

ZELDES, NEEDLE & COOPER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
1000 LAFAYETTE BLVD.
POST OFFICE BOX 1740
BRIDGEPORT, CONNECTICUT 06601-1740
TELEPHONE (203) 333-9441
FAX (203) 333-1489

David P. Atkins
Direct Dial: (203) 332-5769
E-MAIL: datkins@znclaw.com

January 17, 2007

Via E-Mail and U.S. Mail

Wick R. Chambers, Esq.
Winnick, Ruben, Chambers, Hoffnung
& Peabody, LLP
110 Whitney Avenue
New Haven, CT 06510-1238

Re: Inquiry To CBA Committee On Professional Ethics Regarding *Super Lawyers*

Dear Wick:

I am writing to you on behalf of Key Professional Media, Inc., the publisher of *Connecticut Super Lawyers*[®] magazine, in light of our recent conversation. You indicated to me that a subcommittee of the CBA Professional Ethics Committee will be drafting an opinion in response to an inquiry about the propriety of Connecticut attorneys advertising their inclusion in *Connecticut Super Lawyers*. You further indicated that the subcommittee would be willing to consider a submission from my client in connection with its preparation of its proposed opinion.

I thought it might be helpful to start with an overview of the *Super Lawyers* selection process, as well as the processes of other lawyer-rating publications, such as Martindale-Hubbell, *The American Lawyer*, and *Best Lawyers in America*. Then, I explain why these services are so valuable to potential clients and to lawyers making referrals. I next discuss why we believe that a Connecticut attorney advertising his or her listing in a *Super Lawyers* publication would not run afoul of the Connecticut Rules of Professional Conduct, including the revised rules provisions that went into effect on January 1, 2007. Finally, I discuss some of the court cases and bar committee opinions addressing lawyers' ability to truthfully advertise that they have been listed in an independent, bona fide lawyer-rating publication.

Lawyer-Rating Publications and Their Selection Processes

A wide range of independent ratings and assessments of lawyers and law firms provide valuable information to consumers. Some of these ratings are largely subjective and others are somewhat

objective. Some are bestowed on many lawyers, and others are bestowed only on one or two lawyers a year. Some (like *Super Lawyers*) are subject to rigorous and highly transparent peer-review processes and quality checks, and others seem more subjective and opaque. The common feature of all these assessments is that they are made by entities that are entirely independent of the lawyers themselves and they rate lawyers only on the basis of quality, achievement, and reputation. Here is a brief description of the processes by which they select the lawyers in their ratings:

Super Lawyers. *Super Lawyers* is a group of magazines that publish articles of interest to lawyers, as well as lists of highly regarded attorneys in various practice areas. Each standalone magazine, which comes out once a year, covers a specific geographic market. *Connecticut Super Lawyers*, for example, covers lawyers in Connecticut, and the planned *New England Super Lawyers* magazine will cover the entire New England legal market (including Connecticut). Furthermore, the *Super Lawyers* lists are also published annually (sometimes along with editorial content) as inserts or special advertising sections in certain regional general-interest periodicals, such as *Connecticut Magazine*, and on its website, www.superlawyers.com.

Super Lawyers strictly adheres to a rigorous selection process directed at casting as wide a net as possible, evaluating quality in the most objective possible terms, and verifying and validating its data. The director of the research department is an attorney and the selection process is managed and conducted by an independent, dedicated research department staff. The only way a lawyer can be listed in a *Super Lawyers* magazine is through this selection process; no lawyer can ever buy her way on to the list. Lawyers (and other advertisers) can buy advertisements in *Super Lawyers* magazine and other local periodicals that publish the lists. But the determination whether a lawyer will be selected by *Super Lawyers* is independent of any advertising or other payments that are made to the magazine. In fact, advertising is only sold after the lawyer selection process has concluded. No one can “pay to play,” or influence the selection process in any illegitimate way.

The *Super Lawyers* selection process has five phases. **Phase One** is an extensive effort to identify the largest possible pool of the most highly regarded practitioners in the relevant state. Each year, *Super Lawyers* mails a ballot solicitation to virtually every lawyer resident in the relevant state and admitted to practice in the relevant market for at least five years. Nationwide, it will send ballots to 800,000 lawyers this year. Every recipient is asked to nominate the best lawyers he or she has *personally* observed in action. They are asked to base their votes on “first-hand knowledge, rather than reputation.” Attorneys may not vote for themselves, and are limited in how many colleagues from their own firm they can nominate. Every nomination is given a point value, with nominations from outside a lawyer’s firm bearing a much higher point value than a nomination from within the lawyer’s own firm. These points produce a Balloting Score, which is only one of several components of the Final Score that yields the ultimate rating.

