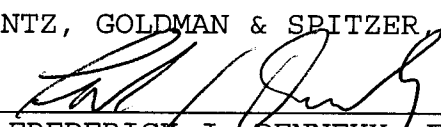
Finally, astoundingly, Opinion 39 not only prohibits attorneys from advertising their *inclusion* in *Best Lawyers*, but from *participating* in the *Best Lawyers* peer review survey. No such prohibition can even arguably be derived from the Rules of Professional Conduct or existing advertising guidelines. Opinion 39 is something altogether new, created ab initio by the Committee, and is a de facto advertising guideline requiring notice not given here -- and an opportunity to be heard.¹⁷

CONCLUSION

For the foregoing reasons, the Court should vacate Opinion 39 as it pertains to *Best Lawyers*.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER, P.A.

BY: 
FREDERICK J. DENNEHY ESQ.

Dated: December 18, 2006

¹⁷ Under Rule 1:19A-2(c), "the Advertising Committee may adopt advertising guidelines consistent with the Rules of Professional Conduct...after affording the bar an opportunity to comment and after approval by the Supreme Court." An advertising guideline typically includes items such as "disclosure requirements...time, place and manner regulations...and, generally, any guideline that the Advertising Committee deems either necessary or desirable in clarifying the application of the Rules governing advertisements and other communications within its jurisdiction." Id.

SUPREME COURT OF NEW JERSEY

IN RE OPINION 39 OF THE :
COMMITTEE ON ATTORNEY :
ADVERTISING :
: Civil Action
: DOCKET NO. 60,003
STUART A. HOBERMAN, ESQ., :
Petitioner, :
v. :
COMMITTEE ON ATTORNEY :
ADVERTISING, :
Respondent. :
:
:
:

APPENDIX TO REPLY OF INTERVENOR *BEST LAWYERS* AND PETITIONER
STUART HOBERMAN, ESQ. TO THE BRIEF IN OPPOSITION TO PETITIONS
FOR REVIEW OF OPINION 39 ON BEHALF OF RESPONDENT COMMITTEE ON
ATTORNEY ADVERTISING

On the Petition:

Frederick J. Dennehy, Esq.
Michael J. Weisslitz, Esq.

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Suite 900, Box 10
Woodbridge, NJ 07095-0958

APPENDIX

Martindale Hubbell Peer Review Ratings
 -Usage Guidelines 001-002

Martindale Hubbell Peer Review Ratings Toolkit 003

Martindale Hubbell Peer Review Ratings-Explanation 004

Martindale Hubbell Peer Review Ratings-The Process 005

Best Lawyers Selection Process 006-007

Best Lawyers Publicity Guidelines 008-009

Chambers USA Rankings Process 010



Lawyer Locator

Legal Articles

Peer Review Ratings

Introduction

Process

Explanation of Ratings

Ratings FAQs

▶ **Usage Guidelines**

Acknowledgements

Legal Fellowship

Ratings Toolkit

Dispute Resolution

Legal Personnel

Legal Careers

Professional Resources

Practice Development

News & Events

Customer Service

Experts & Services

Peer Review Ratings - Usage Guidelines

Permitted and Non-Permitted Uses of the Martindale-Hubbell Lawyer Rating Icon Marks ("Icon Marks") and the AV®, BV® and CV® Certification Marks ("Martindale-Hubbell Ratings Marks" or "Ratings Marks")

The Martindale-Hubbell Lawyer Ratings **Icon Marks ("Icon Marks")** are service marks owned by Reed Elsevier Properties Inc. and used under license by Martindale-Hubbell to identify the lawyer ratings services conducted and administered by Martindale-Hubbell. Peer evaluations establish ratings on a lawyer's legal ability and ethical standards - the CV, BV and AV certification marks are owned by Reed Elsevier Properties Inc. ("Martindale-Hubbell Ratings Marks" or "Ratings Marks").

