SUPREME COURT OF NEW JERSEY
E-18/19/20 September Term 2006
(60,003)

IN RE: OPINION 39
OF THE COMMITTEE
ON ATTORNEY ADVERTISING

NEW JERSEY MONTHLY, LLC, (E-18-06)

Petitioner.

JON-HENRY BARR, ESQ., (E-19-06)
GLENN A. BERGENFIELD, ESQ.,
CARY B. CHEIFETZ, ESQ.,
MARIA DELGAIZO NOTO, ESQ.,
ANDREW J. RENDA, JR., ESQ,
and JOHN S. VOYNICK, JR.,
ESQ.,

Petitioners,

and

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

Intervenor-Petitioner.

STUART A. HOBERMAN, ESQ., (E-20-06)

Petitioner,

and

WOODWARD-WHITE, INC.,
publisher of "THE BEST

LAWYERS IN AMERICA,"

Intervenor.

LEXISNEXIS, a Division of
Reed Elsevier, Inc.,
MARTINDALE-HUBBELL,

Intervenor.

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v.

COMMITTEE ON ATTORNEY
ADVERTISING,

Respondent. **REPORT OF SPECIAL MASTER**

Vogel, Chait, Collins & Schneider, P.C., attorneys for petitioner New Jersey Monthly, LLC (Arnold H. Chait, appearing).

Gibbons P.C., attorneys for petitioners Jon-Henry Barr, Esq., Glenn A. Bergenfield, Esq., Cary B. Cheifetz, Esq., Maria DelGaizo Noto, Esq., Andrew J. Renda, Jr., Esq., and John S. Voynick, Esq. Jr., and intervenor-petitioner Key Professional Media, Inc., d/b/a "Super Lawyers" and "Law & Politics" (Kevin McNulty appearing; John J. Gibbons and E. Evans Wohlforth, on the brief), co-counsel Stryker, Tams & Dill, LLP (Bennett J. Wasserman, Martin G. Gilbert and Howard A. Matalon, on the brief) and co-counsel Heller Erhrman LLP (E. Joshua Rosenkranz, appearing, and Jean-David Barnea, on the brief).

Wilentz, Goldman & Spitzer, P.A., attorneys for petitioner Stuart A. Hoberman, Esq. and intervenor Woodward-White, Inc., publisher of "The Best Lawyers in America" (Frederick

J. Dennehy and Michael J. Weisslitz, appearing).

Graham Curtin, P.A., attorneys for intervenor LexisNexis, Martindale-Hubbell (Thomas R. Curtin and Jennifer Schoenberg, appearing).

Anne Milgram, Attorney General, attorney for respondent Supreme Court Committee on Attorney Advertising (Steven Flanzman and Anne Marie Kelly, Senior Deputy Attorneys General, appearing).

Anthony R. Saunders, Staff Attorney, member of the New Jersey Bar, and William Blumenthal, General Counsel, Maureen K. Ohlhausen, Director, Office of Policy Planning, and Gustav P. Chiarello, Attorney Advisor, Office of Policy Planning, admitted *pro hac* vice, Counsel for the United States Federal Trade Commission, *amicus curiae* (Mr. Saunders, Mr. Blumenthal, Ms. Ohlhausen, and Mr. Chiarello, on the brief).

Walter A. Lesnevich, Chairman of the New Jersey Board of Attorney Certification, *amicus curiae* (Mr. Lesnevich, on the brief).

FALL, J.A.D. (retired):

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I. INTRODUCTION.

Attorney advertising is commercial speech protected by the First Amendment of the United States Constitution. Bates v. State Bar of Arizona, 433 U.S. 350, 383, 97 S. Ct. 2691, 2709, 53 L. Ed. 2d 810, 835 (1977). Commercial speech may be regulated by the States to advance a legitimate governmental interest as long as that regulation is not more extensive than is necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 200 S. Ct. 2343, 2351, 65 L. Ed. 2d 341, 351 (1980). Attorney advertising that is false, deceptive or misleading is subject to restraint. Bates, supra, 433 U.S. at 383-84, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835-36.

The issue in this case is whether Opinion 39, issued by the New Jersey Supreme Court Committee on Attorney Advertising on July 24, 2006, constitutes a valid regulation of attorney advertising. Opinion 39 prohibits attorneys from advertising their inclusion in lists rating and ranking lawyers that were developed and published by Key Professional Media, Inc., entitled Super Lawyers lists, and by Woodward-White, Inc., entitled The Best Lawyers in America list, said lists being compiled based on the results of peer-review attorney rating and ranking

methodologies utilized by those business entities. Opinion 39 also prohibited New Jersey attorneys from responding to peer-review and rating ballots transmitted to them by those entities. The Committee concluded that such advertising which uses superlatives such as "super" and "best" was misleading to consumers because it constitutes comparative advertising prohibited by the New Jersey Rules of Professional Conduct (RPC) 7.1(a)(3), and because it was likely to create an unjustified expectation about the results the advertising lawyer can achieve, in violation of RPC 7.1(a)(2). This and related issues will be discussed and analyzed in Part III of this Report.

