IN THE MATTER OF THE PETITION FOR REVIEW OF COMMITTEE ON ATTORNEY ADVERTISING OPINION 39 JON HENRY BARR, Esq., GLENN A. BERGENFIELD, Esq., CARY B. CHEIFETZ, Esq., MARIA DELGAIZO NOTO, Esq., ANDREW J. RENDA, JR., and JOHN S. VOYNICK, JR., Esq. Petitioners, - and – KEY PROFESSIONAL MEDIA, INC. (d/b/a "Super Lawyers" and "Law & Politics") Intervenor-Petitioner.	**SUPREME COURT OF NEW JERSEY** Civil Action Docket No. 60,003

REPLY BRIEF OF PETITIONERS JON HENRY BARR, ESQ., et al. AND INTERVENOR KEY PROFESSIONAL MEDIA, INC. (d/b/a "SUPER LAWYERS" AND "LAW & POLITICS")

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INTRODUCTION

Missing from the Committee's brief is any acknowledgment of the value of rating services, like *Super Lawyers*, to consumers and lawyers making important decisions about which lawyer to retain or refer. Bona fide rating services offer consumers critical cues about lawyers' reputation and experience.

The Committee has failed to demonstrate -- as it must to sustain the ban -- that advertising a *Super Lawyers* listing is inherently misleading. First, the name of the publication, alone, does not mislead. A lawyer who discloses that he has been included in a *Super Lawyers* list is not making a naked claim that he is "Super," and is certainly not promising to win a case. Rather, he is simply reporting the certification of an independent publisher that has collected extensive data and applied a rigorous selection protocol to all candidates. Second, the *Super Lawyers* rating system is not misleading just because it measures subjective qualities. The U.S. Supreme Court has made clear that bona fide certifications are permissible as long as they apply objective criteria to the qualities they measure. Third, all of the Committee's objections to the *Super Lawyers* selection protocol are meritless; indeed, a leading independent research and survey firm concluded that the *Super Lawyers* selection process is "scientific and objective." [Pra345]

Since the Committee has not demonstrated a legitimate interest in categorically banning ads reporting a *Super Lawyers* listing, this Court should hold that such ads are permissible.

I.

BONA FIDE LAWYER RATING SERVICES PROVIDE IMPORTANT INFORMATION TO CONSUMERS AND TO LAWYERS MAKING REFERRALS

Just as consumers have come to rely on peer reviews and professional ratings to select heart surgeons, investment advisors, colleges, and even law schools, they have also come to depend on the same sorts of ratings to inform their choice of legal counsel. For almost a century, Martindale-Hubbell monopolized the field. Over the past decade, however, an array of new publications has emerged -- ranging from the supremely subjective and exclusive *American Lawyer* Litigation Department of the Year to the data-driven and more inclusive *Super Lawyers* listing. Because an attorney's reputation among her peers could be the most important information a potential client or referring attorney might consider, *see In re Felmeister & Isaacs*, 104 *N.J.* 515, 527 (1986), a peer-reviewed rating, like *Super Lawyers*, is especially valuable.

While the methodologies and styles of these rating services vary, the bona fide ones share certain qualities: They are merit-based, they apply a rigorous selection process, and they do not permit attorneys to purchase a rating for a price or to

illegitimately influence the selection. Thus, they enrich the pool of truthful and reliable information available to potential clients, and facilitate a lawyer's duty to refer a client to more qualified counsel in appropriate cases. *See, e.g.*, *In re Yetman*, 113 *N.J.* 556, 562 (1989).

Of course, no single rating service is -- or purports to be -- definitive. Rather, a bona fide rating is one piece of information consumers and referring attorneys can consider. The question before this Court is whether the Committee has presented a sufficiently strong government interest to justify depriving consumers and referring attorneys of this information -- at the point at which they most need it, when they are examining a lawyer's bio or ad and deciding whether to contact or retain her. The Committee has not come close.

II.