Super Lawyers does not rest on external nominations alone. Its research staff also independently conducts a “star search” seeking qualified candidates by scouring professional databases, press, and websites, and by interviewing law firms’ managing partners and marketing directors—all with a view toward identifying highly talented lawyers who might have been missed in the balloting process, particularly talented lawyers in narrow specialty areas.

Phase Two is the evaluation process. *Super Lawyers* conducts independent research on every candidate, searching for evidence of peer recognition and professional achievement. It gathers information across 12 criteria: recent verdicts and settlements; transactions; representative clients; experience; honors and awards; special licenses and certifications; position within law firm; bar and or other professional activity; pro bono and community service; scholarly lectures and writings; education and employment background; and other outstanding achievement. Each criterion has a prescribed point range, yielding a separate Research Score.

Phase Three is peer evaluation by a Blue Ribbon Panel. The practitioners who receive the highest point values (top 10-20%) in their areas of practice (based upon combined scores in Phases One and Two) are recruited to be part of a Blue Ribbon Panel charged with the responsibility of rating all the other practitioners in the same practice area. In all, *Super Lawyers* designates up to 60 practice areas, which means they appoint dozens of Blue Ribbon Panels in each jurisdiction to evaluate the lists in their own areas of expertise. The panelists each are asked to evaluate those of the lawyers in their specialty area with whom they are familiar, and assign them a score. The panelists' scores are then averaged, and each candidate receives a Blue Ribbon Panel Score (or "BRP Score"). On rare occasions, a member of the Blue Ribbon Panel may also add to the pool qualified candidates who were not identified through the balloting and star search. These names are then reviewed by the research staff in the same manner as those candidates initially identified in the balloting process (Phase Two).

Phase Four is the final selection. The raw scores—the Balloting Score, Research Score, and BRP Score—are weighted and aggregated to yield a Final Score. Candidates are then grouped according to the size of their firms, to ensure an appropriate balance between lawyers in larger firms, smaller firms, and solo practitioners. On the basis of the Final Scores, the staff places the top lawyers in each law-firm-size category on the *Super Lawyers* list, until it has selected a number of candidates that equals 5% of the total active resident bar.

Phase Five is quality control. *Super Lawyers* uses a sophisticated attorney database to track all information relating to each attorney. The database includes individual records for more than one million attorneys. Essentially every contact with an attorney is captured in the database. The individual records include standard information on each attorney, including contact information, bar number, birth date, bar admittance date, law school, professional memberships and accreditation. They also include who voted for the attorney, whom the attorney voted for, the blue ribbon panel ranking, and research details. By tracking the voting record of each attorney, *Super Lawyers* is able to detect—and root out—any ballot manipulations such as "back scratching" (lawyers agreeing to vote for one another) and "block voting" (where members of the same law firm vote in a way to try to maximize their firm's numbers on the list). For example, *Super Lawyers* measures the correlation between those persons who voted for a particular lawyer and those that lawyer voted for—if the correlation is too high, back scratching is suspected and investigated. Similarly, if more than 10% of lawyers in a particular firm are on the lists, measures are taken to ascertain whether any block voting has occurred, or more generally, whether the listings are appropriate. Additional control mechanisms exist to prevent other types of ballot manipulations or result inconsistencies (such as law firm associates getting selected, or retired lawyers).

Before publishing its lists, *Super Lawyers* takes two additional steps. First, it conducts a Web-based search to ensure that any candidate for their lists has not been subject to public disciplinary proceedings or has any other outstanding matters that would reflect adversely on her. A candidate's disciplinary status is also confirmed with the appropriate regulatory body. Second, no lawyer's name is published unless she responds to an inquiry personally verifying the information to be published, and the magazine sends each lawyer a declaration to sign averring that she has never been subject to disciplinary or criminal proceedings.

