

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF THE PETITION
FOR REVIEW OF COMMITTEE ON
ATTORNEY ADVERTISING OPINION 39

Civil Action

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Petitioners,

- and -

KEY PROFESSIONAL MEDIA, INC.
(d/b/a "Super Lawyers" and "Law
& Politics")

Proposed Intervenor-Petitioner.

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**PETITION FOR REVIEW OF COMMITTEE ON ATTORNEY
ADVERTISING OPINION 39**

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STATEMENT OF THE CASE

The petitioners¹ are six members of the New Jersey Bar who seek review, pursuant to R. 1:19A-3(d), of Opinion 39 (the "Opinion"), published by the Committee on Attorney Advertising on July 24, 2006 (see *N.J.L.J.*, *N.J. Lawyer* for that date). The proposed intervenor is Key Professional Media, Inc., the publisher of Super Lawyers Magazine. The Opinion [Petitioners' Appendix ("Pa") 1] imposes a blanket ban on attorney advertisements that appear in the annual New Jersey Super Lawyers Magazine [Pa4], as well as in a contemporaneous advertising supplement of New Jersey Monthly Magazine. [Pa148] New Jersey Super Lawyers Magazine is distributed to lawyers. New Jersey Monthly Magazine is directed to the public. [Pa199]

The Opinion [Pa1-3] declares that disclosure by an attorney that he or she has been selected as a "Super Lawyer" violates RPC 7.1(a)(3) on the ground that such advertisements are inherently comparative and misleading, and violates RPC 7.1(a)(2) on the ground that such advertising is "likely to create an unjustified expectation about results" the lawyer could achieve. The Opinion also deems it improper for New Jersey lawyers to participate in

¹ Jon-Henry Barr, Esq., of Clark, N.J. [Pa233]; Glenn A. Bergenfield, Esq. of Princeton, N.J. [Pa237]; Cary B. Cheifetz, Esq. of Summit, N.J. [Pa241]; Maria DelGaizo Noto, Esq. of Matawan, NJ [Pa245]; Andrew J. Renda, Jr., Esq. [Pa249] and John S. Voynick, Jr., Esq., both of Cedar Grove, N.J. [Pa253]

the peer review balloting conducted by the Minnesota-based publisher of Super Lawyers, but considers it proper for attorneys to participate in a survey conducted by Martindale-Hubbell. [Pa3] The Committee approves Martindale-Hubbell's attorney rating system (AV, BV or CV), which forms the basis of its comparative advertising, its Bar Register of Preeminent Lawyers and its websites at www.martindale.com and www.lawyers.com. As justification for the different treatment, the Opinion offers that Martindale-Hubbell's ratings are "directed toward other attorneys" and that "[t]hese ratings are familiar to other lawyers and likely to have minimal recognition to the public." [Pa3]

This Opinion's adverse effects on the Bar have been immediate and widespread. An entire publication has been shut down and scores of New Jersey attorneys that previously used their Super Lawyers selection to promote their practices can no longer do so. On July 31, 2006, the New Jersey State Bar Association wrote to the Committee asking that "the Committee stay enforcement of Opinion 39 pending further review by either your Committee or the New Jersey Supreme Court." [Pa181] On August 4, 2006, Petitioners and Key Professional Media Corp. requested that the Committee reconsider its Opinion pursuant to R. 1:19A-3(c) and seek input from the Bar because of its wide ranging impact. [Pa183] The Committee rejected both requests [Pa185], necessitating this Petition pursuant to R. 1:19A-3(d).

Had the Committee made any factual inquiry of Super Lawyers, it would have learned that the methodology used by Super Lawyers is, in fact, clear, reliable and fair. [Pa186]² If questions remained, the Committee could have gone to the publisher's website, www.superlawyers.com, for a more detailed explanation of the methodology. [Pa187] And if the Committee still had any unanswered questions, it could easily have communicated directly with the publisher.

