

SUPREME COURT OF NEW JERSEY
DOCKET NO. 60,003

IN RE OPINION 39 OF THE)
COMMITTEE ON ATTORNEY)
ADVERTISING,) Civil Action
)
) On Petitions for Review
) of an Advisory Opinion
) of the Committee on
) Attorney Advertising
_____)

BRIEF IN OPPOSITION TO PETITIONS FOR
REVIEW OF OPINION 39 ON BEHALF OF RESPONDENT
COMMITTEE ON ATTORNEY ADVERTISING

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STATEMENT OF THE CASE¹

This matter has its genesis when the Committee on Attorney Advertising (the "Advertising Committee" or "Committee") received a written inquiry dated May 19, 2005 from Lloyd Levenson, Esq. (ACa1).² Therein, Mr. Levenson generally questioned the propriety of advertisements that appeared in a magazine entitled "New Jersey Super Lawyers 2005," suggesting that the advertisements ran afoul of prior Opinions issued by the Advertising Committee and violated provisions of New Jersey's Rules of Professional Conduct ("RPC"). Mr. Levenson forwarded the Committee a copy of the "New Jersey Super Lawyers 2005" magazine (ACa29-120), a copy of a letter dated December 17, 2004 congratulating him on his selection as a "Super Lawyer" and "encourag[ing him] to tout [his] status as a New Jersey Super Lawyer" (Aca5) [along with a copy of an "order form" for the purchase of extra copies of the magazine and/or a mounted personalized "Super Lawyer" certificate (ACa6-7)] and a copy of a solicitation from "U.S. 1 Newspaper Business Law 2005" for advertisements to appear in "U.S. 1's" June 8, 2005 newspaper

¹ The Procedural History and Statement of the Case are combined herein for ease of reference.

² References to documents included within the Appendix to this Brief will be identified as ACa (for "Advertising Committee."). References to documents included within the Joint Appendix filed by Barr, et al. and Key Professional Media will herein be referenced as BKPMa, to documents included within the Joint Appendix filed by Hoberman and Woodward/White, Inc. as HWWa, and to documents included within the Appendix filed by *New Jersey Monthly* as NJMa.

(which was to include a listing of more than 100 Central Jersey "Super Lawyers") (ACa4).

In a series of subsequent letters, Mr. Levenson provided the Committee with copies of advertisements touting the "Super Lawyer" designation (in media other than the "Super Lawyers Magazine") (ACa10, 14), and a copy of a mailing he received from an individual attorney who had been named as one of the "Top 10" "Super Lawyers" in 2005 thanking his colleagues for nominating him on the "Super Lawyers" ballot. (ACa12-13). Mr. Levenson additionally provided the Advertising Committee with copies of documents he received from Key Professional Media (the publisher of "Super Lawyers Magazine") in November 2005, to include a letter congratulating him on his selection as a "New Jersey Super Lawyer" for 2006 (and again encouraging him to tout his status), solicitations to place advertisements in both the "New Jersey Super Lawyers 2006 Magazine" and in a special "Super Lawyers" advertising section to be published in *New Jersey Monthly* magazine, and general information concerning the methodology used to select "Super Lawyers." (ACa15-25).

During the pendency of its review of this matter, the Committee expanded its inquiry to include review of advertisements wherein attorneys promoted their selection to be included in "The Best Lawyers in America" (ACa26-28). The Committee had opportunity to review both the 2005 and 2006 stand-alone "Super Lawyers"

magazines (ACa29-120, BKPMa4-103) and the May 2005 and April 2006 *New Jersey Monthly* magazine's "Super Lawyers" advertising inserts (ACa121-208, ACa209-313). Those publications include numerous examples of the sorts of advertisements that were ultimately found to be objectionable by the Committee.³ The Committee additionally had opportunity to review advertisements placed by attorneys touting the designation "Super Lawyer" or "Best Lawyer" in other communication medium.⁴

³ It is noted that, within its appendix, petitioners Barr, et al. and Key Professional Media Inc. include a copy of a 2006 "Rising Stars" edition of Super Lawyers magazine (BKPMa104-147) and an August 2006 "Rising Stars" supplement to *New Jersey Monthly* magazine (BKPMa148-180). Neither of these magazines were specifically reviewed by the Committee, as both bear publication dates after the issue date of Opinion 39. The four magazines which are specifically referenced within Opinion 39 are the 2005 "Super Lawyers" stand alone magazine (ACa29), the 2006 "Super Lawyers" stand alone magazine (BKPMa4), and the 2005 and 2006 "Super Lawyers" magazine inserts published in *New Jersey Monthly* (at ACa121 and ACa209, respectively).

⁴ Advertisements wherein individual attorneys or law firms tout the "Super" or "Best" lawyer designations were readily available for Committee review, as all four magazines are peppered with advertisements placed by individual "Super Lawyers" or by their law firms, as well as with individual and law firm "biographies," which in actuality are paid advertisements composed in whole or in part by the subjects of the "biographies." (ACa19-22).

Advertisements touting individual attorneys' designation as "Super" or "Best" lawyers in other communication medium were also reviewed by the Committee. Representative samples (all of which were directly brought to the Committee's attention in Mr. Levenson's letters) include an advertisement placed in the Atlantic City Press congratulating an attorney "upon being voted one of the State's TOP 100 SUPER LAWYERS (Among New Jersey's 80,214 Lawyers)" Atlantic City Press, July 13, 2005, p. C3 (emphasis in original) ACa14); a mailing sent by a "Top 10" "Super Lawyer" thanking his
(continued...)

The Committee was able to review information concerning the selection methodologies utilized by both "Super Lawyers" and by "The Best Lawyers in America," as that information was readily and publicly accessible both in printed publications (i.e., in "Super Lawyers" magazines and in "The Best Lawyers in America" annual publication) and on websites maintained by both publishers. See www.superlawyers.com; www.bestlawyers.com. Several significant facts concerning "Super Lawyers"' selection methodology and marketing strategy (gleaned from review of those materials that were before the Advertising Committee and/or those materials that have been submitted in supplementation of the record by the intervenors) warrant discussion. First, the list of attorneys that are designated as "Super Lawyers" in any given year is a list that is ultimately the end-product of a process that begins with the mailing of ballots soliciting votes for proposed "Super Lawyers" to New Jersey attorneys with five years or more experience. Attorneys who receive the ballots are asked to vote in response to the following inquiry: "[of] the New Jersey lawyers whose work you have observed first-hand, who are the current best?" (while the ballots are sent to attorneys with five years or more experience, it

⁴(...continued)
colleagues for voting for him and touting his having been designated as both a "Super" and a "Best" lawyer (ACa12-13); and an advertisement placed by a New Jersey law firm in a Law Journal magazine supplement entitled "2005 Directory of New Jersey In-House Counsel" congratulating nine of the firm's lawyers for having been named as "Super Lawyers." (ACa9-10).

appears that attorneys may vote for any attorney regardless of the number of years of experience that attorney may have). No explanation of reasons why any given individual may be nominated are requested or required on the ballot form (ACa315).⁵

Approximately 30,000 ballots were mailed by Key Professional Media to New Jersey attorneys for the 2006 selection period (BKPMa259, Certification of Charles Thell, ¶5). Key Professional Media does not inform the Court of the number of ballots that were returned.⁶

The ballots mailed to attorneys in 2006 allow an individual to vote for up to 14 attorneys, seven of whom may be from the voter's own law firm (ACa315). At the conclusion of the selection process, a full 5% (1 of every 20) of New Jersey lawyers are designated as "Super Lawyers." (ACa317). Those attorneys are

⁵ The balloting process appears to be the primary source for selection of individual attorneys to be *Super Lawyers*. In a "fact sheet" entitled "Super Lawyers in a Nutshell," which accompanied the ballots sent to New Jersey attorneys in 2006, Key Professional Media states (in response to a question "How are Super Lawyers selected?") that "the foundation of the process is a survey sent to active lawyers in the state." (ACa317).