Martindale-Hubbell Ratings. Martindale-Hubbell has served as both a listing and a ranking of attorneys nationwide for well over a century. Individual attorneys and firms wishing to be included in the Martindale-Hubbell directory, which is now available both in print and on-line, pay Martindale a significant listing fee each year. The listing fee for a large law firm can total more than \$100,000 per year. Martindale rates 45% of the more than 800,000 lawyers in its directories with letter grades. Martindale advertises that the purpose of these ratings is to "guide[] buyers of legal services and those referring business in making faster, smarter decisions." The ratings, focused on lawyers' legal ability and ethical qualifications, are based on confidential questionnaires and interviews with members of the bar and bench. Lawyers are evaluated at various points in their careers—about every five to eight years. Martindale initiates 80% of the reviews, while the remaining 20% are initiated by the lawyers themselves or a colleague. Lawyers who are found to meet the publishers' standards may be awarded letter grades commensurate with their experience level. Attorneys are awarded a grade of AV, BV, or CV based on their peer-reviewed level of experience and legal ability. (The "V" indicates that Martindale has concluded that the lawyer meets "very high" ethical standards; only lawyers who meet these standards are rated.) <http://www.martindale.com>. Martindale does not disclose the criteria or precise process by which it arrives at any of these grades. Approximately 21% of all attorneys in the Martindale directory (47% of all *rated* lawyers) receive an AV rating, 21% receive a BV rating, and 3% receive a CV rating; the remaining attorneys are unrated.

Martindale also publishes a book, *The Bar Register of Pre-Eminent Lawyers*, which it calls "the most exclusive directory of law firms," listing only those attorneys that "have earned the AV[®] Rating ... and have therefore been designated by their colleagues as preeminent in their field." Any firm including an AV-rated lawyer may be listed in this book—if it pays an additional fee. Martindale also operates lawyers.com, which it describes as a "consumer-oriented" lawyer referral website specifically targeted to "individuals and small businesses that need an attorney or law firm." The Martindale ratings are prominently featured on the website, which bills itself as "the most trusted source for identifying qualified legal counsel" and "the #1 online lawyer directory." For an additional cost, lawyers can pay for increased exposure on both martindale.com and lawyers.com. For example, attorneys can pay for a banner advertisement, for their listing to appear among the first on a search result list, or for an expanded biography.

Chambers USA Listings. Chambers is a London-based publisher that rates U.S. law firms and attorneys nationwide and publishes an annual directory entitled *America's Leading Lawyers for Business: 2006 The Client's Guide*. It ranks lawyers on a scale of one to six and designates "leading firms" in particular practice areas. It also labels top attorneys as "senior statesm[e]n," "star[s]," "up-and-coming individual[s]," and "senior associates to watch." These honorifics are based on submissions by the law firms and attorneys themselves, as well as by the "referees"

they designate—their clients, for the most part. Although Chambers does not publicly disclose its selection criteria or process, its publisher purports to “obtain a consistent market view” and bases its rankings on unsolicited submissions by law firms and personal interviews of 10,000 lawyers. The rankings also contain editorial comments on the individual attorneys and law firms that are written by Chambers’ staff. The comments are “derived from the research, with quotations used when they sum up the prevailing opinion of the market.” There is no charge to be listed in the guide, but lawyers or firms can “enlarge” their entry in the listing “at a cost based on the size of the profile they choose.” See <http://www.chambersandpartners.com>.

Best Lawyers in America. Published annually as a book, on-line listing, and advertising supplement to many publications, *Best Lawyers in America* lists lawyers and law firms that are considered at the top of their respective fields. Over a thousand corporations subscribe to *Best Lawyers* and potential clients use *Best Lawyers* “to locate counsel in unfamiliar jurisdictions for major legal matters.” Lawyers are nominated by a “voting pool,” but the editors will also consider unsolicited nominations from law firm marketing directors. The voting pool generally consists of lawyers who had attained the honor in the previous year. Members of the voting pool are asked to grade the nominees based on the question, “If you could not handle a case yourself, to whom would you refer it?” After the votes are tabulated, editors make the final decisions in “close cases” based both on comments that are made about a nominee during the polling process and on the grades of the voting lawyers. Lawyers do not need to pay to be listed in the publication, but may pay for a “bio page” containing additional information. In addition, lists drawn from the *Best Lawyers* listings are published in advertising-supported general-interest magazines, such as *New York Magazine*. See <http://www.bestlawyers.com>.