The purpose of these proceedings was to develop a record that will form a basis for a meaningful review by the New Jersey Supreme Court of the determinations made by the Committee in Opinion 39, and adjudication of the issues presented by the petitioners and intervenors.

This Report reflects the evidentiary record developed as a result of eight full days of hearings, during which 140 separate exhibits were entered into evidence, consisting of more than 1,800 pages of material. A Table of Exhibits is contained in Appendix A, outlining and briefly describing each exhibit.

The exhibits themselves are too voluminous to be directly appended to this Report, and have been filed separately with the Clerk of the Supreme Court. Consequently, where necessary for clarity and continuity, the Report itself describes and quotes from many of the exhibits to enable the reader to read through the Report itself without repeatedly referencing back to exhibits or other materials. That has made the Report lengthy, perhaps overly so; however the overriding goal was to create as comprehensive and complete a record as possible, recognizing that some of that record and portions of this Report may ultimately be disregarded by the Court as insufficiently relevant or pertinent to the issues presented.

Many of the exhibits marked into evidence constitute materials that were produced in response to Notices to Produce served upon the petitioners and intervenors by the Committee on Attorney Advertising. A large portion of those requested documents contain information is proprietary in nature. As a result, counsel for the Committee and the petitioners and intervenors entered into a series of negotiated confidentiality consent orders that provided for production of the documents sought while at the same time preserving their confidential nature, subject

to determinations in this Report and, ultimately, by the Supreme Court. The process of developing confidentiality orders satisfactory to all counsel and wading through the reams of information provided elongated these proceedings beyond that originally contemplated.

The referenced proprietary information essentially pertains to the innermost-workings, formulae and weighting factors utilized by each polling entity when conducting their peer-review rankings and ratings of lawyers for their respective publications. For lack of a more descriptive phrase, it was referred to during the hearings as "the Colonel's Secret Recipe," to convey the notion that once the details of those methodologies becomes publicly disclosed they could be replicated by others, potentially destroying the proprietary nature of what has taken years by those entities to develop. Complicating that issue is the fact that those attorneys surveyed or polled completed the ballots with the assurance and expectancy of confidentiality of the opinions they expressed.

As will be apparent to the reader of this Report, each of these peer-review and attorney ranking and rating entities publishes for public consumption a great deal of information concerning the methodologies they have employed in reaching their results. The information concerning

those methodologies not already set forth in their publications centers on the specific formulae they utilize in weighting and calculating the raw data and information they gather during their peer-review surveys and other processes. How much of that information should be publicly disclosed in order to properly evaluate the issues presented by the petitions pending before the Supreme Court is a matter for ultimate determination by the Court, if indeed it deems such information to be relevant at all.

By way of example, if the Court determines that the publishing of attorney advertisements that showcase their attorney rankings and ratings issued by these entities constitutes comparative attorney advertising and that, pursuant to section 7.1(a)(3) of the New Jersey Rules of Professional Conduct (RPC), such comparative attorney advertising shall remain prohibited as being per se misleading or deceptive, then the manner and methodologies utilized by these entities in reaching their conclusions is essentially irrelevant. Therefore, an abundance of caution was utilized during the hearings when dealing with this referenced proprietary information.

Of course, these entities have thrust themselves into the public arena of advertising in the context of a regulated profession by conducting their surveys and

issuing their listings. The appropriate regulatory entity, here, the Committee on Attorney Advertising and ultimately the Supreme Court, has the right of access to sufficient and adequate information in order to properly perform its regulatory function of protecting the public from the dissemination of misleading or deceptive information through attorney advertising. There is a delicate balance to be struck between the amount of information required in the proper exercise of that regulatory responsibility and the right of those entities to protection of their commercial proprietary interests.

In partially performing that balancing function, at least in the first instance, this Report contains far more information concerning the methodologies utilized by these entities than has been previously publicly disclosed, and the information contained in this Report concerning those methodologies should be sufficient and adequate to enable the Court to address the issues presented.

That having been said, Appendix A identifies, by an asterisk, those exhibits falling within the umbrella of the various consent protective orders. However, some of those identified exhibits contain information that either should not be considered proprietary, or it has been determined in this Report that they do not warrant further protection

under those orders. Those determinations are discussed and explained in the body of this Report.

The balance of the material contained in the various appendices, with the exception of Appendices P and Q, constitute documents that were discovered through extensive independent research and have been directly appended to this Report to assist the reader in understanding the information and analyses presented.