⁶ It was reported in *The New York Times* that only 4.8% of the ballots sent to New Jersey lawyers were returned. See Donovan, Karen, Some Lawyers Ranked 'Super' Are Not the Least Bit Flattered, The New York Times, September 15, 2006 (ACa319). Assuming the statistic to be accurate and further assuming that the number of ballots mailed was 30,000, the number of ballots actually returned with nominations in 2006 would equal approximately 1,440. More than 1,650 lawyers are listed in the "Super Lawyers 2006 Magazine"; thus, the number of lawyers selected to be "Super Lawyers" apparently exceeds (by more than 200) the number of lawyers who participate in the voting process.

then listed in the "Super Lawyers" magazine and in the *New Jersey Monthly* "Super Lawyers" insert. Attorneys who purchase advertisements are featured in the lists in red, bold print, whereas the names of those who do not purchase advertisements appear in black print. The magazines further differentiate among the "Super Lawyers" by including lists of the "Top 10," "Top 100" and "Top 50 Female" "Super Lawyers." see, e.g., ACa217, 219.

Individual attorneys who are designated to be included on any given year's list of "Super Lawyers," or those attorney's law firms, are solicited by Key Professional Media to place advertisements in both the "Super Lawyers" stand alone and *New Jersey Monthly* magazines (ACa15-25). Advertisements may take one of three forms -- the advertisement may be a "standard profile," a "platinum profile" or a "display advertisement" (ACa20-22).⁷ In

⁷ Rates for advertisements appearing in the 2006 "New Jersey Super Lawyers" magazine and/or the 2006 *New Jersey Monthly* "Super Lawyers" advertising insert were:

Type of Advertisement	<i>New Jersey Super Lawyers Magazine</i> Alone	<i>New Jersey Monthly Super Lawyers Advertising Insert</i> Alone	Both Publications
"Standard Profile"	\$1,495	\$1,495	\$2,495
"Platinum Profile" Full Page	\$6,595	\$8,940	\$12,780
"Platinum Profile" 2-Page Spread	\$10,995	\$16,135	\$22,820 (continued...)

addition, it appears that Key Professional Media solicits attorneys to purchase reprints of the magazines and plaques which "commemorate" an attorney's selection as a "Super Lawyer." (ACa6-7).

"The Best Lawyers in America" publishes an annual compendium listing those attorneys who are selected to be designated as "Best Lawyers." (Certification of Steven Woodward Naifeh, ¶3, HWWa11). While the Advertising Committee notes in its opinion that there appear to be substantial differences in the methodologies employed by Key Professional Media and Woodward/White, Inc. to develop their respective lists, it is the case that lists compiled by "The Best Lawyers in America" are ultimately the product of a "peer-review survey." Id. at ¶5, HWWa12. The rankings must therefore be expressly recognized to be subjective.

Within Opinion 39, the Advertising Committee noted that "The Best Lawyers in America" seems to be "trending" to a "Super Lawyer's" business plan. Support for that statement can in fact be gleaned from the materials submitted by petitioners Hoberman and Woodward/White, as Mr. Naifeh, the President of the publisher of "The Best Lawyers in America," concedes in his certification that Woodward/White has "allowed" "several major city and regional publications, (e.g., *New York* magazine and *San Diego* magazine)" to

⁷(...continued)

Display Advertisements	\$1,525 to \$8,995	\$2,405 to \$14,135	10% Discount
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(ACa21-22).

"use our lists as the basis of special advertising sections" in return for "a percentage of the advertising revenue these publications solicited." Id., ¶15, HWWa15.⁸

Some sixteen months after receiving Mr. Levenson's initial inquiry, the Advertising Committee issued Advisory Opinion 39 on July 24, 2006. Central to the opinion is the lodestar determination that consumers -- specifically, non-attorney members of the general public -- may readily be misled by advertisements touting attorneys as "Super" or "Best" lawyers.

Petitions for review of Opinion 39 were filed by Jon-Henry Barr and five other attorneys who were designated as "Super Lawyers" and by Stuart A. Hoberman, an attorney who has been designated as a "Best Lawyer in America." The publishers of both "Super Lawyers" (Key Professional Media, Inc.) and "The Best Lawyers in America" (Woodward/White, Inc.) were granted leave to intervene, as was *New Jersey Monthly* magazine.⁹ Opinion 39 was

⁸ The Advertising Committee's observation finds further support in information publicly available at www.bestlawyers.com/news/news.asp?event_id=28; therein, in a "note from the editors" addressing Opinion 39, Woodward/White concedes that "we decided that it was in the interests of lawyers listed in our publication, in the interest of the legal profession and in the interest of potential clients to make our lists available editorially and 'advertorially.'" (ACa324).

⁹ A total of three legal briefs in support of the petitions for review have been filed. The individual "Super Lawyers" and Key Professional Media filed a brief dated August 14, 2006; petitioner Hoberman filed a brief dated August 24, 2006; and *New Jersey Monthly*, filed a brief dated September 18, 2006. The Attorney
(continued...)

stayed by Orders of the Court entered August 18, 2006 and September 6, 2006.

⁹(...continued)

General filed a Verified Petition on October 18, 2006, seeking an extension of time to file a consolidated reply brief through November 3, 2006, which Petition was granted by Order of the Court filed on October 23, 2006.

ARGUMENT

POINT I

THE ADVERTISING PROHIBITIONS SET FORTH IN
OPINION 39 SHOULD BE UPHELD BECAUSE MISLEADING
ADVERTISING, TO INCLUDE COMPARATIVE
ADVERTISING AND ADVERTISING THAT IS LIKELY TO
CREATE AN UNJUSTIFIED EXPECTATION ABOUT
RESULTS, IS NOT PROTECTED BY THE FIRST
AMENDMENT AND IS SUBJECT TO OUTRIGHT
PROHIBITION.

The foundation underpinning the advertising prohibitions set forth in Opinion 39 is the Committee's determination that advertising by attorneys which promotes or touts self-aggrandizing titles such as "super lawyer" or "best lawyer" is intrinsically misleading. Misleading advertising falls outside the sphere of protection afforded commercial speech by the First Amendment, and may be prohibited in its entirety. New Jersey's Rules of Professional Conduct expressly forbid lawyers from making false or misleading communications about the lawyer or the lawyer's services, and expressly define a communication to be false or misleading if it compares the lawyers' services with other lawyers' services or is likely to create an unjustified expectation about results the lawyer can achieve. R.P.C. 7.1(a)(2), R.P.C. 7.1(a)(3). So long as the Court is satisfied that there is an adequate basis to sustain the Committee's conclusion that the advertising is misleading, the Court should reject all claims that the advertising prohibitions established within Opinion 39

transcend the free speech rights of either the petitioning attorneys or the intervening publishers.

Although both Key Professional Media ("KPM") and Woodward/White ("WW") argue that Opinion 39 should be overturned because the Committee did not adequately consider the methodology used by either publisher to generate the annual lists of "Super Lawyers" and "Best Lawyers in America" respectively, the Committee did not need to consider either publisher's selection methodology. Simply stated, the selection methodology does not matter because the labels that the publishers confer on those attorneys who are selected to be included on their respective lists -- namely, the labels "super" and "best" -- are labels that are inherently misleading.