ADVERTISING A *SUPER LAWYERS* LISTING IS NOT INHERENTLY MISLEADING

The Committee cannot sustain its ban without proving that a lawyer's reference to a *Super Lawyers* listing is inherently misleading.[1] While acknowledging that it has no evidence that

[1] The Committee's argument -- that it can categorically ban an ad mentioning a *Super Lawyers* listing even if it is not inherently misleading, *see* Opp. at 33-40 -- requires little response. The U.S. Supreme Court has repeatedly held that regulators cannot ban ads just because they might potentially mislead some consumer somewhere. *See* Pet. at 7-10 (reviewing case law). The *(Footnote continued)*

the accolade has ever actually misled a consumer, the Committee asserts that the reference is inherently misleading, for three reasons: (A) a list bearing a title with superlatives such as "Best" or "Super" misleads, no matter how rigorous and reliable the selection process; (B) any independent rating that measures subjective qualities is misleading; and (C) the *Super Lawyers* selection process is unreliable. Each is incorrect.

A. Superlative Labels Bestowed by a Bona Fide Rating Service Are Not Inherently Misleading

The Committee's lead argument is that the most objectionable aspect of the ratings it condemns is their name. According to the Committee, Opinion 39 "should ... properly be read [as] an indictment of the promotion and advertising of labels such as 'Super Lawyer' or 'Best Lawyer.'" Opp. at 11 (emphasis added). By this theory, "the selection methodology does not matter," *ibid.*, which explains why the Committee dispensed with any effort to understand the *Super Lawyers* process before condemning it. No matter how rigorous, accurate, or transparent the process -- according to the Committee --

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Court has also rejected the Committee's assertion that it can ban speech in the interest of protecting the "dignified public image of the legal profession." Opp. at 34; *see Zauderer v. Office of Disciplinary Counsel*, 471 *U.S.* 626, 647-48, 105 *S. Ct.* 2265, 85 *L. Ed. 2d* 652 (1985); *44 Liquormart, Inc. v. Rhode Island*, 517 *U.S.* 484, 510, 116 *S. Ct.* 1495, 134 *L. Ed. 2d* 711 (1996) ("[C]onclud[ing] that a state ... does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes.").

consumers are misled by the superlative. This objection would seemingly evaporate if only the publisher traded in *Super Lawyers* for a blander name, such as the "Smith-Jones list."

The Committee intertwines three reasons for objecting to superlative labels. First, it deems "titles such as 'super lawyer' or 'best lawyer'" to be "self-aggrandizing." *Id.* at 10 (emphasis added).[2] But these distinctions cannot be "self-aggrandizing," as the lawyers do not anoint themselves. Like the Harvard law degree a lawyer might tout, or a National Board of Trial Advocacy certification, *see Peel v. Attorney Registration & Disciplinary Comm'n*, 496 *U.S.* 91, 95, 110 *S. Ct.* 2281, 110 *L. Ed. 2d* 83 (1990), a bona fide rating is conferred by an independent party pursuant to a prescribed process.

That distinction makes all the difference. A regulator may, of course, prohibit a lawyer from advertising his own unvarnished claim that he is the "best" in his field. That is because an individual lawyer's self-assessment is especially prone to puffery and peculiarly unverifiable, making it both valueless and misleading. These are the sorts of claims that concerned both the U.S. Supreme Court and this Court when they

[2] The Committee's formulation is factually incorrect. *Super Lawyers* not only expressly directs lawyers who advertise in the magazine to say that they have been "listed in *Super Lawyers* Magazine," but also actively discourages them from saying that they have been "named a Super Lawyer." Lately, *Super Lawyers* has been especially rigorous in monitoring compliance. [Pra314]

observed that "advertising claims as to the quality of services ... are not susceptible of measurement or verification." *Bates v. State Bar of Ariz.*, 433 *U.S.* 350, 383-84, 97 *S. Ct.* 2691, 53 *L. Ed. 2d* 810 (1977); *see Felmeister*, 104 *N.J.* at 527.

Second, the Committee argues that any superlative is impermissible because it is comparative, which (by operation of *RPC* 7.1(a)(3), the Committee believes) means it is misleading by definition. Opp. at 24-25. Precisely because not every comparison is inherently misleading, however, the U.S. Supreme Court has protected an attorney's right to advertise independently conferred accolades that distinguish him from other lawyers. Thus, for example, in *Peel*, the Court held that an attorney had a right to advertise the truthful fact that he was certified by the NBTA. 496 *U.S.* at 99-100. The Court was unconcerned with the prospect that consumers might conclude that lawyers so certified were more highly qualified than members of the bar without such certifications. *Id.* at 102.