The opposite occurred. At no time before release of the Opinion did Super Lawyers receive any communication from the Committee seeking information on the methodology used in selecting "Super Lawyers." [Pa271, 284] Had an inquiry been made, Super Lawyers personnel would have promptly furnished any information the Committee sought and, if necessary, would have appeared before the Committee. [Pa273] For example, the relevant committees on attorney advertising for Florida and Virginia made such inquiries, and Super Lawyers promptly provided all information sought. [Pa189-95, 284] Florida has specifically approved Super Lawyers Magazine. Virginia's decision is pending. [Pa272]

² The Committee's examination seems to have been confined to looking at the page in the magazine summarizing the selection process. [Pa2, n.1] From that alone, the Committee concluded that the process was "arbitrary" and without "empirical or legally sanctioned support." The Opinions states that Super Lawyers did not make its "specific methodology" available for review. The Committee never asked Super Lawyers for its methodology or, for that matter, anything else.

The Super Lawyers selection process is divided into four phases: (1) Creation of a candidate pool. Super Lawyers mails more than 30,000 Ballots to New Jersey lawyers admitted to the bar for at least five years. [Pa266] Accompanying the ballot is a full description of the selection process. Super Lawyers' research staff also engages in its own search for qualified candidates. (2) Research. Research is conducted utilizing twelve search criteria. Each attribute is given a specific point value. (3) Peer Evaluation by Practice Area. Review and refinement of the candidate pool is conducted by practitioners receiving the highest point values in their areas of practice. (4) Selection. Once all point totals are counted, candidates are grouped according to the size of their firms. The top five percent in each category are named Super Lawyers. [Pa270]

Super Lawyers has built-in safeguards to prevent balloting irregularities. All ballots are inspected for evidence of manipulation. No self-nominations are permitted. Super Lawyers monitors and discards any excessive block voting and "back-scratch" voting whereby lawyers vote for one another. Votes for members of one's own firm are not accepted unless there is an equal number of votes for lawyers outside the firm, and within-firm votes are weighted less heavily than votes for outside attorneys. Each candidate is checked for disciplinary action, researched on the internet, and personally contacted to ensure the

accuracy of information. A candidate who does not return his or her personal data verification is removed from the Super Lawyers candidate list before publication. [Pa271]

Attorneys or firms cannot pay to be included on the Super Lawyers list, to be included in editorial material, or to be featured on the front cover. Selection to the list pursuant to Super Lawyers' methodology is a prerequisite to, and independent of, any advertising that states or implies Super Lawyers selection. [Pa265]

Super Lawyers magazine is distributed only to lawyers. When it reaches the general public, it is through a "Special Advertising Section" in New Jersey Monthly magazine, with each page clearly designated as such. [Pa148]

QUESTIONS PRESENTED

1. Is a blanket prohibition on comparative advertising under RPC 7.1(a)(3) an unconstitutional abridgement of commercial free speech?
2. Does this advertising create an "unjustified expectation" of results, in violation of RPC 7.1(a)(2)?
3. Did the Committee's factually baseless exemption of Martindale-Hubbell from its advertising prohibition deny substantive due process of law and equal protection of the laws to petitioners?
4. Does the Opinion amount to a gag rule or prior restraint upon

attorneys' First Amendment rights to express their opinions as to other lawyers' abilities?

5. Did the Committee violate due process by denying petitioners notice and an opportunity to be heard, and did it violate the procedures of R. 1:19A-2(c) by issuing a *de facto* advertising guideline without an opportunity for comment by the bar or Supreme Court approval?

ARGUMENT

I.

A BLANKET PROHIBITION ON COMPARING LAWYERS' SERVICES
UNDER RPC 7.1(a)(3) IS AN UNCONSTITUTIONAL
ABRIDGEMENT OF COMMERCIAL FREE SPEECH.

In the 22 years since RPC 7.1(a)(3) was adopted, the United States Supreme Court has made clear that a blanket prohibition on comparative statements, without regard to their truthfulness, is an unconstitutional abridgement of commercial free speech. RPC 7.1(a)(3), particularly as it has been interpreted by the Committee in Opinion 39, contains such a blanket prohibition and cannot be enforced.

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), held that advertising by lawyers was a form of commercial speech entitled to protection by the First Amendment. Indeed, attorney advertising is a positive boon to consumers seeking attorneys -- an important component of "the

relevant information needed to reach an informed decision." *Id.*³ Commercial speech that is not false, deceptive or misleading can be restricted only if the state can show that the restriction directly and materially advances a substantial state interest. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Even then, the restriction must be the "least restrictive possible means" of preventing deception. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644, 105 S.Ct. 2265, 2278, 85 L.Ed.2d 652, 668 (1985).