The Advertising Committee's decision should thus properly be read, in the first instance, to be an indictment of the promotion and advertising of labels such as "Super Lawyer" or "Best Lawyer," rather than an indictment of the process used by either KPM or WW to select those who are included on each year's lists. The Committee's predicate finding that the labels "super" and "best" are misleading can be supported under either a practical analysis of the message that such advertising is likely to convey to consumers, or under a literal analysis and application of the definition of a "false or misleading communication" that is set forth within R.P.C. 7.1 -- once the advertising is recognized to be

misleading, Opinion 39 may and should be sustained without need for additional legal analysis.¹⁰

- a. **Opinion 39 Should be Sustained in its Entirety because Misleading Advertising -- Particularly Advertising of Subjective Claims Concerning the Quality of an Attorney's Services -- is not Advertising that is Protected by the First Amendment.**
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The principles governing the standards for judicial review of restrictions on advertising by attorneys are well established. Advertising by attorneys was first recognized to be a form of commercial speech protected by the First Amendment in Bates v. State Bar of Arizona, 433 U.S. 350, 383, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). The Supreme Court therein recognized that commercial speech generally is "calculated" and that the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Id. The Court thus held that the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. Id. See also Zauderer v. Ohio, 471 U.S. 626, 637, 105 S. Ct. 2265,

¹⁰ This is not to suggest that the Committee's express reservations about the arbitrariness and subjectivity of the methodologies employed by KPM and WW are insignificant; rather, as will be addressed in Point II herein, the Committee's opinion may be sustained for the independent reason that the methodology used to select attorneys for designation as "Super Lawyers" or as "Best Lawyers" lacks objectivity. For the reasons set forth above, however, the Court need go no further than the argument within Point I if it concurs with the Committee's conclusion that the act of promoting oneself as a "Super Lawyer" or as a "Best Lawyer" is *per se* misleading, because there simply is no protection afforded misleading commercial speech.

85 L. Ed. 2d 652 (1985) (commercial speech is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech;" advertising falls within those bounds); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 454, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) (commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

Misleading advertising secures no protection under the First Amendment. The Supreme Court has consistently recognized that attorney advertising that is false, deceptive or misleading is subject to restraint. States are therefore free to entirely prohibit actually misleading as well as "inherently" misleading commercial speech. In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); Friedman v. Rogers, 440 U.S. 1, 11, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979) ("untruthful speech, commercial or otherwise, has never been protected for its own sake ... obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."); Zauderer, supra, 471 U.S. at 638 (states are free to

prevent the dissemination of commercial speech that is false, deceptive or misleading).

The Supreme Court has also consistently cautioned that advertising claims that speak to the quality of services provided by an attorney are particularly suspect, and has repeatedly suggested that such claims may be restricted. When initially deciding that attorney advertising was commercial speech generally subject to the protections of the First Amendment, the Court was careful to caution that "advertising claims as to the quality of services -- a matter we do not address today -- are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." Bates, supra, 433 U.S. at 383-84. The Supreme Court also recognized in Bates that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Id.¹¹ See also Zauderer, supra, 471 U.S. at

¹¹ The Supreme Court was careful when deciding Bates to specifically limit the scope of its holding to the advertising of the prices of certain "routine" legal services because that sort of advertising was not 'inherently' misleading. The Court cautioned that the holding should not be taken to apply to advertisements relating to the quality of legal services:

The issue presently before us is a narrow one. First, we need not address the peculiar problems associated with advertising claims relating to the *quality* of legal services. Such claims probably are not susceptible of

(continued...)

641, n. 9 (1985) ("our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services"); cf. also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 481, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988) (O'Connor, J., dissenting) (noting that "the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the 'free sample' may be much more serious."). The New Jersey Supreme Court has likewise recognized that subjective claims concerning an attorney's reputation may be prohibited "because of the inordinate difficulty of assuring the accuracy of [information centered on an attorney's reputation]." Petition of Felmeister and Isaacs, 104 N.J. 515, 527 (1986).

Advertising that one has been selected as a "Super" or "Best" lawyer is advertising that inferentially speaks to the quality of services and representation provided by the advertising

¹¹(...continued)

precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. Appellee does not suggest, nor do we perceive, that appellants' advertisement contained claims, extravagant or otherwise, as to the quality of services. Accordingly, we leave that issue for another day.
[433 U.S. at 366].

attorney.¹² When an attorney advertises, in any advertising medium, that he or she has been selected as a "super" or "best" lawyer, that attorney necessarily seeks to trumpet to the consumer that he or she is a better lawyer than one of his or her peers who is neither "super" nor "best."¹³ The fact that an attorney has been selected to be a "super" or "best" lawyer on an annual list published by KPM or WW, however, does not reasonably support an

¹² Consideration of inferences that consumers are likely to draw from advertisements is a necessary and proper function of bodies charged with regulating the permissible scope of attorney advertising. Consider Florida Bar v. Pape, 918 So. 2d 240 (2005), cert. denied, ___ U.S. ___, 126 S. Ct. 1632, 164 L. Ed. 2d 335 (2006), wherein the Florida Supreme Court rejected First Amendment challenges to a disciplinary action imposed against two attorneys for advertising which used an image of the head of a pit bull with a spiked collar as the firm's logo and prominently displayed the firm's phone number "1-800-PIT-BULL." In concluding that the advertisement violated a Florida Rule of Professional Conduct which prohibited the use of statements describing or characterizing the quality of the lawyer's services, the Court's opinion was necessarily based not on any statistical evidence or studies that sought to measure or otherwise quantify the effect that such advertising was likely to have on consumers, but rather on practical consideration and analysis of the message that was likely to be inferred by consumers -- namely, that "a reasonable consumer [would be led] to conclude that the attorneys are advertising themselves as providers of 'pit bull'-style representation." 918 So. 2d at 244.

¹³ The consumer may readily be misled into believing that the label-bearing attorney can produce superior results, thus lending the illusion of validity to the bearer of the label. Indeed, the very label "Super Lawyer" may readily conjure up images of comic-book super heroes. At least one advertisement placed in the 2006 *New Jersey Monthly* "Super Lawyers" advertising insert sought to build upon that very image, as it included a statement: "IN THE PROFESSION, THEY'RE SUPER LAWYERS. AMONG OUR CLIENTS, THEY'RE SUPER HEROES." (Capitalization in original). See advertisement placed by White and William, LLP (ACa257).

inference that the attorney is in fact superior to his or her peers.

In this case, the Advertising Committee's actions represent nothing more than an effort to protect consumers who are likely to be the target audience for advertisements placed in publications such as *New Jersey Monthly*, "U.S. 1 Newspaper" or the "Atlantic City Press" from misleading advertising claims. Within Opinion 39, the Advertising Committee properly recognizes that those consumers cannot and should not be expected to be sufficiently discriminating to be able to differentiate in anything but a subjective manner between a "super" lawyer (or, for that matter, any of a wide variety of adjectives that might be employed to convey superiority) and a "non-super" (perhaps a good or even an ordinary) lawyer.¹⁴ Lawyers who advertise their selection as "Super" or "Best" lawyers necessarily imply that they are in fact deserving of the advertised accolade (query why one would advertise the designation otherwise?), but in doing so those lawyers mislead

¹⁴ It is entirely appropriate to consider the audience at which an advertisement is aimed when analyzing whether any particular advertisement is or is not misleading. See *Bates, supra*, 433 *U.S.* at 383, n. 37 ("The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience ... Thus, different degrees of regulation may be appropriate in different areas."). In this case, given that advertisements touting designations as "Super" or "Best" lawyers appeared in newspapers and magazines generally circulated to consumers, the Committee's analysis properly focuses on whether the advertisements may be misleading to everyday consumers, as consumers are the individuals who will likely be the target audience for such advertisements.