For similar reasons, the Committee is incorrect in equating a lawyer's reference to a bona fide rating with a repetition of someone else's off-the-cuff opinion. The Committee is, of course, correct that if a lawyer may not announce that she is the "best," she is equally barred from declaring that someone else considers her the "best," when the anointer lacks the process, basis, or independence on which to make such an

assertion credibly. Opp. at 21-22 (citing Advertising Comm. Op. 8, 127 *N.J.L.J.* 753 (Mar. 21, 1991)). But that, again, is because the moniker is too easily conferred and too hard to verify. Unlike an independent publisher's assessment based upon thousands of votes and hundreds of hours of research, the potentially biased or baseless opinion has no value to consumers. In short, the Committee is correct that a lawyer cannot "circumvent the Rules of Professional Conduct by promoting a misleading moniker," "simply because the label ... is conferred by a commercial third party." *Id.* at 22 (emphasis added). But a lawyer does not circumvent the Rules -- or mislead consumers -- when accurately reporting the superlative assessment of a third party that is independent and has a bona fide, merit-based process for gathering the necessary information and drawing a legitimate conclusion.

Third, the Committee insists that these superlatives misleadingly foster unjustified expectations, in violation of *RPC* 7.1(a)(2). *Id.* at 20, 24. The Committee correctly points out that a consumer who sees them may infer that the attorney in question is, indeed, "a better lawyer than one of his or her peers who is neither [listed as] 'super' nor 'best.'" *Id.* at 16. So long as the rating is bona fide, however, the Committee is most assuredly wrong when it asserts that the inference is unjustified -- i.e., that "[t]he fact that an attorney has been

selected to be a 'super' or 'best' lawyer ... does not reasonably support an inference that the attorney is in fact superior to his or her peers." *Id.* at 16-17. That is like saying that when *U.S. News & World Report* ranks Yale the #1 law school in the nation, "that ranking does not reasonably support an inference that it is in fact superior to," say, Campbell University Wiggins School of Law, which is ranked toward the bottom. Reasonable minds might quibble over a particular rating -- whether Yale deserves to be #1 or lawyer Jones deserves to make the list -- or over whether a methodology weighs the right attributes. But in either context, if the rating is independent, and the process is legitimate, then the inference of superiority is reasonable, and it is up to the consumer to decide how much stock to put in this one data point.

The expectations go no further than the certification of reputation and experience. When a lawyer reports that she was included in a *Super Lawyers* list, no rational reader would read that report as an assurance that she will win a particular case, and no consumer could possibly believe that the lawyer has the power of a "comic-book super hero[]" to leap to winning verdicts in a single bound or otherwise "produce superior results." *Id.* at 16 n.13. *Super Lawyers* caters to lawyers and to adults of above-average intelligence [Pra314], not to toddlers. When the U.S. Supreme Court cautioned courts to "reject the paternalistic

assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television," *Peel*, 496 *U.S.* at 105, it was rejecting exactly that sort of offensive consumers-are-cretins paternalism the Committee serves up here.

The consumer is every bit as equipped to assess the value of a listing in *Best Lawyers* or *Super Lawyers* as she is to decide how much stock to place in any of the other comparative facts that a lawyer is permitted to report -- such as a *summa cum laude* designation (as opposed to *magna cum laude*, *cum laude*, or no *laude*), selection for law review, admission to Harvard (rather than Hastings), or a Martindale AV rating (as opposed to BV, CV, or no rating). Each of these distinctions is comparative in nature -- or at least "inferentially speaks to the quality of services and representation provided by the advertising attorney." Opp. at 15-16. And "[l]awyers who advertise" any of these credentials "necessarily imply that they are in fact deserving of the advertised accolade." *Id.* at 17. As the Committee puts it, "query why one would advertise the designation otherwise?" *Ibid.* Yet, we let lawyers tout each of these accolades to consumers -- so long as the entity conferring each has a bona fide process -- because more information is better, and we trust consumers to assess how much weight to give each piece of information and to make decisions accordingly.