Appendix P is a joint stipulation of facts entered into between Key Professional Media, Inc., d/b/a "Super Lawyers," and the Committee on Attorney Advertising. Materials contained in that stipulation that should remain proprietary have been redacted; the un-redacted version of Appendix P has been supplied to the Court for its review. A full discussion of this exhibit is contained in the Part V of this Report, and it is included as an appendix rather than marked as an exhibit to enable the reader to directly review those stipulations in conjunction with the body of the Report. The Appendices contain 301 additional pages.

As the Table of Contents reflects, Part II of the Report contains a detailed factual and procedural history, followed by an analysis of the relevant decisions of the United States Supreme Court, and history of the regulation

of attorney advertising throughout this Country by the various States in Part III.

A summary and analysis of each of the evidentiary presentations made by New Jersey Monthly, LLC; Key Professional Media, Inc., d/b/a "Super Lawyers" and "Law & Politics;" Woodward-White, Inc., publisher of "The Best Lawyers in America;" and LexisNexis Martindale-Hubbell is contained in Parts IV through VII.

Part VIII presents and analyzes the various expert reports submitted by the parties, and Part IX discusses the amicus curiae briefs submitted by the United States Federal Trade Commission and the New Jersey Supreme Court Committee on Attorney Certification.

II. FACTUAL AND PROCEDURAL HISTORY.

In New Jersey, "[t]he Rules of Professional Conduct . . . of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these Rules . . . shall govern the conduct of the members of the bar . . . of this State." R. 1:14. Attorney advertising is generally governed by RPC 7.2, which provides, as follows:

> (a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through the public media, such as a telephone directory, legal directory, newspaper or other periodical,

radio or television, internet or other electronic media, or through mailed written communications. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall reply in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1:17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

The requirements to which attorney advertising pursuant to RPC 7.2 are subject are set forth in RPC 7.1, as follows:

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make

the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive.

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of the specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

> (b) It shall be unethical for a lawyer to use an advertisement or other related communications known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule [1:19A-3(d)].
>
> [Emphasis added.]

The Committee on Attorney Advertising is appointed by the Supreme Court and consists "of seven members, five of whom shall be members of the bar and two of whom shall be public members." R. 1:19A-1(a). The Committee

> shall have the exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications with Rules of Professional Conduct 7.1 "Communications Concerning a Lawyer's Service," 7.2 "Advertising," 7.3 "Personal Contact with Prospective Clients" (excluding subsections (c), (d), (e) and (f)), 7.4 "Communication of Fields of Practice," and 7.5 "Firm Names and Letterheads," and with any duly approved advertising guidelines promulgated by the Advertising Committee with the approval of the Supreme Court.
>
> [R. 1:19A-2(a).]

R. 1:19A-3 provides for the receipt and investigation of inquiries by the Committee within its area of jurisdiction, and the issuance of advisory opinions. "An opinion disapproving an advertisement or other related

communications shall, until and unless revised in accordance with subsection (d) or reconsidered, be binding upon the inquirer and anyone with actual or constructive knowledge thereof, so that such use of a disapproved advertisement or other related communication shall be per se unethical conduct." R. 1:19A-3(c). Additionally:

> When the Advertising Committee believes it to be in the best interest of the bar or the public, it may publish its opinion in the New Jersey Law Journal and New Jersey Lawyer. Published opinions shall constitute constructive notice to, and shall be binding on, all members of the bar and in connection with any ethics proceedings, unless revised pursuant to section (d) or reconsidered.
>
> [Ibid.]

"Any aggrieved member of the New Jersey bar may seek review of any final action of the Advertising Committee relating to requests for advisory opinions in accordance with R. 1:19-8." R. 1:19A-3(d).

The Committee received a written inquiry from a member of the New Jersey bar dated May 19, 2005, questioning the propriety of attorney advertisements that appeared in a magazine entitled New Jersey Super Lawyers 2005, see Exhibit KPM-4, and other related materials, suggesting that such advertisements violated provisions of New Jersey's Rules of Processional Conduct. During its review of that

inquiry, the Committee expanded its scope to include review of advertisements where attorneys promoted their selection of being included in the publication The Best Lawyers in America. The extent of the Committee's review is more specifically set forth in the "Statement of the Case" contained in the Committee's brief in opposition to the filed petitions. See Db1-9.

On July 24, 2006, the Committee on Attorney Advertising issued Opinion 39, entitled "Advertisements Touting Designation as 'Super Lawyer' or 'Best Lawyer in America.'" See 185 N.J.L.J. 360; 15 N.J.L. 1549. Responding to complaints and inquiries of New Jersey lawyers advertising themselves or their colleagues as Super Lawyers and The Best Lawyers in America, the Committee posed the issue being confronted as follows:

> The issue is whether advertisements in any medium of distribution publicizing certain New Jersey lawyers as "Super Lawyers" or "Best Lawyers in America" violate the prohibition against advertisements that are comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2).