the consuming public, because there simply is no basis to equate the fact that KPM or WW might name an individual as a "Super" or "Best" lawyer with any inference or suggestion that the designated attorney is in fact a better quality attorney than a non-designated peer.¹⁵ The advertising should thus be recognized to be the very type of advertising which both the United States and New Jersey Supreme Courts have suggested may be restricted. The advertising ban effected by Opinion 39 should be sustained because it is entirely consistent with the long line of cases that have recognized the special problems inherent with attorney advertising that includes subjective claims concerning the quality of an attorney's services, and the need for the States to be afforded

¹⁵ It is necessarily the case that the above analysis is subjective, rather than objectively girded on results of studies or surveys of consumers regarding the likely inferences that consumers might draw from any given advertisement. In the context of review of attorney advertisements, the Court has condoned the use of "common sense" analysis, even in the absence of empirical data. As was stated in Felmeister and Isaacs, supra :

Given the lack of substantial reliable knowledge as to the effects of attorney advertising, we believe the Constitution allows the state (here this Court) to use common sense and that which it believes is common knowledge in determining the likely facts We do not believe that the first amendment requires a state to abandon the pursuit of what it sincerely and reasonably believes to be substantial state interests simply because, in the nature of things, conclusive proof is lacking.

[104 N.J. at 545-46].

deference to prohibit such advertising in its entirety without running afoul of the First Amendment.¹⁶

b. Advertising of the Designation "Super Lawyer" And/or "Best Lawyer" is Definitionally "Misleading" Pursuant to R.P.C. 7.1.

As noted above, the Advertising Committee could have determined that cause existed to prohibit attorneys from advertising designations of "super" or "best" lawyer, even without considering the Rules of Professional Conduct, based on the Committee's determination that the advertising is fundamentally misleading. In this case, however, the Committee's conclusion is buttressed, and, indeed, an entirely independent basis for the action taken by the Committee exists, based on application of R.P.C. 7.1. Advertisements that tout the labels "super" or "best"

¹⁶ The remaining proscriptions within Opinion 39 all are logical extensions of the fundamental proscription that attorneys may not advertise the label "super" or "best" lawyer. Advertising by an attorney within an insert to a magazine that is populated solely with listings of so-called "super lawyers" is advertising necessarily designed to further promote the "super lawyer," and the Committee's concern that such advertising is inevitably likely to seek to convey that message to the reader is not subject to reasonable question.

Additionally, the Committee's edict that attorneys should refrain from participating in surveys that are taken for the purpose of generating inherently comparative descriptive labels is again a logical extension of the Committee's underlying position that the labels being generated are misleading. Given the Committee's position that New Jersey attorneys would be engaging in unethical conduct were they to promote the labels being generated by the surveys, it was reasonable for the Committee to caution attorneys against participating in the survey process.

clearly fall within the definition of "misleading" established in R.P.C. 7.1(a), and those advertisements are therefore prohibited.

R.P.C. 7.1(a), in no uncertain terms, proscribes misleading communications. The Rule specifies that advertising is "false or misleading" if it "is likely to create an unjustified expectation about the results the lawyer can achieve," R.P.C. 7.1(a)(2) and/or if it compares the lawyer's service with other lawyers' services. R.P.C. 7.1(a)(3). Advertising that one is a "super" or "best" lawyer is misleading for both reasons. See Felmeister and Isaacs, supra, 104 N.J. at 526 (recognizing that R.P.C. 7.1, to a significant extent, precludes attorneys from advertising the quality of their services).

While the petitioners may argue that the Rules of Professional Conduct are not violated where an advertisement does not expressly reference results that might be obtained by an attorney or specifically compare one attorney with another, the Rules of Professional Conduct should not be interpreted in such a crabbed fashion. Rather, the relevant consideration is what the advertisement is likely to connote to a consumer; in this case, it is reasonable to believe that a consumer will infer that a "super" lawyer has been so designated because he or she has skills and acumen exceeding that of his or her peers, and because he or she will be able to achieve results that exceed the results that might be obtained by a mere ordinary lawyer.

The Court should also eschew any suggestion that the Committee could not have concluded that the advertising in question in fact violated the Rules of Professional Conduct without a broader factual record or without objective survey data to support that conclusion. Indeed, the Court has already recognized the particular difficulty with, and elusive nature of, attempting to create an objective data base to support what are necessarily subjective observations and determinations, and has sustained prohibitions on attorney advertising in instances where the record did not include quantifiable supporting evidence. See Felmeister and Isaacs, supra, 104 N.J. at 544-47. The Advertising Committee's work would seemingly be stymied (not only in this matter but conceivably in the vast majority of matters) were the litmus test for applying any proscription within the rules of Professional Conduct to be a requirement for statistical validation.

It should be recognized that Opinion 39 is not the first opinion issued by the Committee to proscribe advertising that one is the "best" in his or her field. Rather, Opinion 39 is entirely consistent with, and is in essence an extension of, Opinion 8, "Quoting the Statement of Another Which, if Made by an Attorney, Would be Considered False or Misleading", 127 N.J.L.J. 753 (March 21, 1991). In Opinion 8, the Committee concluded that an attorney could not advertise that she had been "introduced by a talk show host as 'the best divorce lawyer in the country,'" as to do so

would be the same as if she herself had claimed that she was the best divorce lawyer in the country, which would be a violation of R.P.C. 7.1(a)(3). The Committee further stated in Opinion 8 that:

An attorney is no less responsible for the content of an advertisement because the words were uttered by another. Consequently, we hold that an attorney may not employ endorsements, testimonials or other statements attributable to another in order to circumvent the Rules of Professional Conduct governing attorney advertising.

In this case, attorneys should not be allowed to do an end-run around R.P.C. 7.1 simply because the label "super" or "best" is conferred by a commercial third party. Rather, the advertising attorneys should be considered to be attempting to circumvent the Rules of Professional Conduct by promoting a misleading moniker, just as the subject of Opinion 8 was considered to be seeking to circumvent the rules by advertising that a talk show host had called her the "best" divorce lawyer.

Finally, it should be noted that the petitioners' reliance on decisions made by sister state bar entities (which decisions have condoned certain forms of advertisements placed by attorneys promoting the designation "Best Lawyer in America" or "Super Lawyer") is misplaced.¹⁷ The decisions referenced in no way

¹⁷ In fact, while it is the case that certain other states have concluded that lawyers may advertise their selection as a "Super Lawyer," the decisions dovetail in significant respects with the Advertising Committee's opinion, because the advertising allowed is substantially limited by disclaimer requirements. (continued...)

constitute binding precedent in New Jersey. New Jersey's Rules of Professional Conduct are not the mirror image of those rules which were considered by sister states,¹⁸ as New Jersey has elected not

¹⁷(...continued)

Although Florida has apparently concluded that its attorneys may advertise the label "Super Lawyer," (BKPMa196), it did so with the caveat that any advertisement must include a reference to the specific magazine wherein the label was conferred. Florida further concluded that the use of the term "Super Lawyer" by itself characterizes the quality of legal services being offered, and therefore warned that any such characterization would violate a Florida rule that prohibits an attorney from "mak[ing] statements describing or characterizing the quality of the lawyer's services in advertisements and written communications." Florida Rule 4-7.2(b)(3).

In a similar ilk, the Philadelphia Bar Association concluded that an attorney could advertise that he or she has been designated a "Super Lawyer," but only when "the advertisement contains sufficiently detailed information about the process and criteria for the reader to whom the advertisement is directed, to determine the manner and context within which the designation was made." See Philadelphia Bar Association, Opinion 2004-10. (ACa326).