This last point bears emphasis particularly with regard to Martindale, which the Committee endorsed, and continues to defend, as a permissible assessor of comparative quality. *Id.* at 40-45. In light of the Committee's professed concern that "any of a wide variety of adjectives that might be employed to convey superiority" is misleading, or impermissibly comparative, or too likely to foster unjustified expectations, *id.* at 17, its endorsement of Martindale is puzzling. Martindale rates lawyers with letter grades -- A, B, C. Anyone who has been through grade school knows that A is the "best" -- one might call it "Super" -- and C is somewhat less so. And the Committee confirms that any consumer who cares to look, would learn that A translates into "highest level of professional achievement"; B into "excellent"; and C into "above-average." *Id.* at 42 n.34 (quoting Martindale website). Beyond that, Martindale also affixes the moniker "Preeminent" to certain law firms, which is, perhaps, even more superlative than "Super" or "Best." [Pra327-29][3] As the Supreme Court has observed, where, as here, "a means

[3] The Committee does not dispute that Martindale runs a consumer-oriented website, lawyers.com, which was pointed out in the Petition, Pet. at 18, but instead offers a non sequitur -- that Martindale has, at times, advised lawyers not to publicize their ratings in the Yellow Pages or on television, Opp. at 40. Any suggestion that this points to a broader Martindale policy against consumer advertising is belied not only by lawyers.com, but also by Martindale's sale of mailing labels touting lawyers' rating, to be used on "all correspondence." [Pra332]

of pursuing [a state's] objective ... [is] woefully underinclusive ... [it] render[s] belief in that purpose a challenge to the credulous." *Republican Party v. White*, 536 *U.S.* 765, 780, 122 *S. Ct.* 2528, 153 *L. Ed. 2d* 694 (2002).

B. The *Super Lawyers* Rating System Is Not Misleading Simply Because It Measures Subjective Qualities Along with Observable Facts

The Committee's second argument is that a *Super Lawyers* listing is inherently misleading not because of what it is called but because of what it measures -- subjective qualities, such as reputation among peers and professional achievement. Opp. at 26. The Committee does not deny what this Court observed two decades ago: "The kind of information a sophisticated client wants -- and gets -- centers on the attorney's reputation: how he is regarded by his peers, how other attorneys whom the client already knows assess his ability, ... etc." *Felmeister*, 104 *N.J.* at 526. "[I]t is the most important information a consumer would need." *Ibid.*

As this Court has acknowledged, lay consumers could never amass the body of relevant information that would allow them to make such judgments without assistance. The challenge, as this Court understood even in the infancy of lawyer advertising, is whether these qualities can be measured in a way that overcomes "the inordinate difficulty of assuring the accuracy of such information." *Ibid.* In the ensuing two decades, rating

services have risen to the challenge, turning that inquiry into a veritable science. At least some of them, like *Super Lawyers*, apply the same rigor and discipline to their selection processes that "economists[] ... and political scientists[]," [Pra346-47] among others, apply to efforts to assess opinion and measure subjective qualities.

In insisting that even the most rigorous effort to measure subjective qualities is inherently misleading, the Committee relies on this single sentence from *Peel*:

> States can require an attorney who advertises 'XYZ certification' to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relative to practice in a particular area of the law.

496 *U.S.* at 109, *quoted in* Opp. at 28. The U.S. Supreme Court there did not suggest that a certification is illegitimate unless it gauges only objective and directly observable facts. *See* Opp. at 26. Rather, as is evident from the Court's choice of words and analysis, the Court was focused on "objective ... standards," which are touchstones of reliability: Is the listing available based on merit to all, or is it made available selectively on some basis other than merit? Is there a layer of objectivity – whether the objectivity is supplied by votes or by a rational point system -- or is the selection process manipulable by the very lawyers seeking the accolades? Is the

claim of quality empty posturing or is it (as the Committee itself puts the test) based upon "quantifiable supporting evidence"? *Id.* at 21.

This focus is clear from *Peel*'s description of the sorts of factors that destroy the requisite level of objectivity. The Court did not suggest that "objective standards" are lacking just because the ultimate quality being assessed is subjective. Rather, it pointed to circumstances where "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." 496 *U.S.* at 102 (emphasis added); *accord Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 *U.S.* 136, 148, 114 *S. Ct.* 2084, 129 *L. Ed. 2d* 118 (1994).

As the survey expert notes, "it is incorrect to assume that a lawyer's reputation cannot be measured in an objective way"; *Super Lawyers* has "devised a systematic methodology for measuring ... [those] characteristics of legal counsel, ... which can only be measured by the opinions of colleagues and peers." [Pra346, 348] In any event, once again, the Committee itself has furnished the most compelling evidence that Opinion 39 does not further any interest in constraining the advertisement of ratings based on subjective qualities: It endorsed ads bearing Martindale ratings, which, far more than *Super Lawyers'*, are based upon "the surveying and/or

interviewing of attorneys and other law firm representatives." Opp. at 26; [Pra331].