American Lawyer Litigation Department of the Year. Every other year, *The American Lawyer* magazine identifies the “Litigation Department of the Year,” and four runners-up. It also identifies the “Best” litigation department and runners-up in a variety of substantive arenas—such as intellectual property; labor and employment; and product liability. *The American Lawyer* explains its process, but it acknowledges that ultimately the choice is supremely subjective. It “invite[s] ... firms to report ... no more than five examples of ‘significant achievements’” in their litigation work. These submissions are reviewed by “reporters and editors” and “whittled down ... to a short list of finalists.” Magazine staff “visit[]” the finalists, and solicit “client references” as well. The firms are judged on six categories: pretrial, trial, settlements, appeals, pro bono, and “a catchall for other matters, including arbitration.” The editors admit that there is no precise formula used in weighing these categories. Ultimately, selection is largely based on the firm’s own ability to persuasively trumpet the strength of their litigation department to the magazine’s editors. *American Lawyer*, Jan. 2006, at 69.

American Lawyer A-List. *The American Lawyer* magazine also compiles a list of top law firms nationwide and dubs the top 20 in their rankings as the “A-List” of firms, which they also refer to as a “select group” of the “New Elite.” The rankings are based on both objective and subjective criteria: law firm revenues, pro bono work, attorney diversity, and associate “satisfaction,” all of which are quantified in some way and incorporated into a complex formula. In particular, the associate satisfaction scores are based on a written survey of mid-level associates at the relevant firms. Only those firms willing to provide *The American Lawyer* with the extensive information needed to tabulate these scores are considered. Due to the sensitive

nature of some of this information, particularly in the area of finances, some firms have decided not to participate. *American Lawyer*, June 2006, at 99.

Independent Ratings are Helpful to Consumers and Lawyers

These sorts of lawyer ratings are of great value to prospective clients who are hungry for any information that bears on quality, particularly information about a lawyer's reputation among peers. Just as consumers rely on independent ratings to guide other important decisions—such as what hospitals to go to or what colleges to attend—they should be allowed to consider similar bona fide ratings in the mix of information they assess as they choose legal counsel. These ratings are especially valuable to the average consumer, who cannot afford to hire the most famous lawyers, but nevertheless needs some signal to assure himself that the lawyer he is about to choose is reputable. There is nothing inherently misleading or untoward about advertising these ratings, so long as the rating entity is independent of the lawyers themselves, does not award ratings on the basis of financial contributions, and provides some explanation for the criteria and process by which the rating is made.

Indeed, one of the most important pieces of information a consumer (or a lawyer making a referral) can have about a lawyer is the lawyer's reputation among her peers. Under usual circumstances, current information on a lawyer's reputation is a better indication of quality than what school the lawyer graduated from 20 years earlier, what courts have admitted her, or her own reports on professional experience and expertise. Information about reputation is valuable to the consumer regardless of whether that reputation places the lawyer among the handful at the pinnacle of her field (as the *American Lawyer* rankings do) or places the lawyer in the top 5% of the pack (as the *Super Lawyers* rankings do). In fact, the latter information is far more valuable to the average consumer. The vast majority of consumers are not in a position to hire the lawyers who are reputed to be the absolute best in their fields. But that does not mean that they should settle for the worst, or even the bottom half. These consumers would still be eager to know whether the lawyer they are interviewing is perceived to be *near* the top of the pyramid. *That* is information that is much harder to come by, especially for a consumer who does not have a golden Rolodex or the capacity to reach the top lawyers directly for recommendations.

Consumers are not the only ones who need this information. The information is also valuable for other attorneys. Clients often ask their lawyers to refer them to specialists in other fields, or need legal assistance in other jurisdictions. When a lawyer does not have a personal connection with the relevant field or jurisdiction, she may wish to consult reliable publications that independently rate or assess lawyers to make an informed recommendation.

Of course, inclusion in any list is not a guarantee of quality, and exclusion is not a brand of mediocrity. Designation on a *Super Lawyers* list or the list of *America's Best Lawyers*, or designation as an *American Lawyer* Litigation Department of the Year, is just one piece of information that a consumer will consider in the mix in choosing which counsel to retain. Just as law school and class rank are relevant and permissible facts to reveal to consumers—even though it would be inadvisable to choose a lawyer on those facts alone—so, too, consumers should not be shielded from independent ratings, even though any one rating, alone, is never definitive.