Martindale-Hubbell Ratings Marks

Permitted Uses by Rated Attorneys and Law Firms

It is expected that, wherever possible, when the Ratings Marks are used, the Icon Marks will also appear. If the Icon Marks will not also appear, the phrase "Peer Review Rated" should follow the display of the Ratings Mark. When both the Ratings Marks and Icon Marks are displayed, the guidelines for use of both the Ratings Marks and the Icon Marks must be observed.

Rated attorneys and law firms may use the Martindale-Hubbell Certification Marks AV®, BV®, CV® under the following circumstances, and with the appropriate approved **Certification Mark Reference** or **Rating Explanation** as noted below:

Printed Communications

- Law firm brochures
- Attorney resumes or curricula vitae
- Firm or individual attorney letterhead
- Business cards *
- Professional announcements
- Listings in other legal directories directed to attorneys - prior written consent is required for directories not published by Martindale-Hubbell to insure that the policies and standards for use of the marks are observed and the function of the marks is preserved.

Internet applications

- Websites
- Martindale-Hubbell® Lawyer Homepages/Lawyer homepages
- Email communications
- Internet banner advertisements

Printed communications (i.e. law firm brochures, attorney resumes, legal directories), printed professional announcements and *Internet Applications* must include the following **Certification Mark Reference**:

"CV, BV and AV are registered certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies."

Printed professional announcements, and all print and CD-ROM based legal directories must include the Certification Mark Reference AND the following **Rating Explanation: Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the confidential opinions of members of the Bar and the Judiciary. Martindale-Hubbell Ratings fall into two categories - legal ability and general ethical standards.** *Internet Applications* must include the **Certification Mark Reference** AND either the **Rating Explanation** identified above OR a **link** to a web page maintained by Martindale-Hubbell which contains the approved explanation.

Web-based legal directories targeted to lawyers and law firms will be required to have a **link** to a Web page maintained by Martindale-Hubbell which contains the approved Certification Mark Reference and

A001

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Rating Explanation.

** Please note, business cards are not required to include the Certification Mark Reference or Rating Explanation; however, this information must be posted on other Printed Communications or Internet Applications offered by the Rated Attorney.*

Non-permitted uses

Use or mention of the Martindale-Hubbell Ratings is not allowed in:

- Yellow Page advertisements
- Newspaper advertisements
- Outdoor advertisements (billboards, buses, benches, etc.)
- Political pieces or advertisements/campaign promotions
- Radio and television commercials
- "Letters to the Editor" or similar articles or opinion pieces that are public commentary or reflect the personal opinions of the rated attorney or firm

When to Contact Martindale-Hubbell

If the Martindale-Hubbell Ratings Marks are to be used in a format that is not identified above as a permitted usage, then the user must contact Martindale-Hubbell Rating Services to obtain written permission prior to use. Permission will be predicated upon the specific guidelines/format set forth by Martindale-Hubbell being met. Permission may be revoked at any time for failure to comply with said specific guidelines/format or for any reason within the discretion of Martindale-Hubbell as the entity responsible for the protection of the certification marks.

Inquiries

Questions about the Martindale-Hubbell Peer Review Ratings system, use of the Icon Marks and the AV®, BV® and CV® Certification Marks can be sent by email to ratings@martindale.com or by mail to:

Peer Review Ratings Services

LexisNexis Martindale-Hubbell
121 Chanlon Road
New Providence, NJ 07974

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▲Top

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Lawyer Locator

Legal Articles

Peer Review Ratings

Introduction

Process

Explanation of Ratings

Ratings FAQs

Usage Guidelines

Acknowledgements

Legal Fellowship

▶ **Ratings Toolkit**

Dispute Resolution

Legal Personnel

Legal Careers

Professional Resources

Practice Development

News & Events

Customer Service

Experts & Services

Peer Review Ratings Toolkit

Leverage the Peer Review Ratings Difference

To enhance your marketing initiatives, LexisNexis Martindale-Hubbell has created a Peer Review Ratings Toolkit that offers lawyer- and firm-specific Peer Review Ratings icons for downloading. In addition to these customized icons, the Peer Review Ratings Toolkit offers other key benefits to showcase your ratings.