C. *Super Lawyers* Adheres to a Rigorous Selection Process that Evaluates the Quality of Its Candidates in the Most Objective of Terms

The Committee's final argument is that the *Super Lawyers* selection process is somehow flawed. The Committee does not dispute -- at least not directly -- the sworn accounts of *Super Lawyers'* extensive four-phase selection protocol described fully in the Petition and even more fully in the supporting declarations (and disclosed in the magazines). Pet. at 4-5; [Pa266-70]. Instead, the Committee quibbles over one component of the selection process -- balloting -- notably voicing not even the slightest issue with the remainder of the *Super Lawyers* selection process. *Cf.* [Pra345] (independent expert concluding *Super Lawyers'* selection process is "scientific and objective").

As the Petition explains at length, balloting is not the only component of the *Super Lawyers* selection process. *Compare* Opp. at 5 n.5, *with* Pet. at 4-5. The balloting is Step One -- the device by which *Super Lawyers* casts the broadest possible net to identify the widest range of reputable lawyers. True, a lawyer can score points in the rating based upon the sheer volume of peers who consider him superior. But in pretending this is all *Super Lawyers* does, the Committee ignores (1) *Super Lawyers'* elaborate point system for scoring twelve indicators of

peer recognition and professional achievement; (2) the significant component of the score based upon individualized ratings awarded by *Super Lawyers'* Blue Ribbon Panels; and (3) the independent research *Super Lawyers* conducts to verify information and to detect any untoward manipulations.

The Committee's attacks on the balloting process are all off-target. [*Cf.* Pra351 (*Super Lawyers* balloting is "systematic, consistent, and unbiased")]. First, the Committee is wrong when it insists "it is clear that objective standards are not applied" to the balloting. Opp. at 28. *Super Lawyers* "follows the best practices in the social sciences," [Pra348] and applies objective criteria to the data: It counts the votes, assigns them point values, adds in the results of the "Star Search" and blue ribbon panel, and cranks the resulting scores through a prescribed algorithm to achieve a result that is objectively verifiable, reproducible, and applicable to all candidates.

Second, the Committee makes much of *Super Lawyers'* decision to rate the top 5% of the New Jersey bar rather than, say, the top 1% or the top 100 lawyers. *Id.* at 29-31. While the Committee posits that *Super Lawyers'* decision to extend its ratings beyond a handful of lawyers could only have been profit driven, [*but cf.* Pra312-13] it ignores the obvious value <u>to consumers</u> of listing a larger group of distinguished lawyers. Most consumers are not in a position to hire the lawyer reputed

to be at the very pinnacle of the profession. But that does not mean that they would be happy to settle for the worst. Clients are eager to know whether the lawyer they are considering is perceived by peers to be near the top tier. Yet again, the Committee's endorsement of Martindale belies the suggestion that there is anything untoward in the decision to broaden the field: Martindale rates fully 45% of lawyers listed in its directory, and awards 21% the AV rating. [Pra333] Indeed, approximately 70% of lawyers selected in the 2006 edition of *New Jersey Super Lawyers* are AV-rated by Martindale, [Pra346] undercutting any notion that one process is reliable and the other is not.

Third, the Committee points out "that a full 5% of practicing attorneys are designated 'Super Lawyers,' notwithstanding that ... less than 5% of New Jerseys' attorneys even return ballots." Opp. at 29-30. What the Committee neglects to mention is that the 5% of lawyers who did respond -- 1,450 lawyers in all -- were each entitled to nominate up to 14 candidates. [Pra308-09] The balloting yielded over 9,000 votes (many lawyers receiving multiple nominations), which resulted in a candidate pool of nearly 6,000 highly regarded lawyers, when added to those identified by the "Star Search," blue ribbon panels, and previous years' votes. [Pra307-08] Ultimately, only 1,657 from this pool made the *Super Lawyers* list. [Pra309]

Fourth, the Committee asserts "the 'Super Lawyers'

selection process is 'arbitrary'" because "attorneys may cast votes for seven members of their own firm." Opp. at 29. The Committee ignores all the safeguards *Super Lawyers* has adopted to prevent block voting: [Pra310-11, 352-53]

- *Super Lawyers* limits the number of in-firm votes counted towards a lawyer's rating. (To prevent firms from gaming the system, *Super Lawyers* does not reveal the number publicly, but it is in the single digits.)
- For every person a lawyer nominates from his firm, he must nominate at least one person from another firm.
- Votes from within a lawyer's own firm are worth only a fraction of the value of external votes.
- *Super Lawyers* runs sophisticated programs to detect block-voting and disqualifies candidates, or depresses their scores, when it detects gaming.