There Is Nothing Misleading About Advertising One's Listing in Lawyer-Rating Publications

The central question before ethics committees like yours that review lawyer advertising generally is whether the ad is misleading within the meaning of Rule 7.1 of the ABA's Model Rules of Professional Conduct. Specifically, the question here would be whether a lawyer who truthfully advertises that he or she has been "AV rated" by Martindale-Hubbell, selected for inclusion in a *Super Lawyers* magazine, or works for a law firm that made *The American Lawyer's* "A-List" is misleading the public.

There is nothing inherently misleading in any such advertisements. Any reasonable consumer understands that a lawyer who is selected for inclusion in a *Super Lawyers* magazine cannot guarantee a winning jury verdict in a single bound, and that a lawyer recognized by peers on the *Best Lawyers* list, or an AV-rated lawyer, is not necessarily going to secure better results than a lawyer who, for whatever reason, did not. Consumers understand that these ratings are no more guarantees of success or superiority than a position on the law review, a degree from Harvard, or experience in 20 jury trials.

The reality is consumers have become adept at assessing these sorts of external ratings. They evaluate ratings in relation to some of their most important life decisions. Ratings are not just a part of choosing a DVD player or a car. They also guide consumers in the choice of colleges, heart surgeons, cancer centers, supported living communities, and investments. There is no reason to believe that the same consumers who use ratings in these (often foreign) arenas would be misled by similar ratings when it comes to choosing lawyers and law firms. To be sure, some of the assessments are more subjective than others. But the inherently subjective nature of peer reviews neither diminishes the value of the credential to consumers nor renders the resulting review misleading.

That is not to say that a rating could never be inherently misleading or used in a misleading manner. It would be misleading to report a rating as an implicit indication of merit, for example, if the rating entity listed any lawyer who was willing to pay a hefty fee. And it would be misleading to say, "Listed in *Winning Lawyers* four years running," without reporting that the rating is for golf scores not legal acumen, or that 90% of the lawyers in the state also made the list. In short, while there may be situations in which a lawyer improperly uses a rating to mislead—situations that would run afoul of any state's rules against misleading advertising—there is nothing inherently misleading about truthfully advertising the fact of an external rating that is independent and above board, particularly where the rating entity publicizes its process and selection criteria, as *Super Lawyers* does.

In addition to the general rule against misleading lawyer advertising, the commentary to revised Rule 7.1 suggests that a lawyer advertisement can be deemed false or misleading if it can lead a consumer to form an "unjustified expectation" about the results the lawyer can obtain, or makes an "unsubstantiated comparison" of the lawyer's services with those of other lawyers in a way that suggests that it could be substantiated. A lawyer who accurately reports his rating by an independent entity does not run afoul of these proscriptions either.

Advertising a listing or rating does not create an expectation of results. Consumers are well aware that a positive rating or a mark of approval from a private third party—for a doctor, a college, or a nursing home—should carry only so much weight in making an informed selection. There is no reason to believe that consumers of legal services would be confused by such ratings, when they are not at all confused about *New York Magazine's* Best Cardiology Department or *U.S. News & World Report's* listing of premier colleges. Because they know that each independent rating entity has its own selection processes, they would not have unreasonable expectations about the quality of a lawyer on one of the lists: They would simply be aware that the particular lawyer was sufficiently qualified to meet the applicable criteria.

Nor would a lawyer advertising his listing be making an “unsubstantiated comparison”—the substantiation comes from the existence of the independent, bona fide rating entity. So, a lawyer who advertises that he is “the best patent lawyer” in the state (in his own opinion) is making an unsubstantiated comparison, but a lawyer who states that she has been selected for inclusion in *Connecticut Super Lawyers* is not. In fact, the latter lawyer is not making a comparison at all; the rating publication (*Super Lawyers*, *The American Lawyer*, etc.) is the one that made the comparison—according to its published criteria. As discussed above, there could some day appear a bogus rating service whose standards were so loose (or nonexistent) that any lawyer advertising his inclusion therein would, in effect, be making an unsubstantiated statement. But *Super Lawyers*, with its carefully designed and quality-controlled selection process—and most (if not all) of the other services we know about—are bona fide rating services, and advertising one's inclusion on its lists is a meaningful, substantiated statement.