- Promote your firm's collective ratings strength with high visibility placement of the total number of rated lawyers in your firm.
- Ratings totals further differentiate your firm and its lawyers as buyers of legal services compare you to competitors in martindale.com's side by side comparison tools.
- Featured placements in search results as users "Find featured rated lawyers only" on martindale.com.

For more information about this new product, please complete the form below.

Yes, please contact me about the Peer Review Ratings Toolkit.

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▲Top

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A003



Lawyer Locator

Legal Articles

Peer Review Ratings

Introduction

Process

▶ **Explanation of Ratings**

Ratings FAQs

Usage Guidelines

Acknowledgements

Legal Fellowship

Ratings Toolkit

Dispute Resolution

Legal Personnel

Legal Careers

Professional Resources

Practice Development

News & Events

Customer Service

Experts & Services

Peer Review Ratings - Explanation

An Explanation of the Peer Review Ratings Categories

There are two components to each Martindale-Hubbell Peer Review Rating:

1. General Ethical Standards Rating

The General Ethical Standards Rating denotes adherence to professional standards of conduct and ethics, reliability, diligence and other criteria relevant to the discharge of professional responsibilities.

The General Recommendation Rating is:

V - Very High

A lawyer must receive a General Ethical Standards Rating before his or her review can proceed to the next step.

2. Legal Ability Ratings

Legal Ability Ratings take into consideration the standard of professional ability in the area where the lawyer practices, the lawyer's expertise, and other professional qualifications. If a lawyer's practice is limited or specialized, Peer Review Ratings are based on performance in those specific fields of law.

Legal Ability Ratings are:

C - Good to High

B - High to Very High

A - Very High to Preeminent

When both categories of Peer Review Ratings are confirmed, a lawyer receives an **CV**, **BV** or **AV** Rating.

If a lawyer moves to a different state, his or her rating will appear in Martindale-Hubbell with the state abbreviation indicating that it was established in another state or province.

Peer Review Ratings reflect career development

A lawyer's Peer Review Rating will generally improve over time. But Peer Review Ratings can be revised downward, or even removed if a decline is noted in ability or ethical standards.

CV® Peer Review Rating — The CV is a good first rating for lawyers and a definitive statement of their above-average ability and unquestionable ethics. This is the maximum rating a lawyer can receive who has been admitted to the bar from 3-4 years.

BV® Peer Review Rating — The BV is an excellent rating for a lawyer with more experience. This is the maximum rating a lawyer can receive who has been admitted to the bar from 5-9 years.

AV® Peer Review Rating — An AV rating is a significant accomplishment - a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence. A lawyer must be admitted to the bar for 10 years or more to receive an AV rating.

Inquiries

Questions about the Peer Review Ratings system can be sent by email to ratings@martindale.com.

or by mail to:

A004

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[Peer Review Ratings](#)

[Introduction](#)

▶ [Process](#)

[Explanation of Ratings](#)

[Ratings FAQs](#)

[Usage Guidelines](#)

[Acknowledgements](#)

[Legal Fellowship](#)

[Ratings Toolkit](#)

[Dispute Resolution](#)

[Legal Personnel](#)

[Legal Careers](#)

[Professional Resources](#)

[Practice Development](#)

[News & Events](#)

[Customer Service](#)

[Experts & Services](#)

Peer Review Ratings - The Process

The process of the Peer Review Ratings system

The Martindale-Hubbell Peer Review Ratings system, which evaluates lawyers and law firms in the United States and Canada, is based on the confidential opinions of members of the Bar and the Judiciary, including both those who are rated and those who are not.