Current RPC 7.1(a)(3) was adopted in 1984 in lieu of the original ABA Model Rule that was recommended for adoption by the Debevoise Committee. See *N.J.L.J.*, July 28, 1983, Supp. at 18. The ABA Model Rule allowed that a comparison was not misleading if "the comparison could be factually substantiated." New Jersey instead adopted a blanket prohibition, stating that comparisons between the services of attorneys had the "probability" of misleading consumers. Comment to RPC 7.1, *N.J.L.J.*, July 19, 1984, Supp. at 13.

Since 1984, however, the United States Supreme Court has twice extended First Amendment protection to comparative

³ See also *In re Felmeister & Isaacs*, 104 N.J. 515, 527 (1986) (noting that the then-new RPC 7.1 might restrict precisely "[t]he kind of information a sophisticated client wants - and gets - [which] centers on the attorney's reputation: how he is regarded by his peers...")

statements that are not otherwise misleading. The Supreme Court has also held that "potential" deception of comparative statements is insufficient to overcome the presumption in favor of constitutional protection.

Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), upheld an attorney's insertion on his letterhead of a title bestowed by a private board of trial advocacy. The Illinois Disciplinary Commission contended that the attorney's statement was, among other things, an implied claim of superiority in the quality of his services, 496 U.S. at 99 -- in other words, a comparison. The Supreme Court noted, however, that the attorney's statement was true and that there was no record that anyone was actually misled. 496 U.S. at 100-01. Expanding upon its earlier opinion in *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Court held that a consumer had the right to draw or not draw inferences as to the quality of the attorney's work, including the inference that the attorney's qualifications exceeded those of other members of the state bar. 496 U.S. at 101-02.⁴

The Supreme Court in *Peel* repeated the admonition of *In re R.M.J.* that a "potentially" misleading statement did not meet a

⁴ Although in the context of entirely different facts, this Court has cited to and followed *Peel*. *In re Anis*, 126 N.J. 448 (1992).

state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public. 496 U.S. at 108. The point was underscored four years later in *Ibanez v. Florida Dept. Bus. & Prof. Reg.*, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994). The conduct in *Ibanez* was, again, a lawyer's use of professional certifications ("Certified Financial Planner" or accountant). Florida's regulatory body contended that they created the "potential" to mislead. Citing its earlier decision in *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the Supreme Court explained that using the designation was neither actually nor inherently misleading and that rote invocation of the words "potentially misleading" was insufficient to meet the state's burden of showing a real harm. 512 U.S. at 146.

Despite constitutional developments since 1984, RPC 7.1(a)(3) still makes any comparison of lawyers' services a *per se* ethical violation. Under the Rule, it does not matter whether the comparison is truthful or whether anyone is or will be misled. The rule has eviscerated the public's interest in receiving information that would allow it to make an inference as to the relative quality of an attorney's work. No interest of the state is directly and materially advanced by such a blanket prohibition.

In 2004, the ABA removed "comparative statements" from the Model Rules completely. In light of *Peel* and *Ibanez*, this was an

appropriate modification. A comparative statement that is false or misleading would be a rule violation whether or not it was in the context of a comparison, but the mere fact of comparison does not equate to false or misleading advertising.⁵

The Committee failed entirely to address or even refer to the First Amendment case law that necessarily limits the scope of RPC 7.1(a)(3). Its Opinion identified no actual deception. Instead it offered that Super Lawyers titles in advertising "have the potential" to lead a consumer into believing that the advertising lawyer is better than other attorneys. [Pa2] First, as *Peel* teaches, that is exactly the inference that a consumer should be free to make. Second, as *Ibanez* explains, mere "potential" deception (assuming it exists) is not sufficient to overcome First Amendment protections. RPC 7.1(a)(3) and its total prohibition of any comparison of a lawyer's services abridges the commercial free speech rights of attorneys who want to make truthful and non-

⁵ See *ABA Model Rule of Prof'l Conduct 7.1* (current), www.abanet.org/cpr/mrpc/rule_7_1.html. Following the lead of *Bates* and its progeny, the ABA comments that attorney advertising helps to fulfill "the public's need to know" and particularly assists "persons of moderate means who have not made extensive use of legal services." *Id.* Rule 7.2, comments 2 and 3.