The commentary to Rule 7.1 further suggests that disclaimers might be appropriate in lawyer advertising involving comparisons or potentially creating client expectations. We do not believe that such disclaimers would necessarily be helpful in the current context. It would seem unnecessary to point out, for example, that a lawyer advertising that he had been “selected for inclusion in the 2006 edition of *Connecticut Super Lawyers*” would have to point out that this did not mean that he could win more cases than a lawyer who had not been selected, or that the selection was made based on that particular magazine's criteria, which may be different from other rating-services' criteria. As discussed above, consumers are quite familiar with independent ratings and rankings, and are able to extract meaningful information from them without being confused by the suggestion that highly rated products or services are inherently “better” than products or services that are rated lower or are unrated.

First Amendment Ramifications of Restricting Lawyer Advertising

The Supreme Court has long held that advertising by attorneys is valuable to consumers of legal services. *See, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350, 382 (1977). “[T]he prohibition of advertising serves only to restrict the information that flows to consumers,” and any move to “prohibit[] ... advertising serves only to restrict the information that flows to consumers.” *Id.* at 374. While attorney advertising that is inherently misleading can obviously be restricted, states have no such authority with respect to truthful advertising. *See id.* at 382-83; *see also Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990).

Precisely because an attorney's reference to a rating is not inherently misleading, it would violate the First Amendment to ban such references. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). Because some portion of the consumer public is largely unsophisticated on legal matters, almost anything a lawyer reports could be "potentially misleading" to someone. *Peel*, 496 U.S. at 100-01. But the possibility that a consumer might misunderstand a reference will not justify a blanket ban unless the reference is "inherently misleading." *Id.*; *see In re R.M.J.*, 455 U.S. 191, 203 (1982).

Thus, for example, the Court has invalidated state-bar rules that have prohibited attorneys from advertising: certification by the National Board of Trial Advocacy, a nongovernmental entity that attests to attorneys' having met a particular set of criteria relating to litigation experience, *see Peel*, 496 U.S. at 94-96; qualification as a Certified Financial Planner (CFP) by a private organization, *see Ibanez*, 512 U.S. at 138; and even the fact of "[a]dmi[ssion] to practice before the Supreme Court of the United States," *R.M.J.*, 455 U.S. at 205-06. Even though consumers might not understand the precise nature of these qualifications or know precisely who issues them, the Court has repeatedly concluded that such information (so long as it was truthful and issued by bona fide organizations) is helpful to consumers in their selection of counsel. *See Peel*, 496 U.S. at 109; *see R.M.J.*, 455 U.S. at 203; *cf. Ibanez*, 512 U.S. at 146. In each case, the Court held that "disclosure of ... truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information." *Ibanez*, 512 U.S. at 142 (quoting *Peel*, 496 U.S. at 108).

States are not powerless to address a scenario in which "unscrupulous attorneys" hold themselves out as having received a rating "issued by an organization that ... made no inquiry into [their] fitness, or by one that issued certificates indiscriminately for a price." *Peel*, 496 U.S. at 102; *see id.* at 110. In such a circumstance, disciplinary authorities—or committees such as yours—may investigate the rating organization's standards, and if they are found to be "bogus," conclude that advertising such a certification is misleading. *Id.* at 102, 109. But the possibility that some ratings might be bogus does not justify a prohibition against bona fide ratings.

That is presumably why the weight of authority to have evaluated the question has concluded that state ethics rules do not prohibit an attorney from truthfully advertising a listing in a publication that rates lawyers. Two federal courts have invalidated state rules forbidding attorneys from advertising their listing in lawyer-rating publications. *See Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (Martindale-Hubbell); *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614, 628 (E.D. Va. 2003) (*Best Lawyers in America*). The opinions of five state bar ethics authorities (in Arizona, Florida, Iowa, Tennessee, and Virginia)—including one approved by the state's highest court—have reached the same conclusion.¹ These courts and

¹ *See* Opinion No. 05-03 (Ariz. State Bar Comm. Rules Prof'l Conduct July 2005), available at <http://www.myazbar.org/ethics> (*Best Lawyers in America*); Letter from Ruth A. Smith, Assistant Ethics Counsel, Florida Bar to William C. White, Publisher, Super Lawyers (Apr. 20, 2006) (*Super Lawyers*), reproduced at http://www.superlawyersfacts.com/Appendix_2.pdf, at PA-000196; Opinion No. 05-03 (Iowa Sup. Ct. Bd. Prof'l Ethics & Conduct Mar. 8, 2005) (*Best Lawyers in America*), available at <http://www.iowabar.org/ethics.nsf>; Advisory Ethics Opinion 2006-A-841 (Tenn. Bd. Prof'l Resp.