Martindale-Hubbell representatives conduct personal interviews to discuss lawyers under review with other members of the Bar. A compilation of these opinions from various sources is necessary to form a consensus, and lawyers under review are sometimes asked to provide professional references to assist with the process.

In addition, confidential questionnaires are sent to lawyers and judges in the same geographic location, area of practice or industry as the lawyer being rated. Members of the Bar are instructed to assess their colleague's legal ability and general ethical standards.

If reports indicate that the lawyer in question does not meet the highest ethical standards, further explanations are requested.

Regular Peer Review Ratings reviews

Peer Review Ratings are reviewed in stages over the course of a lawyer's career. The first review - to establish a Rating - usually occurs five years after first admission to the Bar. Established Peer Review Ratings are reviewed every five to eight years thereafter - or earlier if Martindale-Hubbell receives information indicating that a lawyer's ethics or abilities are under question.

Disbarred or suspended lawyers automatically have their Peer Review Ratings removed. Bar admitting authorities continuously supply Martindale-Hubbell with disciplinary information.

Completely Confidential

All Peer Review Rating review materials are strictly confidential, enabling participants to provide completely candid assessments of their colleagues. Under no circumstances are any Peer Review Ratings review materials released. It is also important to note that, since Martindale-Hubbell does not undertake to develop Peer Review Ratings for all lawyers, the fact that a lawyer is not rated should not be construed unfavorably.

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BestLawyers The Best Lawyers In America®**Comments****The Editors****Board of Advisors****Methodology****Selection Process****Guidelines for Publicizing**

Inclusion in *The Best Lawyers in America* is based entirely on peer review. For twenty-five years, the top lawyers in the country have helped make *Best Lawyers* the leading legal referral guide by candidly evaluating the work of other top lawyers in the same specialties and geographic areas.

Lawyers are nominated to *Best Lawyers* in three ways. First, all of the lawyers in the previous edition of *Best Lawyers* are automatically nominated into the next edition. Second, during the voting process, voting lawyers are asked to nominate any outstanding lawyers who have not yet been nominated. These lawyer nominations are generally for lawyers at other firms and register as votes as well as nominations.

Finally, now that most large firms have marketing departments, *Best Lawyers* allows marketing directors to nominate lawyers from their own firms. We ask only that they exercise prudence. Nominating too many lawyers not only creates an unwieldy ballot but can also prejudice voters against all the nominees from a firm. Nominating underqualified lawyers can cast a firm's best candidates in an unfavorable light. [Click here for Best Lawyers nomination forms.](#)

In most cases, nominees who are not selected for inclusion in *Best Lawyers* automatically remain on the ballot for the next two editions.

In established specialties, the voting pool consists primarily of lawyers listed in the previous edition of *Best Lawyers*. Nominees who get particularly high votes may also be asked to vote. When new specialties are added, the voting pool consists of listed lawyers in related specialties and/or listed lawyers in the same specialty in another jurisdiction, as well as nominees who receive particularly high votes.

In large legal communities (such as New York City and Washington, DC), lawyers are asked to vote only on lawyers in the same specialty and in the same legal community. In medium-size legal communities (such as Columbia, South Carolina, or San Jose, California), lawyers may be asked about lawyers in related specialties in the same community or in the same specialty across the entire state. In small legal communities (such as Corpus Christi, Texas, or Rapid City, South Dakota), lawyers may be asked about all of the lawyers in the same community across the full range of specialties.

Best Lawyers is published annually. Each year, lawyers in half the states (by population) are called and asked to vote by phone; lawyers in the other half are asked to vote by e-mail or fax. The next year, the process is reversed, so that every voter has an opportunity to vote "in person" every two years.

Whether by telephone, e-mail, or fax, we ask voting lawyers the same question, "If you could not handle a case yourself, to whom would you refer it?" Lawyers are asked to give nominees A-B-C letter grades – A for

a lawyer the voter would certainly refer a case to, B for a lawyer the voter would probably refer a case to, and C for a lawyer the voter might hesitate to refer a case to. Lawyers are allowed to give pluses or minuses in order to make their votes more precise.