New Jersey stands nearly alone in its blanket prohibition. According to the ABA Center for Professional Responsibility, thirty-two states address comparative advertising in their rules. www.abanet.org/cpr/professionalism/State_Advertising.pdf. All but one of these permit comparative advertising if it is "factually substantiated." Only Alabama has a blanket prohibition on comparative advertising like New Jersey's.

misleading statements. The Rule is unconstitutional and cannot form a basis for the Opinion. This Court should overturn Opinion 39, find RPC 7.1(a)(3) unconstitutional and refer it to an appropriate committee for further study and change consistent with the developments since its adoption.

II.

USE OF THE SUPER LAWYERS DESIGNATION DOES NOT CREATE AN UNJUSTIFIED EXPECTATION AND IS THEREFORE NOT FALSE AND MISLEADING UNDER RPC 7.1(a)(2).

RPC 7.1(a)(2) provides that an advertisement is false or misleading if it "is likely to create an unjustified expectation about results the lawyer can achieve." The explanatory comments accompanying adoption of the rule in 1984 indicate that its intended purpose was to prohibit advertisements concerning specific results obtained by a lawyer on behalf of a client, such as the amount of damage awards, the lawyer's record in obtaining verdicts, and client endorsements. See Comment to RPC 7.1, *N.J.L.J.*, July 19, 1984.

Since the adoption of RPC 7.1(a)(2), the Committee has applied the rule to prohibit attorney advertisements whose content was found misleading because the claims were false. *E.g.*, *Advisory Comm. Op.* 645 and *Advertising Comm. Op.* 6 (Nov. 29, 1990) (joint opinion) (claim that referral service calls would be "screened by a trained paralegal" when facts proved otherwise); *Advertising Comm. Op.* 29 (Feb. 3, 2004) (statements suggesting that attorney could exert "extralegal" influence in municipal

court matters); *Advertising Comm. Op.* 30 (revised February 7, 2005) (false advertising in client solicitations).

The Opinion, however, takes the unprecedented step of extending *RPC* 7.1(a)(2) to bar attorney advertising even when the content is true. As the Committee viewed it, *RPC* 7.1(a)(2) bars attorneys from advertising as Super Lawyers because a potential client might expect that such attorneys could achieve better results than others. [Pa2] The flaw in the Committee's application of *RPC* 7.1(a)(2) is that the expectation must be "unjustified" in order to allow prohibition of such advertising. When a potential client receives truthful information based upon a fair methodology, it is for the client to decide whether the information justifies the retention.

Peel, supra, is instructive in this regard. In *Peel*, as here, an attorney used a certification by a private board in his advertising. Illinois sought to prohibit such advertising as creating an unjustifiable expectation as to the results that attorney could achieve. *Peel*, however, found that reasoning incorrect. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success. Rather, it is simply a fact from which consumers may or may not draw an inference of the likely quality of an attorney's work. 496 *U.S.* at 101. *Peel* noted that there was no empirical evidence that consumers would be misled by the advertising of

attorney certifications, even if they were not aware of the precise standard underlying the certification process. 496 U.S. at 107-08. Barring evidence of actual deception in the manner or content of the advertising, *Peel* concluded, attorneys are entitled to distinguish themselves from other members of the bar in this fashion.⁶

Although the certification discussed in *Peel* did not involve a peer ratings system, in the Opinion the Committee approved other uses of such designations under RPC 7.1(a)(2). The Committee held that the "AV, BV, CV" ratings system of Martindale-Hubbell was permissible ratings advertising. [Pa3]

Attorney advertising that contains a peer review rating does not create an unjustifiable expectation of better results. The Committee's evident concern that the public cannot understand ratings systems is unduly paternalistic. The only conclusion that can be drawn from the Opinion's approval of Martindale-Hubbell's system is that it is the Committee's opinion of the value of any particular ratings system that determines whether an attorney has a First Amendment right to truthfully advertise his or her rating under that system. Under *Peel*, that was not the Committee's

⁶ *Peel* ultimately led this Court to adopt RPC 7.4(d), which allows an attorney to communicate the fields of law in which he or she specializes, the name of the certifying organization, and an appropriate disclaimer if the organization is not approved by the Court or the American Bar Association.

judgment to make. Even if it was, however, the Committee's work was deficient.