committees all concluded that it is ethical for lawyers truthfully to provide this type of information to consumers, some after conducting an assessment of the nature of the listing in question and the processes used to determine its composition. Furthermore, the Federal Trade Commission recently has opined, in response to a call for public comments on a rule change in New York, that “literally accurate superlative descriptions (such as advertising that an attorney is listed among ‘*Super Lawyers*’ or ‘*America’s Best Lawyers*’, or that a lawyer has earned a ‘highest’ ‘AV’ ranking awarded by *Martindale-Hubbell*) ... may benefit consumers so long as they are neither false nor misleading.”² The New York authorities heeded the FTC’s call, and amended that state’s corollary to Rule 7.1 specifically to permit lawyers to include references to “bona fide professional ratings” in their advertising. N.Y. Code Prof’l Resp. § 1200.6(b)(1) (eff. Feb. 1, 2007).

The only outlier is New Jersey’s Opinion 39—authored by the New Jersey Supreme Court’s Committee on Attorney Advertising—which the New Jersey Supreme Court promptly stayed. *See Order, In re Opinion 39 of the Comm. on Attorney Advertising* (N.J. Aug. 18, 2006), reproduced at http://www.superlawyersfacts.com/Stay_Order.pdf. This past summer, the New Jersey committee not only concluded that attorneys in that state were forbidden from advertising their inclusion in *Super Lawyers* and similar magazines, but further enjoined them from providing biographical information to such magazines, and even from participating in the peer-review surveys that form part of their nomination and listing processes. *See Opinion No. 39, 15 N.J.L. 1549, 185 N.J.L.J. 360, 2006 WL 2382939, at *2-3* (N.J. Comm. Attorney Adver. July 24, 2006). But as the petition for review points out, both the committee’s process and its analysis were flawed. *See Petition for Review, In re Opinion 39 of the Comm. on Attorney Advertising* (N.J. filed Aug. 14, 2006), reproduced at http://www.superlawyersfacts.com/Petition_For_Review.pdf. The opinion did not even acknowledge the First Amendment, much less weigh its conclusion against the Supreme Court’s strictures. In addition, the Committee did not seek input from the publications themselves and ascertain the facts about the selection processes (which is required under New Jersey law), and thus based its decision on false impressions about the nature of *Super Lawyers*’ selection process. *See Opinion 39, 2006 WL 2382939, at *1 & n.1* (characterizing the “selection and ranking process” as “arbitrary,” even though it is both rigorous and published, and falsely concluding that “selection ... is focused upon encouraging lawyers to advertise”). For these reasons, we believe it is highly unlikely that Opinion 39 will survive the imminent judicial review.

Sept. 21, 2006), reproduced at <http://www.superlawyersfacts.com/tennesseepinion.pdf>; Legal Advertising Opinion A-0114 (Va. State Bar) (*Best Lawyers in America*), available at <http://www.vsb.org/committees/standing/advertising/a114.html>, approved by Order (Va. Aug. 26, 2005).

² Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission to Michael Colodner, Counsel, New York Office of Court Administration, at 3 n.10 (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-text.pdf>.

* * *

Whether or not the revised Connecticut Rules of Professional Conduct were intended to prohibit lawyers from truthfully reporting bona fide ratings, we imagine that many lawyers are concerned about whether they may permissibly do so, in light of New Jersey Opinion 39 and the publicity it has generated nationwide. Indeed, that is likely why your Committee is considering the matter. The very uncertainty about whether such advertising is permissible is of great concern to the tens of thousands of lawyers nationwide listed in *Super Lawyers* magazines or other lawyer-rating lists—and to my client. We thus hope that the CBA ethics subcommittee and the full Committee will take the opportunity to fairly and thoroughly review this matter. We hope that this letter will assist you in that endeavor.

If you or any Committee member has any further questions regarding *Super Lawyers*, please do not hesitate to contact me.

Respectfully submitted,



David P. Atkins