Once all of the evaluations have been compiled, the letter grades are converted into numerical equivalents and then averaged. Eccentric votes – far better or far worse than the others – are excluded from this calculation. The numerical average required for inclusion varies according to the average for all the nominees within the specialty and the geographic area. In close cases, the editors make final decisions based both on comments that are made about a nominee during the polling process and on the grades of the voting lawyers (votes can be given more or less weight depending on the voter's own grades and on how closely that voter predicts the outcome for the other nominees in the specialty).

As soon as the selections are finalized, the selected lawyers are checked against state bar association sanction lists to make sure that every lawyer is in good standing with the ethics committee of his or her state bar. Then letters of congratulation are sent to all the listed lawyers. At the same time, marketing directors receive summaries of the survey results for their firms, including lists of returning listees, new listees, and quantitative information comparing the firm's survey results to those of other firms in the city, state, region, or nation.

Ultimately, of course, a lawyer's inclusion on these lists is based on the subjective judgments of his or her fellow attorneys. While it is true that the lists may at times disproportionately reward visibility or popularity, we remain as confident today as we were twenty years ago that the breadth of our survey, the candor of our respondents, and the sophistication of our polling methodology largely correct for any biases and that these lists continue to represent the most reliable, accurate, and useful as well as the most transparent guide to the best lawyers in the United States available anywhere.

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BestLawyers
 Comments
 The Editors
 Board of Advisors
 Methodology
 Selection Process
 Guidelines for Publicizing

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Press release for individual lawyer:

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Press release for firms:

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The 2007 edition is the thirteenth edition of *The Best Lawyers in America*. Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence in the United States. Because *Best Lawyers* is based on an exhaustive peer-review survey in which 24,000 leading attorneys throughout the country cast almost two million votes on the legal abilities of other lawyers in their specialties, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

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The Chambers USA Guide

Research

Research into the strengths and reputations of US attorneys is carried out in the same way as the research for the Chambers 'Global' and the 'UK' guides. The methodology has been approved by the British Market Research Bureau, which audits the research annually. In-depth interviews with clients and with attorneys are done over the telephone, each one lasting about half an hour.

For the current US directory, over 10,000 of these interviews were conducted covering the whole of the USA. They were carried out by a team of 40 full-time researchers over a period of 6 months.

Rankings

Law firms and individual attorneys are ranked in bands on a scale of 1-6, with 1 being the best. "W" ranking is awarded to Associates to Watch who have come to our attention, "U" to those considered Up and Coming, and a "*" ranking is for attorneys with exceptional recommendations in their field. "S" indicates a Senior Statesman: an attorney who no longer works 'hands-on' with the same intensity but who, by virtue of close links with major clients, remains pivotal to the firm's success.

The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment, and other qualities most valued by the client.

Firms and individuals are put alphabetically into tiers/bands according to the conclusions of our research. The number of bands varies depending on the number of firms in a sector and, most importantly, the differentiations that can be drawn between different groups of firms. To discern this, we take into account volume of feedback and the quality of that feedback; whether the firm is full service or perceived as having niche specialisms; the size of the team and law firm; clients acted for and matters dealt with. It may be that a law firm is so far ahead that it merits being in a tier of its own, which results in more tiers.

Editorial comment is also derived from the research, with quotations used when they sum up the prevailing opinion of the market.

The rankings and editorial comment about attorneys are independent and objective. Inclusion in this section of the guide is based solely on the research team's findings. No-one can buy their way in.

Once the rankings are completed, those included are given a listing in the guide (setting out contact details) which is free of charge. They can, if they wish, enlarge this entry at a cost based on the size of the profile they choose.

If you or your firm are ranked and you would like to expand your online listing, please email Brad Sirott with the relevant details, or call him on +44 207 778 1627.