The Committee concluded that those forms of advertisements are prohibited by the Rules of Professional Conduct, analyzing the issue as follows:

This new form of comparative advertising first appeared in an advertising insert to a 2005 *New Jersey Monthly* magazine and subsequent stand-alone magazine, both devoted primarily to advertisements by law firms promoting their designation as "Super Lawyers." A 2006 *New Jersey Monthly* "Super Lawyers" magazine and subsequent stand-alone magazine have now been published.

The advertisements appearing in both magazines were solicited as paid-for advertising, with the size of the advertisements dependent on the price paid. The primary focus of those advertisements was to congratulate the chosen lawyers for their designation as "Super Lawyers."

The "Super Lawyer" designations have spawned a new surge of attorney marketing in the form of advertisements placed in New Jersey lawyer-directed papers, in local newspapers and by distribution to the public through attorney mailers, flyers, brochures, telephone book listings, and on websites, all of which tout the "Super Lawyer" label and congratulate or promote the so-called "Super" lawyers.

The Committee has also received inquiries concerning the propriety of the advertising and promotion of a New Jersey lawyer's status as a "Best Lawyer in America." There are some differences between the "Super Lawyer" and "Best Lawyer" descriptions. First, the "Best Lawyer" methodology of selection is based solely on peer review interviews with a premium placed on those who have been selected as a "Best Lawyer" in previous years. Second, the "Best Lawyer" selection is not focused upon encouraging lawyers to advertise in an advertising supplement and appears to market its "Best Lawyer" compendium primarily to other lawyers. However, "Best Lawyer" seems to be trending towards a "Super Lawyer" business plan with similar advertising supplements in other jurisdictions, but not yet in New Jersey.

This Committee has not previously addressed

this issue. The Advisory Committee on Professional Ethics, however, has addressed the propriety of attorney advertising through *Who's Who in New Jersey*. ACPE Opinion 311, 98 *N.J.L.J.* 633 (July 24, 1975). That Committee concluded that an attorney may be listed in a directory which is used primarily for reference purposes but warned that attorneys must be wary of directories whose primary purpose is publicizing the listings and must also be careful of using self-laudatory statements in those listings. The Committee recognizes that this Opinion was issued prior to significant law changes in the field of attorney advertising but finds that some of the underlying concerns noted in the Opinion remain viable today.

Advertising which promotes a designation such as "Super Lawyer" or "Best Lawyer in America" does not comply with *RPC* 7.1(a)(3). *RPC* 7.1(a)(3) states that a communication is misleading if it "compares the lawyer's service with other lawyers' services." Use of superlative designations by lawyers is inherently comparative and, thus, not within the approved ambit of New Jersey's *Rules of Professional Conduct*. Such titles or descriptions, based on an assessment by the attorney or other members of the bar, or devised by persons or organizations outside the bar, lack both court approval and objective verification of the lawyer's ability. These self-aggrandizing titles have the potential to lead an unwary consumer to believe that the lawyers so described are, by virtue of this manufactured title, superior to their colleagues who practice in the same areas of law.

Similarly, this type of advertising does not comply with *RPC* 7.1(a)(2). *RPC* 7.1(a)(2) states that a communication is misleading if it "is likely to create an unjustified expectation about results the lawyer can achieve ...." When a potential client reads such advertising and considers hiring a "super" attorney, or the "best" attorney, the superlative designation induces the client to feel that the results that can be achieved by this attorney are likely to surpass those that can be achieved by a mere "ordinary" attorney. This simplistic use of media-generated sound bite title

clearly has the capacity to materially mislead the public.

Moreover, the Committee notes that the entire insert to the *New Jersey Monthly* "Super Lawyers" publication, including biographical sketches and even the listing of attorneys, is marked by the magazine as an advertisement. For this reason, and also because of the proximity of attorney advertisements to magazine text on individual "Super Lawyers," any advertisements placed in the "Super Lawyers" magazine insert or stand-alone version are prohibited, even when such advertisements do not include the words "Super Lawyer." It is inevitable that a member of the public, reading an article about a certain attorney who has been designated by the magazine as a "Super Lawyer," will note a nearby advertisement congratulating that lawyer (though not using the prohibited words "Super Lawyer"), and will attribute the marketing designation to the subject of the advertisement. Hence, the placement of an attorney advertisement in the magazine insert serves the same purpose as the use of the superlative, inherently comparative, marketing title. Therefore, the Committee has decided that attorney advertisements, even those advertisements that do not repeat the moniker of "Super Lawyer," appearing in the "Super Lawyer" magazine insert, are prohibited.