¹⁸ As Petitioners point out, some other states have condoned the propriety of advertising that one is a "Super Lawyer" or a "Best Lawyer." Petitioner's cite to Arizona Ethics Opinion 05-03 in support of their claim that other states have condoned the advertisement of the fact that one is listed in "The Best Lawyers in America." While the Arizona Committee on the Rules of Professional Conduct has issued an advisory opinion in 2005 wherein it concluded that an Arizona attorney could advertise his inclusion in "The Best Lawyers in America" so long as the advertised representation was truthful and included the year in which and the specialty for which the lawyer was listed in the publication, the Committee expressly noted that the conclusion was expressly dependent on analysis of a modified professional conduct rule which defined a "false or misleading" communication to be a communication containing "a material misrepresentation of fact or law, or [a communication that] omits a fact necessary to make the statement considered as a whole not misleading."

to modify R.P.C. 7.1 to conform with the ABA's Model Rule 7.1¹⁹ and instead applies a Rule that includes more detailed and specific prohibitions on attorney advertising than are found in the Model Rule.²⁰

New Jersey's Rules include a *per se* prohibition on advertisements that are comparative in nature and on advertisements that are likely to create unjustified expectations about results that can be achieved.²¹ Given that the labels "super" and/or "best"

¹⁹ A.B.A. Model Rule 7.1 was modified in 2002 and now provides:

Communications concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

²⁰ The Court has recognized that New Jersey's Rules of Professional Conduct are stricter than those of most states. See Felmeister and Isaacs, supra, 104 N.J. at 544.

²¹ Given the Court's constitutional authority to promulgate and enforce the Rules of Professional Conduct, see N.J. Const. Art. VI, § 2, P 3, the Court has flexibility in interpreting the Rules of Professional Conduct unavailable to the Committee. Accordingly, it could choose to interpret R.P.C. 7.1 as establishing something other than a *per se* ban on the advertisements at issue here. If it so chooses, the Court could look to the analysis of attorney advertising contained in Arizona Ethics Committee Opinion 05-03, supra, which noted that, under the relevant Rule in Arizona, "[t]he reference to comparative statements ... now must be viewed as a tool for engaging in proper analysis of the ethical requirements

(continued...)

lawyer are labels that are necessarily and inextricably associated and intertwined with the purported quality of the attorney, what the Advertising Committee ultimately sought to prohibit in Opinion 39 was nothing less than advertising claims trumpeting the quality of services provided by an attorney. The advertising is clearly comparative, and clearly designed to create expectations about results that can be achieved. Opinion 39 should be sustained, thus, because it is ultimately compelled by application of R.P.C. 7.1 (a)(2) and 7.1 (a)(3).²²

²¹(...continued)

for advertising ... and **not** as a requirement *per se*." [Emphasis in original.] As the Opinion explains, a comment to the Rule provides that a comparative statement is misleading if the comparison is "presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." The Opinion ultimately concluded that a lawyer's listing in *The Best Lawyers in America* was misleading only if the advertisement "omit[ted] a fact necessary to make the statement considered as a whole not misleading." Were the Court to adopt such an approach, it would of course be free to enunciate, consistent with the First Amendment, its own requirements for necessary limitations, qualifications, and disclosure to ensure that any given advertisement was, in its entirety, not misleading.

²² In its discretion, the Court could choose to reexamine the text of R.P.C. 7.1 and to consider whether cause exists to amend the rule in a manner consistent with the modifications that have been made in the Model Rules. In such event, the Court may consider referring the matter to the Professional Responsibility Rules Committee, for review of the issues raised and solicitation of comments from interested persons and groups. See R.M. v. Supreme Court, 185 N.J. 208 (2005).

POINT II

THE PROHIBITIONS ON ADVERTISING THE DESIGNATION "SUPER LAWYER" WITHIN OPINION 39 SHOULD BE SUSTAINED BASED ON APPLICATION OF PEEL v. ATTORNEY REGISTRATION AND DISCIPLINARY COMM'N, 496 U.S. 91 (1990).

Even were the Court to conclude that the advertisements at issue were neither fundamentally nor definitionally misleading (and therefore not subject to outright prohibition under established First Amendment principles), the ban on attorney advertising effected by Opinion 39 should be sustained for the independent reason that the methodology for selecting attorneys to be listed as a "Super Lawyer" or a "Best Lawyer in America" is inherently subjective, and thus subject to prohibition upon application of the precedent established in Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990). An integral part of the process employed by both KPM and WW to determine who will be in their respective lists is the surveying and/or interviewing of attorneys and other law firm representatives. Ultimately, then, both lists are generated based on subjective opinions expressed by a limited number of individuals. Significantly, neither list is created by application of universally applied, objective criteria.

In Peel, the Supreme Court upheld the right of an attorney to include factual information on his letterhead regarding his certification as a civil trial specialist by the National Board

of Trial Advocacy (the "NBTA").²³ The Court cautioned, however, that its opinion was ultimately based on a threshold showing that the NBTA in fact applied measurable and objective criteria prior to awarding certification. The Court admonished that "if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading." Peel, supra, 496 U.S. at 102.²⁴

While attorneys may be being truthful when they state that they have been selected as a "Super Lawyer" or as a "Best Lawyer in America," that truthfulness does not equate into

²³ While the Peel decision focused on advertisement of a certification conferred on an attorney, there is no logical reason to distinguish, for purposes of First Amendment analysis, between a "certification" and a "designation" or "label" conferred by a commercial publisher.

²⁴ The Supreme Court reasoned in Peel that the claim made by attorney Peel that he was certified as a civil trial specialist was properly distinguishable from statements of opinion as to the quality of an attorney's work. The Court thus found that a lawyer's certification by NBTA was a "verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice." 496 U.S. at 101.

The NBTA certification considered in Peel is markedly distinguishable from the designations at issue herein, as one need demonstrate no minimum experience or education requirements, nor pass any objective examination, in order to be designated a "Super" or "Best" lawyer.

protected speech under the Peel test. Rather, the Supreme Court cautioned in Peel that:

A lawyer's truthful statement that "XYZ Board" has "certified" him as a "specialist in admiralty law" would not necessarily be entitled to First Amendment protection if the certification were a sham. 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 (emphasis added)].

The Advertising Committee's ban on advertising of "Super Lawyer" or "Best Lawyer" designations should thus be sustained so long as the Court concludes that the selection processes are subjective, and that the labels are not conferred on, or available to, all lawyers who meet consistently applied, objective standards. There is nothing in the record, even as it has been supplemented, which would in any way support a finding that the labels "Super Lawyer" or "Best Lawyer" are available to all lawyers that meet objective standards; rather, it is clear that objective standards are not applied.

Similarly, there is nothing in the record, even as supplemented, that would in any way suggest or prove that the selection methodologies employed by either publisher produce lists which are scientifically or statistically valid. The Advertising Committee specifically found the methodology employed by KPM to select attorneys for inclusion on the list of "Super Lawyers" to be

"arbitrary" (and noted the inherent subjectivity of the "Best Lawyer" selection methodology when commenting that the process "is based solely on peer review interviews.").²⁵ The Committee's finding that the "Super Lawyers" selection process is "arbitrary" is necessarily buttressed by the fact that attorneys may cast votes for seven members of their own firm to be "Super Lawyers."²⁶ Equally disturbingly, it appears that a full 5% of practicing attorneys are designated "Super Lawyers," notwithstanding that it

²⁵ Prior to issuing Opinion 39, the Committee reviewed available information, including information printed in "Super Lawyers Magazine" and that posted on the internet (see www.superlawyers.com), which details the selection methodology employed by KPM to generate the list of "Super Lawyers" in any given year. While both KPM and *New Jersey Monthly* complain that they were not contacted by the Committee prior to the issuance of Opinion 39 and further suggest that the Committee's opinion may well have been different had the opportunity been provided to either or both intervenors to provide information concerning the selection process to the Committee, their claims are belied by the fact that information detailing the selection methodology is readily available within the public domain. Further, even were the Court to harbor any concerns regarding the adequacy of the record before the Committee, those concerns should be assuaged presently in light of the supplementation of the record which the Court has allowed.