Finally, and most sensationally, the Committee equates *Super Lawyers* with "an entity that is issuing 'certificates indiscriminately for a price.'" Opp. at 32 (quoting *Peel*, 496 *U.S.* at 102). Again, the Committee cites not a wisp of evidence to contradict *Super Lawyers*' sworn testimony that the selection process is insulated from the sales function, and that *Super Lawyers* never sells a single ad until the selection process is complete. [Pra312-13] Rather, the Committee rests the scurrilous allegation on nothing but the observation that *Super Lawyers* relies on "advertising revenue to support its operations." Opp. at 31. Never mind that other publications -- including the vaunted Martindale -- also derive a sizeable

portion of their income from attorney advertisements, which belies the Committee's claim that this factor is cause for concern. [Pra327-28 (Martindale's biographical sections are paid for by the law firms listed)][4] The more direct response is that *Super Lawyers'* collection of advertising revenue from listed lawyers is no more suspect than *The New York Times'* collection of advertising revenue from any number of companies that are routinely featured in its business section. So long as the editorial function is insulated from the revenue function -- as it is for *Super Lawyers*, both temporally and functionally -- the co-existence of both functions is no cause for concern.

III.

THE COURT SHOULD RULE THAT IT IS PERMISSIBLE FOR A LAWYER TO ADVERTISE A *SUPER LAWYERS* LISTING

Since an ad truthfully reporting that a lawyer has been included in a *Super Lawyers* list is constitutionally protected, and the Committee has not offered a sufficient interest for banning such an ad, this Court must at a minimum declare that such ads cannot be banned. As the Committee itself has

[4] Ironically, the Committee again had its facts backwards when it held up Martindale as a positive counter-example, for Martindale is the one that sells accolades for a price. Martindale defines AV lawyers as falling within a range of lawyers that it rates from "very high to preeminent." [Pa209] A lawyer can secure an accolade at the higher end of that spectrum, thereby securing a listing in Martindale's *Bar Register of Preeminent Lawyers*, simply by paying additional fees for advertising. [Pra327-29]

indicated, this Court could easily reach that conclusion by interpreting the current rules as not prohibiting such an ad. *See* Opp. at 24 n.21. Alternatively, this Court can reach that conclusion by declaring that the Rules -- and particularly *RPC* 7.1.(a)(3), prohibiting all comparisons -- are unconstitutional as applied, to the extent that they cover ads reporting inclusion in *Super Lawyers*.

Petitioners urge this Court to make such a ruling on the merits rather than merely remanding to the Committee on procedural grounds. Since this Petition has been filed, Opinion 39 has inflicted considerable economic damage on *Super Lawyers*, not just in New Jersey, but nationwide [Pra316-24] -- in addition to the damage to the First Amendment rights of *Super Lawyers* and advertising attorneys. The Committee irresponsibly and unconstitutionally placed the publication under an ethical cloud, and the damage will only increase until this Court rules on the merits.

Beyond those minimal steps, this Court should take a further step to prevent like constitutional harm to other parties. As even the Committee seems to agree, *RPC* 7.1 needs to be updated. Opp. at 24-25 nn.19-22. *RPC* 7.1(a)(3)'s categorical ban on comparative advertising, adopted back in 1984, is unconstitutional on its face. That rule should be struck. The overarching proscription against "false or misleading"

advertising suffices both to give the Committee the flexibility it seeks and to protect consumers. *See id.* at 24 n.21 (bemoaning the Committee's inability to exercise "flexibility in interpreting the Rules"). In its place, this Court should accept the Committee's invitation to adopt Model Rule 7.1, which the ABA modified recently to address the former rule's constitutional flaws in light of *Peel* and *Ibanez*. *See id.* at 24 n.19 (quoting ABA Model Rule 7.1 in full); *id.* at 25 n.22 (inviting the Court "to amend the rule in a manner consistent with the modifications that have been made in the Model Rules").

CONCLUSION

Petitioners respectfully request that the Court vacate Opinion 39 and declare that lawyers may advertise truthfully that they have been included in a *Super Lawyers* listing and grant such other relief as this Court deems appropriate.

Respectfully submitted,

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