Further, it may be that biographical sketches appearing in the "Super Lawyers" insert to the *New Jersey Monthly* magazine are paid for by the subject attorneys or written in whole or in part by the attorneys. If this is so, then the "article" is misleading as it appears to be journalistic material but is, in fact, mere self-promotion. Accordingly, to the extent biographical sketches or other "articles" in the "Super Lawyers" insert are paid for by the subject attorneys or written in whole or in part by the attorneys, such "articles" must bear the word "advertisement" in large print at the top.

Lastly, the Committee has reviewed the survey sent to New Jersey lawyers that supports the

selection of attorneys for the "Super Lawyer" designation. It is the Committee's position that participation in a survey of this type, where an attorney knows or reasonably should know that the survey would lead to a descriptive label that is inherently comparative such as "Super Lawyer" or "Best Lawyer," is inappropriate.

The survey results for "Super Lawyer" designation are not intended to cater to other attorneys but, rather, are designed for mass consumption. In contrast, other ratings organizations such as Martindale-Hubbell, which rates attorneys AV, BV or CV, are directed toward other attorneys. Martindale notes that not all attorneys or firms are rated and that most attorneys as they become more experienced move from a CV towards an AV rating. These ratings are familiar to other lawyers and likely to have minimal recognition to the public.

Accordingly, advertisements describing attorneys as "Super Lawyers," "Best Lawyers in America," or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, *RPC* 7.1(a)(3), or that are likely to create an unjustified expectation about results, *RPC* 7.1(a)(2).

The methodology used by the media corporation to award the "Super Lawyer" designation is unclear. Although the designations are purportedly based in part on a poll of practicing New Jersey attorneys and input from non-lawyers, then weighted in accordance with a non-disclosed system established by the publishers, Law & Politics and/or its sister corporation Key Professional Media, they do not make available the specific methodology for objective review or analysis. A careful review of the selective aspects of the promotional methodology, however, underscores the arbitrary selection and ranking process used by the publisher, and provides no empirical or legally sanctioned support for the results.

On August 14, 2006, a petition was filed in the Supreme Court by Jon-Henry Barr, Esq., Glenn A. Bergenfield, Esq., Cary B. Cheifetz, Esq., Maria DelGaizo Noto, Esq., Andrew J. Renda, Jr., Esq., and John S. Voynick, Jr., Esq., as petitioners, and by Key Professional Media, Inc., d/b/a "Super Lawyers" and "Law & Politics," proposed intervenor-petitioner, seeking an order vacating Opinion 39 "and/or RPC 7.1(a)(3) outright or, in the alternative, [vacating] the Opinion and remand[ing] the entire matter to the Committee for plenary consideration under R. 1:19A-2(c)." The Court granted the application of Key Professional Media to intervene, and assigned that petition docket number E-19.

On August 24, 2006, Stuart A. Hoberman, Esq. filed a petition in the Supreme Court seeking an order vacating "Opinion 39 or, at the very least, vacat[ing] the portion of Opinion 39 referencing *The Best Lawyers in America*." Woodward/White, Inc., publishers of The Best Lawyers in America, was granted leave to intervene by order entered on September 6, 2006, and the Court assigned that petition docket number E-20.

On September 8, 2006, New Jersey Monthly, LLC filed a motion seeking permission to file petition in the Supreme Court seeking an order vacating Opinion 39 or, in the

alternative, referring the matter "to a trial court or special master for a plenary hearing." By order entered on September 8, 2006, the Court granted the motion, and assigned that petition docket number E-18.

The Court entered orders on August 18, 2006, and September 6, 2006, staying the provisions of Opinion 39.

The Court granted the Committee's application for an extension of time to file a consolidated reply to these petitions. On November 13, 2006, the Committee on Attorney Advertising filed a brief and appendix in opposition to the petitions, urging rejection of the challenges to Opinion 39.

Reply briefs and appendices were filed by the petitioners and intervenors. They also filed motions seeking permission to supplement the record with materials concerning the objectivity and validity of the underlying peer review selection processes conducted by Key Professional Media, Inc. and Woodward/White Inc. Opposition to those motions was filed by the Committee. Thereafter, LexisNexis, Martindale-Hubbell was granted permission to intervene.

On March 23, 2007, the Supreme Court issued an order granting the petitions for review of Opinion 39 and

> ORDERED that the matter is summarily remanded to retired Appellate Division Judge Robert A. Fall to sit as a Special Master for limited purpose of developing, on an expedited basis, an evidentiary record in respect of the facts and legal issues that relate to the petitions for review granted pursuant to this Order; and it is further
>
> ORDERED that as part of his determinations on the scope and content of the record, the Special Master shall consider and act on all motions to expand the record now pending before the Supreme Court; and it is
>
> ORDERED that the Special Master shall file his findings and conclusions with the Supreme Court within forty-five days of the completion of the plenary hearing.