²⁶ While KPM's literature suggests that voting is monitored and that a weighting process is applied, in fact, even a cursory review of the final lists of "Super Lawyers" generated in both 2005 and 2006 suggests that biases in the process exist. It thus appears that the overwhelming majority of attorneys selected as "Super Lawyers" practice in larger firm settings, and that exceedingly few public sector attorneys were selected as "Super Lawyers" in both 2005 and 2006.

has been reported that less than 5% of New Jersey's attorneys even return ballots.²⁷

Finally, the admonition in Peel that it could be misleading to truthfully advertise a certification if that certification were issued by an entity that issued certificates indiscriminately for a price cannot be herein ignored, given that KPM derives substantial income from the publication of "Super Lawyers" magazines, and the related marketing of advertisements within those magazines.²⁸ As conceded in Mr. Thell's certification, Super Lawyers' primary source of revenue is advertisements purchased by attorneys listed in the Super Lawyers magazine and the inserts in regional magazines. (Certification of Charles F. Thell, ¶7, BKPMa60). Indeed, Mr. Thell details that "Super Lawyers" derives in excess of [REDACTED] of annual revenue from its activities in New Jersey." Id. at ¶15.

²⁷ The subjectivity of the selection process employed by KPM and WW stands in marked contrast to the objectivity of certification programs, in particular the Court's own standards for obtaining certification. In order to obtain Supreme Court certification, an attorney must establish eligibility and satisfy requirements regarding education, experience, knowledge and skill, and must successfully complete a written examination on the area of practice for which certification is sought. See R. 1:39, generally. The criteria for certification by the Court are defined, and the certification is universally available to all who meet objective criteria.

²⁸ "Best Lawyers" also now generates income by providing its lists to regional magazines, and then obtaining a percentage of the advertising revenue generated upon publication of the lists. (HWWa15).

KPM's claim that its selection process is divorced from its subsequent advertising efforts should be seen as illusory. KPM generates substantial business income by soliciting designated "Super Lawyers" to advertise in its publications (or to buy magazine reprints or plaques), and "encourages" selected attorneys to "tout" their designation as a "New Jersey Super Lawyer." At a minimum, it would appear that KPM's election to designate five percent of all attorneys to receive the "Super Lawyer" label in any given year is not only arbitrary, but also likely a product of a need to ensure a large enough pool of individuals to solicit for advertising and other marketing efforts (indeed, the transparency of the economic motivation for keeping the pool of "Super Lawyers" at 5% of the attorney population is only magnified when one considers that the number of ballots returned is likely less than the number of "Super Lawyers" selected). One can further speculate that the apparent biases in the selection process (see n. 24, *supra*) may be a product of the need to ensure that marketing efforts focus upon those attorneys who will ultimately be the most likely candidates to purchase advertisements.

Simply put, the fact that KPM (and, to perhaps a lesser degree, WW) depends on advertising revenue to support its operations necessarily belies any claims that there is entire separation between the selection process and the subsequent marketing efforts, and raises concerns that the designation may be

considered to be one issued by an entity that is issuing "certificates indiscriminately for a price." When coupled with the fact that the entire selection process is obviously not based on universally applied objective criteria, it should be clear that the advertising prohibited by Opinion 39 is not advertising that would otherwise be subject to protection under the First Amendment.

POINT III

THE ADVERTISING BAN EFFECTED IN OPINION 39 SHOULD BE UPHELD, IN WHOLE OR IN PART, UNDER THE CENTRAL HUDSON TEST, FOR THE ADVERTISING BAN DIRECTLY ADVANCES SIGNIFICANT STATE INTERESTS AND IS NOT MORE EXTENSIVE THAN NECESSARY TO SERVE THE STATE INTERESTS.

Even were the Court to conclude that the advertising at issue is truthful advertising and not per se misleading, the prohibitions effected by Opinion 39 should be sustained, in whole or in part, upon application of the Central Hudson test. In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Supreme Court established a four-part analysis to be applied in commercial speech cases:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

[447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)].

A series of related state interests which are promoted through banning advertising by attorneys as "Super" or "Best" lawyers may readily be identified. It has long been recognized that "States have a compelling interest in the practice of professions within their boundaries, and that as part of their

power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Ibid. ; see also Ohralik v. Ohio State Bar Ass'n, supra, 436 U.S. at 460 (1978) (recognizing that the state has a general interest in protecting consumers and a special responsibility to maintain standards among lawyers).

The state has a substantial interest in "maintaining public confidence in the bar and in the professionalism of its members." See In the Matter of Anis, 126 N.J. 448, 457 (1992). To accomplish that end, the state has a related substantial interest in enforcing rules of professional conduct and preventing advertising that will tarnish the dignified public image of the legal profession, to include advertising of claims of superiority such as claims that one is a "super" or "best" lawyer.

It is further the case that the state has a substantial interest in ensuring the accuracy and relevancy of commercial information in the market-place, which interest is only accentuated where the product being advertised is professional services.

Additionally, the state has a related substantial interest in preventing the potentially misleading effects of advertisements, as well as the corrosive effects that such advertising can have on appropriate professional standards. See Shapero, supra, 486 U.S. at 486 (O'Connor, J., dissenting opinion). Finally, the state has a substantial interest in assuring that citizens' decisions about their selection of counsel are made in a rational matter rather than an emotional matter. See Felmeister and Isaacs, supra, 104 N.J. at 535.

Once substantial state interests are properly identified, the third prong of the Central Hudson test requires that a finding be made that the state interests are in fact advanced by the restriction being analyzed. In this case, the advertising ban effected by Opinion 39 promotes each of the identified state interests.²⁹ Advertising that one is a "Super" or "Best" lawyer

²⁹ It is necessarily the case that the determination whether the State's substantial interests are promoted by the advertising ban effected by Opinion 39 is subjective and not a determination supported by factual proof. In this sense, however, the record before the Advertising Committee is just like the record that was considered in Felmeister and Isaacs, supra, 104 N.J. 515. Therein, the Court eschewed the suggestion that empirical studies or similar data would be required to support a conclusion that the state's interests are in fact promoted by a restriction on commercial speech:

The rule [that factual proof is required to justify restrictions on commercial speech under Central Hudson] is apparently not quite so rigid. In *Ohralik*, for instance, the substantial state interest that justified a
(continued...)

ultimately places the legal profession on a plane similar to that of any other commercial seller. While the state interest in preventing the undesirable effects of puffing or other subjective claims of superiority may not be particularly strong where the product being advertised is a beverage or a household item, the interests are acute when the claims made concern the services of attorneys. See Felmeister and Isaacs, supra, 104 N.J. at 526, 536 (recognizing that "attorney advertising raises the understandable and realistic concern that the legal profession will degenerate into just another trade" and that "the Constitution [does not require] that the rules governing attorney advertising be the same as those applicable to beer, automobiles, or casino hotels."); see

²⁹(...continued)

total ban on in-person solicitation for pecuniary gain under certain circumstances was that, under those circumstances, lawyers are likely to be able to coerce clients in a manner inimical to the client's interest in retaining the attorney. A reading of both the United States Supreme Court and Ohio Supreme Court opinion makes it clear that there was no record support for the proposition that this kind of adverse effect will occur sufficiently often to warrant the prophylactic rule. ... As the Supreme Court said in *Zauderer*: "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead'."