The Committee's investigation of the Super Lawyers ratings system, judging from the face of its Opinion and the skimpy record that it has supplied to the petitioners, was almost non-existent. Indeed, the Committee admitted that it possessed incomplete information concerning the methodology, relegating what little information it had to a one-paragraph footnote. [Pa2] The Committee nevertheless rushed to judgment, branding the Super Lawyer designation a "simplistic use of a media-generated sound bite." *Id.* In actuality, the Super Lawyers selection methodology is rigorous and reliable. It involves months of effort to code and process information regarding each attorney and to analyze the attorney through a careful peer review process. All attorneys are assessed on a scale that includes their education, experience, professional achievements, balloting and internal review, before candidates are selected. See *supra* at 3.

Super Lawyers' methodology is a fair selection process containing an abundance of check and balances. Lawyer advertisements stating they have been selected as Super Lawyers are truthful. Once those thresholds are surmounted, it is for the client, not the Committee, to decide whether the information "justifies" retaining an attorney who has earned the Super Lawyer designation.

Assuming *arguendo* that the Committee properly applied RPC 7.1(a)(2), it was still not entitled to categorically ban attorneys from advertising using the Super Lawyers designation. As discussed in Point I, *supra*, restrictions on non-misleading commercial speech must be limited in scope. Rather than ban such advertising, the Committee was required to, *e.g.*, suggest additional disclosures or disclaimers concerning the designation. It did not consider these less restrictive alternatives.

It might be inferred that the Committee's traditional sensibilities were offended by the modern content and presentation of the Super Lawyers designation. That is not a proper basis, however, to find a violation of RPC 7.1(a)(2) or to prohibit the use of the Super Lawyers designation.

III.

THE SELECTIVE APPLICATION OF RPC 7.1 TO PROHIBIT ATTORNEY ADVERTISING UNDER THE SUPER LAWYERS DESIGNATION HAS NO FACTUAL BASIS AND IT DENIES PETITIONERS SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

As noted above, the Opinion distinguished between attorney advertising of ratings under the Super Lawyers designation and ratings by a competing organization, Martindale-Hubbell. This disparate treatment of permissible forms of attorney advertising cannot withstand scrutiny under the substantive due process and equal protection guarantees of the United States and State Constitutions. *U.S. Const.*, amend. XIV; *N.J. Const.*, art. I, ¶1;

see *Pasqua v. Council*, 186 N.J. 127, 147 (2006).

Discriminatory enforcement by state and local officials is unconstitutional. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *State, Tp. of Pennsauken v. Schad*, 160 N.J. 156 (1999). Even where no fundamental constitutional right is involved, application of a law, rule or regulation is discriminatory if not rationally related to a legitimate state interest. A classification must be struck down if it rests on grounds irrelevant to the achievement of the state's objective and no set of facts can reasonably be conceived to justify it. *Heller v. Doe by Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). And where, as here, a discrimination is based on the content of communications protected by the First Amendment, the Court must apply heightened scrutiny and strike down the distinction unless it is narrowly tailored to serve a compelling state interest. *E.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, 220 (1972); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (surveying case law as to content-discriminatory regulations).

The Committee determined that attorneys could continue to advertise their "AV, BV or CV" rating under Martindale-Hubbell, while barring attorneys from advertising their Super Lawyers

designation. Given the Committee's approval of one competitive ratings system, there is no rational basis for treating another such system differently. In arriving at this result, the Committee, by its own statement, was unclear as to the methodology employed by Super Lawyers in selecting attorneys to receive its designation. The Committee solicited no information from Super Lawyers, but had no difficulty making conclusory assertions that the methodology was "arbitrary" and "without empirical or legally sanctioned support". No evidence was cited to support these statements.

Super Lawyers' selection methodology entails an elaborate peer review, with multiple levels, cross-checks and assessments to insure that the attorneys certified are selected in a fair manner using widely accepted indicators of recognition and professional achievement. All of this information was available to the Committee for the asking.

Ironically, it was that same speculation which led the Committee to approve of the Martindale-Hubbell ratings system, which also utilizes an attorney peer review process. Martindale-Hubbell assesses attorneys and rates them as "AV", "BV", "CV", or does not rate them at all. The Committee's rationale for approving the Martindale-Hubbell rating system was based upon two notions -- first, that the Martindale-Hubbell system was directed toward other attorneys, and not for mass consumption; and, second,

that the rating system had little recognition to the public.