On April 3, 2007, a notice was sent to all counsel scheduling a case management conference, and a hearing on all pending motions for April 20, 2007, at the Ocean County Courthouse. The motion hearing and case management conference were conducted on April 20, 2007. The motions were adjudicated by an order entered on April 22, 2007, providing as follows:

1. The motions of petitioner Stuart A. Hoberman, Esq. in M-162-06 and M-999-06 to expand the record are granted, as is Mr. Hoberman's motion in M-1000-06 to file a reply to the appendix filed by the respondent;

2. The motions of petitioners Jon-Henry Barr, Esq., et al. in M-629-06, and in M-630-06 to file a reply appendix to the appendix filed by respondent, are granted; and

3. The motion of petitioner New Jersey Monthly, LLC in M-635-06 to expand the record is granted;

And good cause further appearing, it is directed that the motions to expand the record set forth herein are granted with the condition that the allegations, representation and contentions set forth in the record as supplemented will not be entered into evidence unless stipulated by all counsel or admitted during the plenary hearing upon a sufficient evidentiary basis being established.

The results of the case management portion of the April 20, 2007 hearing were memorialized, in lieu of a formal order, by letter to all counsel dated April 21, 2007, which provided in pertinent part:

1. By April 30, 2007, counsel will file with the Special Master, and serve upon each other, a list of facts and documents they contend should constitute the record on appeal;

2. By May 4, 2007, counsel will file with the Special Master, and serve upon each other, a letter legal memorandum setting forth their position, and support thereof, on the issues of

    a. whether the methodologies employed by various of the petitioners/intervenors in formulating the designations of "Super Lawyers" and/or "Best Lawyers in America" constitute a recognized area of expertise upon which an expert opinion could be offered;

    b. whether expert opinion is required or appropriate to resolve the issues before the Court; and

c. whether such expert testimony and evidence is relevant.

3. By May 15, 2007, counsel shall, if they so desire, file and serve responses to both the lists of facts and documents, and to the legal memoranda served upon them;

4. Kevin McNulty, Esq. shall confer with counsel as to an appropriate time when all can be available, and then arrange for a telephone management conference call to take place on May 22, 2007, when the Special Master (who will make himself available any time on that date) will determine the scope of the plenary hearing. Counsel should be prepared to provide a list of witnesses as to those facts and evidence that cannot be reasonably stipulated or taken judicial notice of. Mr. McNulty shall inform the Special Master and all counsel of the necessary call-in information concerning that conference call;

5. The first group of dates for the plenary hearing to take place in Courtroom Number 1 at the Ocean County Courthouse are June 12, June 13, and June 14 (Mr. Curtin is given permission to arrange with counsel an alternative date to June 14 - alternatively, the Special Master is available June 15, June 18 and June 20);

6. The second group of dates established for the plenary hearing, if needed, are July 31, August 1, and August 2 in Courtroom Number 1 at the Ocean County Courthouse. Such additional dates will be established, if necessary, by the Special Master upon conferring with counsel; and

7. It is contemplated that the plenary hearing shall be completed and the record established prior to the end of August 2007, with the findings and conclusions of the Special Master to be issued shortly thereafter in advance of the 45-day period permitted by

the Court's March 23, 2007 Order.

Following a series of e-mail communications, at the request of counsel, the deadline for the filing and serving of a list of facts and documents they contend should constitute the record was extended to May 2, 2007, and the deadline for filing and serving responses thereto was amended to May 17, 2007.

Within the extended time periods, each counsel submitted a list of facts and documents they contended should constitute the plenary hearing record. See Exhibit C-4. Counsel also submitted statements concerning the appropriateness and necessity for expert testimony. See Exhibit C-5. Reply statements were also filed by counsel. See Exhibit C-6. The case management conference call with counsel was adjourned to and then conducted on May 25, 2007.

The evidentiary hearing began on June 12, 2007, during which petitioner New Jersey Monthly, LLC presented the testimony of Kate Tomlinson, publisher and editor-in-chief of New Jersey Monthly magazine. Several exhibits, discussed in detail in Parts IV and V of this Report, were entered into evidence.

Prior to receiving the testimony of Ms. Tomlinson on June 12, several matters were discussed. First noted was the receipt of certain communications from members of the public concerning Opinion 39, the Special Master stating that

> from time to time I get emails in my home email from people who are interested in this case, mostly lawyers, giving some information or wanting to give some information to me. Of course, that's inappropriate for me to receive anything other than what we receive in court on the record subject to direct and cross-examination and evidentiary rules and so on. So, my stock answer to them is, as I've privately told you, is going to be: "Here are the names of the lawyers who are involved in this case. If you have any relevant information, you may contact these lawyers and if they feel it's appropriate in the course of the case, then your information can be given to the court through the normal procedures."
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> * * * *
>
> I know they do that in good faith. I think one of the articles in one of the legal publications said I was conducting "public hearings." The hearings that we have are public. So it's not that they're public hearings where it's an open forum for anybody to come in and -- this is a court case. Petitions for certification have been granted. There are counsel of record. Everything has to come in properly through that evidentiary chain. And I think perhaps one of the articles may have misled some people to think that they should contact me.