[104 N.J. 545].

also Anis, supra, 126 N.J. at 455 ("The time has not yet come, however, when we must view the practice of law as akin to the sale of aluminum siding.").³⁰ Clearly, then, the substantial state interests that support the regulation of attorney advertising are promoted by the restrictions on misleading advertising that the Advertising Committee sought to enforce within Opinion 39.

The final prong of the Central Hudson analysis requires that the regulation or restriction in question be appropriately proportional to the state interest. Petitioners argue that the restrictions effected by Opinion 39 are excessive. They further suggest that even if the regulation promotes recognized state interests, the Committee could have fashioned appropriate disclaimer language in lieu of outright prohibition. Petitioners' argument, however, misses the mark. As the Court recognized in Felmeister and Isaacs, supra, in this field (i.e., regulation of attorney advertising) the only alternative to outright restrictions are requirements of disclosure. 104 N.J. at 538. Restrictions may be sustained where disclosure requirements would be impractical and less than effective in achieving the same goal as would be achieved by restriction, and when disclosure requirements might be more

³⁰ It may also be noted that the need for the Supreme Court to carefully and scrupulously regulate attorney conduct and advertising is heightened because attorneys are outside the scope of the Consumer Fraud Act, and thus claims seeking redress for misleading advertising by attorneys cannot be pursued under the Consumer Fraud Act. See Macedo v. DelloRusso, 178 N.J. 340 (2004).

likely to befuddle than to enlighten. Id. at 539. In this case, the Advertising Committee reasonably eschewed crafting disclosure requirements and instead imposed a prophylactic ban.³¹ See Florida Bar v. Went For It, Inc., 515 U.S. 618, 633, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (in upholding Florida rule which prohibited attorneys from sending targeted direct mail solicitations to accident victims for 30 days after the accident, the Court rejected claims that the Florida rule could have been more narrowly drawn, noting that the Central Hudson test was satisfied where the Bar's rule was reasonably well tailored to its stated objectives); see also Ohralik, supra, 436 U.S. at 468 (recognizing that prophylactic rules may, in certain cases, be necessary and appropriate in furtherance of the state's interest in protecting the lay public).

Finally, it is particularly significant to recognize that the Supreme Court has clearly held that the Central Hudson test does not require that a showing be made that the advertising restriction at issue satisfy the "least-restrictive-means" test. Rather, the Court has held that the "least-restrictive-means" test

³¹ In Felmeister and Isaacs, supra, the Court rejected the disclosure requirement in favor of "requiring the advertiser ... to delete the material that constitutes the risk," in part, based upon "judicial notice of the absence of experience in [the field of attorney advertising] on the basis of which one might arrive at an informed judgment as to the effectiveness of disclosure requirements in presumably otherwise emotional ads," as well as the Court's collective knowledge because the record before the Court did not address the issue of which of the two approaches would be more effective in protecting the consumer. 104 N.J. at 538-39.

has no role in the commercial speech context. See Board of Trustees v. Fox, 492 U.S. 469, 477, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). All that is required is that a fit exist between the ends and the means chosen to accomplish those ends. The fit need not necessarily be perfect but instead need only be reasonable, and the fit selected does not necessarily have to represent the single best disposition. Id. (citations omitted)³²; see also Went for It, 515 U.S. at 632.

Given the principles established in Fox, the Court need not determine whether the concerns that the Committee sought to redress in Opinion 39 could have been assuaged by requiring disclaimers to be placed in advertisements. Rather, the Court need only be satisfied that an advertising ban was one reasonable means to seek to advance the substantial state interests which militate against allowing attorneys to advertise labels such as "Super" or "Best" lawyer. It is submitted that such a determination is readily supportable, and that Opinion 39 should therefore be sustained under the Central Hudson test.

³² In Fox, the Supreme Court reviewed a series of prior decisions wherein advertising restrictions were invalidated, and noted that in each case the invalidated provisions did not extend only marginally beyond what would have adequately served the governmental interest, but instead were restrictions which were substantially excessive and were placed with apparent disregard for 'far less restrictive and more precise means.' Fox, supra, 486 U.S. at 479. The Court also noted that those decisions which upheld regulation of commercial speech could not be reconciled with a least-restrictive-means test. Id.

POINT IV

OPINION 39 DOES NOT DENY PETITIONERS EQUAL PROTECTION OF THE LAW BECAUSE A RATIONAL BASIS EXISTS FOR THE DISTINCTIONS DRAWN BY THE COMMITTEE BETWEEN "SUPER" AND "BEST" LAWYERS AND MARTINDALE HUBBELL.

Petitioners' contention that Opinion 39 is unconstitutional because it denies them equal protection of the laws should be rejected, because the Committee had a rational basis to distinguish between "Super Lawyers" and "Best Lawyers" and rating organizations such as Martindale-Hubbell ("MH"). The Committee reasonably drew a distinction between the petitioners' labels and those conferred by MH based on the Committee's perception of the likelihood that any particular label might mislead the public. The distinction is also reasonable because, while KPM and WW impose no limitations on the medium in which their rankings may be promoted or mentioned (indeed, KPM specifically encourages attorneys to "tout" their designation as a "Super Lawyer"), MH imposes restrictions on attorneys, and precludes attorneys from using or mentioning MH ratings in medium that would likely have wide circulation (to include yellow page, newspaper and outdoor advertisements, as well as radio and television commercials). Finally, the Committee could reasonably have considered MH's multi-tiered rating system to reasonably be more discriminating than KPM's or WW's rating systems.

Initially, it should be noted that the classifications being challenged herein affect neither a fundamental right nor a suspect class.³³ In the absence of a fundamental right or a suspect classification, courts apply a rational basis standard to determine whether a government restriction denies equal protection. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312; 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). State and local governments generally can meet the rational basis standard by showing that their actions are rationally related to legitimate state interests. Under a rational basis review, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. Massachusetts Board of Retirement, *supra*, 427 U.S. at 527. The Supreme Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. McGowan v. Maryland, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. Id. at 426. A classification that does not involve a fundamental right or proceed

³³ Petitioners' contention that a heightened level of scrutiny is required because Opinion 39 affects communications protected by the First Amendment should be rejected for the reasons set forth in Point I herein. Misleading communications are not protected by the First Amendment and are therefore subject to outright prohibition.

along suspect lines is accorded a strong presumption of validity. Heller v. Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Under a test of rationality, it is the Petitioner's burden to show that the law is not rationally related to a legitimate state interest. Id. at 320.

The petitioners cannot meet their heavy burden to show that there is no conceivable rational basis for the distinctions drawn in Opinion 39, because there are in fact viable and rational reasons why the Committee elected to draw distinctions between "Super Lawyers," "Best Lawyers" and lawyers receiving "AV," "BV" or "CV" ratings from MH.³⁴ As suggested previously, the primary interest which the Committee sought to further in Opinion 39 was the interest in protecting consumers from the evils of misleading

³⁴ MH provides the following descriptions of the three ratings conferred:

"CV" -- "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" -- "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" -- "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."

See www.martindale.com; (HWWa32).

advertising. When viewed through the lens of what a consumer is likely to infer, it is simply not subject to reasonable dispute that a viable and real distinction can be drawn between labels that use self-aggrandizing, superlative adjectives to describe an attorney, and those that do not. There is thus a rational basis for the distinctions drawn in Opinion 39 between the petitioners and MH.