[Pa3] These unresearched conclusions, however, are demonstrably wrong, as illustrated by the factual record that the Committee failed to make.

The Martindale-Hubbell ratings system, according to the Foreword to its listings, is designed to ensure that "[p]otential clients can easily determine a firm's status...." [Pa216 (emphasis added)] Martindale-Hubbell has created a "Bar Register of Preeminent Lawyers" and links that information to attorneys who it claims are the "premiere" lawyers in specific fields of expertise. Its websites list lawyers' AV ratings and also identify lawyers who are "Peer Review Rated." According to Martindale-Hubbell, this means that "his/her colleagues have recognized the lawyer for his/her legal ability, ethics, reliability, diligence and other criteria relevant to the discharge of professional responsibilities." [Pa231]

The Committee's statements also cannot be squared with the content of Martindale-Hubbell's lawyers.com internet portal. That site, available to any consumer with internet access, declares itself the "number one" source of online information concerning lawyers, with visitor traffic steadily increasing yearly. The website touts its "unique tools", which include a "side by side results comparison" of attorneys. [Pa231] In short, the distinction in the Opinion, which purports to rely on Martindale's

unavailability outside of legal circles or the public's inability to discern the nature of comparisons that are being made, cannot be sustained.

A substantive due process or equal protection discussion usually entails a searching examination of the record in the court or administrative tribunal below. Here, however, there is virtually no record. Without asking anything of Super Lawyers and without more than a cosmetic look at Martindale-Hubbell, the Committee resolved that one was good and the other bad. And the Committee offered no rationale why New Jersey lawyers could participate in one ratings survey that results in a label "Preeminent Lawyers" and that is targeted to the general public, but would be prohibited from giving their opinion to another survey that results in a synonymous and equally comparative label, "Super Lawyers."

The Committee may have more familiarity with New Jersey based Martindale-Hubbell, or may consider Martindale-Hubbell's rating style more appropriate.⁷ But either rationale unconstitutionally discriminates between messages based on their content. Neither is rationally related to a legitimate state interest. By applying

⁷ It does not appear that issues relating to Martindale-Hubbell were placed before the Committee by any attorney inquiry. [Pa288] The Committee did not discuss more than a dozen other attorney rating publications that include New Jersey attorneys. [Pa277, 286a-286b]

the RPCs to bar advertising and participating in Super Lawyers, but endorsing that very conduct as to Martindale-Hubbell, the Opinion misstated the facts and denied petitioners the equal protection of the laws.

IV.

OPINION 39 AMOUNTS TO A GAG RULE OR PRIOR RESTRAINT THAT IMPERMISSIBLY SUPPRESSES PETITIONERS' RIGHTS TO FREE EXPRESSION AND A FREE PRESS.

The Opinion also forbids all attorneys in New Jersey from expressing their opinions about the expertise, experience and skills of their peers through ballots distributed by Super Lawyers. [Pa3] That content-based restriction on expression is presumptively invalid and subject to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). To justify a content-based restriction, a state must demonstrate that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). That threshold is almost never met as to "prior restraints on speech and publication[, which] are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683, 697 (1976).

The Opinion prohibits attorneys, whether or not they seek to

be Super Lawyers or advertise in Super Lawyers, from participating in a survey about their colleagues. An attorney who has no interest in the Super Lawyers list is nonetheless barred from providing a first-hand opinion about another member of the bar.

That gag rule does not further a compelling state interest. The Committee's rationale that participation in a survey could lead to an "inherently comparative" label was inappropriate. [Pa3; see *supra* Point I] Protecting unwary customers from their own perceived naiveté, absent falsity or deception, is not a compelling state interest that would justify the suppression of pure speech based upon its content. The Constitution does not permit regulation to protect the public from truthful speech. *Liquormart v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Moreover, even if the State interest were compelling, the gag rule would not directly further it.

The most important factor a potential client might consider in choosing an attorney is that attorney's reputation among his or her peers. The list contained in Super Lawyers provides that very information. The Committee has impaired the public's ability to make an informed decision of how specific lawyers are rated by their colleagues, thereby suppressing what may be the best information available. See *Felmeister*, 104 N.J. at 527.