Second, the Special Master explained he had been contact by staff counsel for the Supreme Court Board on

Attorney Certification, which subsequently filed an amicus curiae brief, stating it "might want to be heard." Counsel were informed:

> Again I referred that email to you. If any of you want to contact that Committee and they want to be heard on it, you'll figure out a way to get that done if you think it's appropriately evidentiary, or they can make an application to intervene, like so many others have. . . . and I think that's important to place all that on the record so that you know and you're assured that nothing comes in to become part of this record unless it comes in through this court proceeding.

Third, it was noted that the application by the United Stated Federal Trade Commission to submit an amicus curiae brief had been granted. Lastly, the efforts of counsel since the April 20, 2007 case management conference to reach stipulations of fact and the entry of certain documents into evidence without formal proof were placed on the record, as follows:

> I think the record should also reflect that what we have done heretofore at the case management conference and subsequently in the telephone conference is that we have asked for and received from each of you proposed stipulations of fact or proposed facts that you're going to try to establish. We've given each of you the opportunity to respond to those as to what you agree to stipulate to and what you want the record to reflect through the normal chain of events through the evidence. We've also done that with regard to the expert-witness issues, and we've also done that

> as to documents, as well. So I think the record should reflect all of that since the conference call was not on the record. . . . So, everyone knows as to what everyone is willing to stipulate to and what one would object to, subject to an evidentiary foundation.

Following Ms. Tomlinson's testimony it was further noted that during the hearing, counsel for the Committee on Attorney Advertising had served upon counsel for petitioner-intervenor Key Professional Media, Inc., d/b/a "Super Lawyers" and "Law & Politics," a "First Request for Production of Documents" in anticipation of the future evidentiary presentation. It was directed that counsel for said intervenor-petitioner first review the document request, that counsel for both parties confer thereafter, and any remaining issues be resolved through a conference call.

Another matter addressed at the June 12, 2007 hearing was the application by petitioners and intervenors for permission to present testimony from an expert on marketing research, as well as an expert on legal ethics.[1] After hearing arguments of counsel, it was ruled that an expert on marketing research could be presented but counsel were precluded from producing expert testimony on the subject of

[1] In their reply appendix filed December 18, 2006, petitioners Barr, et al. and intervenor-petitioner Key Professional Media, Inc. had submitted, in certification form, the expert opinion of Max Blackston, Britt Power and Nick Gourevitch of Global Strategy Group, a marketing research and consulting firm. (Pra 342).

legal ethics. In so ruling the Special Master stated, in pertinent part:

> First, I don't believe . . . that we need a legal ethics expert. I really believe that issue is within the Court's ken to be able to determine and discern based upon the witnesses and evidence that we receive in this matter.
>
> Having said that, I do believe that a marketing expert and/or an advertising expert would be of value to the Court. And I'm referring to the Supreme Court that ultimately will make the decisions in this case based upon the record that we develop and also the report that I develop for the Court pursuant to the charge to me to do so. I say that because I'm persuaded, looking at the brief of the Federal Trade Commission, . . . when you look at this issue globally and then, of course, specifically in New Jersey, there are only three States, at least if the FTC brief is correct, that completely prohibit . . . comparative advertising by lawyers. Whether this falls within the penumbra of comparative advertising, of course, is something to be discussed. But nevertheless in those other States, from my reading of that brief, there are standards that have to be developed and gate-keeping standards that have to be developed if you allow this type of [attorney advertising]. Obviously -- and I . . . largely agree with Mr. Flanzman with respect to the existing state of the rules. He argued from the very beginning that there was a *per se* violation at least on the issue of comparative advertising. That could be so, without really opining on it now. Nevertheless, the Court is going to look at this and I think it's very important that we . . . assure that the record is as expansive as possible, as global as possible. We can find out what other jurisdictions are doing in relationship to their ethics standards to give the Court an appropriate basis to look at this issue and determine, number one, what is being

> done, is it appropriate to do in terms of the standards that are in New Jersey and/or what should or could be in New Jersey. And then, two, you really need to know if you're going to gate-keep this in terms of . . . the principle that there's never going to be permitted deceptive advertising, and then if comparative advertising is permitted in any way, shape, or form, or if this is not construed to be comparative advertising, what is the criteria?; how is this . . . gate-keeping function to be done? Should it be done? Should it be undertaken? Is it too difficult to do? All these issues and many, many, many others, all of which have been stated here today are going to be looked at.
>
> But I believe that a marketing and/or an advertising expert as [has] been suggested would be appropriate, and I'm going to permit it to occur. But I'm not going to permit a legal ethics expert. I don't believe that that's appropriate. I believe that certainly the record will be able to fully demonstrate and the Court will know what [it] believe[s] is ethical without any expert telling them.