It should be noted that the fact that the Committee did not specifically comment upon any rating organizations other than "Super Lawyers," "Best Lawyers" and "Martindale Hubbell" should not be read to suggest that any other rating entities would be afforded disparate treatment. Opinion 39 sets forth a defined roadmap for determining whether any given label would be misleading, and in fact applies to "advertisements describing attorneys as 'Super Lawyers,' 'Best Lawyers in America,' or similar comparative titles." (emphasis added). The fact that other rating organizations are not discussed thus should not be taken to suggest that the Advertising Committee condoned use of whatever labels those rating organizations may confer; rather, whether or not any given label would be subject to the same limitations as those imposed on the "super" and "best" labels would depend on the label itself. Clearly, if a new rating organization were in the future to rank attorneys and convey a label such as "greatest," "magnificent," or "outstanding" (or, indeed, any of countless

synonyms for "super" or "best" that one might elect to use), it would seem beyond dispute that advertising such labels would run afoul of Opinion 39, regardless how exacting the standards might be for obtaining the label.

Additionally, the distinctions drawn in Opinion 39 should survive an equal protection challenge for the reason that there are certain significant differences between MH's ratings and the prohibited "Super" and "Best" lawyer ratings. MH apparently imposes experience requirements that an attorney must satisfy before he or she can receive a given rating, and it thus appears that only attorneys who meet threshold minimum experience requirements can obtain the higher ratings.

Even more significantly, a rational basis for distinguishing the MH ratings from those proscribed in Opinion 39 exists based on the fact that MH places limitations on the advertising of its labels, in stark contrast to "Super Lawyers" and "Best Lawyers." While KPM encourages lawyers to tout the "Super Lawyer" moniker, MH prohibits attorneys from using or mentioning its ratings in communication medium with large circulations and which would most likely target consumers with little knowledge or familiarity with lawyers, to include "yellow page" and "newspaper" advertisements as well as all radio and television advertisements. [See www.martindale.com; "Peer Review Ratings -- Usage Guidelines", (HWWa 29, 30)]. It was thus fair and reasonable for the Committee

to conclude that MH's ratings "are familiar to other lawyers and likely have minimal recognition to the public," because MH's labels would not likely be promoted or touted to a broad consumer audience as have the "Super" and "Best" lawyer designations.

The Committee's express justifications for prohibiting advertisements describing attorneys as "super" or "best" lawyers, and the concomitant justifications for not extending the prophylactic ban to advertisements using less familiar and non self-aggrandizing labels, are reasonable and more than adequately meet the rational basis standard of review. Petitioners' equal protection challenges should therefore be summarily dismissed.

POINT V

**THE COMMITTEE PROPERLY CONSIDERED THIS MATTER
BY WAY OF ADVISORY OPINION, WHICH AFFORDS THE
PETITIONERS/INTERVENORS NO INHERENT RIGHT TO
BE HEARD.**

The petitioners/intervenors assert, in what are necessarily related arguments, that: 1) the Advertising Committee should have proceeded by way of guideline rather than by way of Advisory Opinion, and 2) that the Committee's election to proceed by way of advisory opinion in essence foreclosed the petitioners from having an opportunity to present information to the Committee or otherwise appear before the Committee or be heard, which in turn is alleged to constitute a deprivation of due process rights. Petitioners' challenge is not viable, however, because there simply are no requirements -- within the Court Rules or elsewhere -- that would dictate that the Committee needed to promulgate guidelines to respond to the inquiry received from Mr. Levenson or dictate that the Committee needed to afford individual attorneys (or business entities) an opportunity to be heard prior to issuance of Opinion 39.

The Court rules clearly vest the Advertising Committee with the authority to issue an advisory opinion where the Committee receives an inquiry in writing questioning the propriety of a particular advertisement. Rule 1:19A-3. In fact, the Advertising Committee commenced its review of this matter after receiving just such an inquiry from a member of the bar. Significantly, the Court

Rule nowhere suggests that the determination whether to proceed by way of advisory opinion or by way of advertising guideline should be made based on the likely impact or effects that any advisory opinion may have on the bar or on any commercial entities. Rather, the Rules vest the Committee with the discretion to travel either procedural pathway, provided that, in the case of an advisory opinion, the threshold requirement that a complaint or inquiry from a member of the New Jersey bar be received by the Committee is satisfied. The Committee's decision to proceed by way of issuing an advisory opinion was thus in conformity with the Court Rules.

Petitioners' claims that they were denied due process because they were not afforded an opportunity to participate in the Committee's deliberations, or otherwise afforded an opportunity to appear before the Committee prior to the issuance of Opinion 39, should likewise be summarily rejected. There simply is no legal requirement, within the Court Rules or elsewhere, that mandates that the Advertising Committee seek out or involve in its deliberations any individual attorney or business entity that might be affected by application of any decision the Committee might make by way of Advisory Opinion.³⁵ Indeed, were the Committee to be

³⁵ Even in the case of an Advisory Opinion that considers the propriety of an individual attorney's advertisement, there is nothing within the Rules that requires the Committee to provide notice to the individual attorney whose advertisement is being questioned. While the Rules do contemplate that the Committee may entertain oral argument, the decision whether to do so is entirely
(continued...)

required to notice and involve all parties who might be in some way affected by any advisory opinion the Committee might issue, the Committee's very functioning could be threatened (at a minimum, such a requirement would exponentially swell, and likely frustrate, the work of the Committee).

Further, it should be noted that, even had the Committee elected to proceed by issuing advertising guidelines, the intervenors in this case (KPM, WW and *New Jersey Monthly*) would not have been afforded any right to comment on any proposed guidelines. Pursuant to R. 1:19A-2, only the bar is afforded an opportunity to comment on proposed advertising guidelines. The petitioners do not, and cannot, cite to any holdings that would suggest that commercial publishers, such as *New Jersey Monthly*, have an inherent right to participate in proceedings of the Advertising Committee, notwithstanding the self-evident fact that all opinions of the Advertising Committee which conclude that attorneys may not publish a certain form of advertisement have spill-over effects on publications that might otherwise accept the prohibited advertisement.

Finally, all of the parties to this action have in fact been afforded the right to seek review of the proposed action of the Committee by filing petitions for review. While the Rules

³⁵ (...continued)
discretionary. R. 1:19A-3(a) and (b).

contemplate that the petitions should be filed only by aggrieved members of the bar, a bar association or ethics committee, in this case no objections were raised when Key Professional Media, Woodward/White and *New Jersey Monthly* sought leave to intervene, and in fact all have had an opportunity to present their positions to this Court. It is therefore submitted that, even were the Court to harbor concerns that the Committee did not seek out information from any of the intervenors prior to issuing Advisory Opinion 39, those concerns have been ameliorated by the Court's allowing the intervenors to be heard on review, by the Court's grant of the requests to supplement the record, and by the Court's having stayed Opinion 39 pending conclusion of its review.

CONCLUSION

For the reasons set forth above, the Attorney General urges that the Court reject the Constitutional challenges made to Opinion 39.

Respectfully submitted,

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DATED: November 13, 2006

SUPREME COURT OF NEW JERSEY
DOCKET NO. 60,003

IN RE OPINION 39 OF THE)
COMMITTEE ON ATTORNEY)
ADVERTISING,) Civil Action
)
) On Petitions for Review
) of an Advisory Opinion
) of the Committee on
) Attorney Advertising
)

APPENDIX IN OPPOSITION TO PETITIONS FOR
REVIEW OF OPINION 39 ON BEHALF OF RESPONDENT
COMMITTEE ON ATTORNEY ADVERTISING
VOLUME I (A1 to A170)

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