If the Opinion stands, any lawyer asked to participate in a

peer review survey will first have to determine, in Orwellian manner, whether the survey is on the Committee's approved list before freely expressing his or her opinion. The Supreme Court has never hesitated to strike down such prior restraints (or even somewhat indirect burdens) on speech. See *Riley v. Nat. Fed. of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). The Opinion's prohibition on lawyer participation in the peer review surveys conducted by Super Lawyers should be rejected.

V.

THE COMMITTEE DENIED PETITIONERS DUE PROCESS OF LAW AND VIOLATED ITS OWN PROCEDURES BY PROMULGATING AN ADVISORY OPINION THAT IS A *DE FACTO* ADVERTISING GUIDELINE WHICH, UNDER RULE 1:19A-2(c), REQUIRES AN OPPORTUNITY FOR COMMENT AND COURT APPROVAL.

In promulgating the Opinion, the Committee denied Super Lawyers and the petitioning attorneys procedural due process of law. The basic requirements of procedural due process remain adequate notice and a meaningful opportunity to be heard. *New Jersey Dir. of Youth and Family Services v. A.R.G.*, 179 N.J. 264 (2004). As discussed earlier, here there was no notice and no one was heard at all. At the same time, there was a procedure in the Rules which would have met these requisites. The Committee should have treated its action as what it really was, the creation of an advertising guideline under R. 1:19A-2(c). Under that Rule,

members of the bar are first afforded an opportunity to comment⁸ and the ultimate recommendation is subject to approval by this Court.

Contrary to the statement by the Committee that the type of advertising it reviewed is a recent phenomenon, survey-based lawyer rankings bearing the title "The Best Lawyers in the U.S." appeared in mass distributed magazines more than two decades ago. [Pa199] Over that time, there has never been any evidence that such information was false or misleading. Although the Committee passed judgment on the evaluation and advertising utilized by Super Lawyers, its publisher never received any notice from the Committee that its methodologies were the subject of inquiry.

[Pa271] Had the Committee offered Super Lawyers an opportunity to submit evidence, it would have responded promptly and fully as it had done in response to queries from similar bodies in other states. [Pa273] The evidence that would have been submitted to the Committee would have demonstrated, as it had in other states, that the process by which attorneys are selected to appear in the list of Super Lawyers is fair, rational and scrupulously administered. [Pa186-95] In short, had the Committee actually conducted a "careful review", the evidence would have shown

⁸ Rule 1:19A-2(c) affords the right of comment to "the bar". Due process requires that a business directly jeopardized by a proposed guideline be afforded the same right.

anything but an arbitrary selection process.

To be sure, the Rules do not themselves specify which subject matters are appropriately addressed by advisory opinions and which by guidelines. Their language and context, however, suggest that advertising guidelines are intended as broad standards of general applicability. See *Attorney Advertising Guidelines 1 and 2* (approved by the Supreme Court), in Pressler, *Current N.J. Court Rules*, p. 452. In contrast, an advisory opinion focuses upon more narrow nuances of the *RPCs* in response to a discrete inquiry from a member of the bar.

The guideline process mandated by *R. 1:19A-2(c)* is designed to permit the marshaling of a factual record that would then be available to the Court, which could then sustain or disapprove of the proposed guideline. An advisory opinion that imposes an immediate blanket ban on lawyer ranking systems that are fundamentally fair and rational, coupled with a gag order that prohibits all attorneys from expressing opinions of their peers' performance through that rating system, is a disguised guideline. Members of the bar and affected businesses should be afforded their due process right to be heard, as well as the procedural safeguards contained in *R. 1:19A-2(c)*.

CONCLUSION

For the reasons expressed above, the Court should vacate the Opinion and/or RPC 7.1(a)(3) outright or, in the alternative, should vacate the Opinion and remand the entire matter to the Committee for plenary consideration under R. 1:19A-2(c).

Respectfully submitted,

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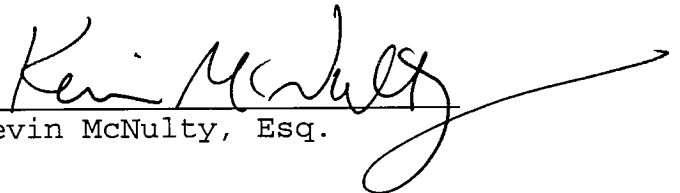
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CERTIFICATION

We certify that the within Petition presents a substantial question and is filed in good faith and not for the purposes of delay.



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