Within the parameters of this ruling, all parties were permitted the opportunity to present testimony from a marketing or advertising expert upon advance submission of a report and curriculum vitae of any such expert. Additional hearings for the presentation of such testimony were scheduled for July 31, 2007, August 1, 2007, and August 2, 2007. Further evidentiary hearings for the presentation of party and lay witnesses were set for August 20, 2007 through August 23, 2007.

Following the June 12, 2007 hearing, significant issues concerning the scope of the Committee's request to Key Professional Media, Inc. for the production of documents arose, including Key Professional Media's contention that the breadth of the Committee's request would require the disclosure of its confidential business practices, trade secrets and other proprietary information. The Committee also requested permission to depose the expert proposed by Key Professional Media, Inc. In order to address these issues prior to the scheduled hearing, a conference call with all counsel was conducted on July 2, 2007. Following that conference call, it was directed that Key Professional Media, Inc. first reply to the Committee's request and, then, that the parties attempt to develop a discovery and confidentiality consent order that would provide for disclosure of the requested information, to allow proper preparation for the evidentiary hearings to follow, but also preserve the confidentiality and proprietary issues for determination at a later date. Depositions of experts in advance of the hearings were not permitted, but all parties were directed to timely submit expert reports and their curriculum vitae in advance of the hearings.

On July 12, 2007, petitioners Stuart A. Hoberman and intervenor Woodward-White, Inc. submitted the July 10, 2007 report of their proposed expert, Edward M. Mazzie, Ph.D. Counsel for intervenor LexisNexis Martindale-Hubbell and counsel for petitioner New Jersey Monthly, LLC advised they would not be presenting expert testimony. Counsel for Key Professional Media, Inc. stated his client intended to call Max Blackston of Global Strategy Group (GSG) as an expert, and provided his curriculum vitae, the GSG report already being contained in the record. See Pra 342-359.

On July 16, 2007, Key Professional Media, Inc. submitted a detailed response to the Committee's request for the production of documents, and engaged in discussions with counsel for the Committee that ultimately resulted in an agreed-upon production of documents, many of which they agreed would be protected from disclosure by a proposed discovery confidentiality consent order. See Exhibit C-1.

In light of the significant discovery and document-production issues, following a conference call conducted with all counsel on July 23, 2007, the scheduled hearings for July 31, 2007 through August 2, 2007, were adjourned to August 20, 2007.

On or about July 24, 2007, the Committee served a "First Request for Production of Documents" upon counsel

for intervenor Woodward-White, Inc., publisher of "The Best Lawyers in America." Woodward-White, Inc. raised confidentiality and proprietary-information issues similar to those raised by Key Professional Media, Inc. Following a conference call with all counsel on July 31, 2007, Woodward-White, Inc. was directed to reply to the request for documents, and then engage in discussions designed to produce a discovery confidentiality consent order that would provide for production of the requested information but, again, preserve the confidentiality and proprietary nature of certain documents pending further order. By consent, a second conference call with all counsel was conducted on August 3, 2007, to more specifically address the document-production issues.

At the request of counsel, the hearings scheduled to commence on August 20, 2007, pertaining to expert testimony, were adjourned to afford counsel additional time to resolve the documentation-production issues.

On August 10, 2007, counsel for the Committee and Key Professional Media, Inc. presented a proposed discovery confidentiality consent order, which was executed on August 20, 2007. See Exhibit C-1. That consent order provided, in pertinent part:

1. Any information or materials produced by Key Media as part of discovery and/or other exchanges of documents or information in connection with the instant proceedings before the Special Master (referred to as "this action") may be designated by Key Media as "Confidential" or "Confidential - Attorneys' Eyes Only" under the terms of this Confidentiality Order ("Order"). Information or material subject to either designation is referred to herein as "Designated Material."

* * * *

3. Information or material designated "Confidential - Attorneys' Eyes Only," or copies or extracts therefrom and compilations and summaries therefrom, may be disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part only to the following persons:

a. The Committee's counsel of record in this action and regular and temporary employees of such counsel to whom it is necessary that the information or material be shown for the purposes of this action.

b. Carol Johnston, Executive Secretary for the Committee.

c. Consultants, subject to and conditioned upon compliance with Paragraph 6 herein. . . .

d. The Special Master, subject to paragraphs 7 and 8 herein.

e. Court reporters employed in connection with this action.

f. Any other person only upon order of the Special Master or upon written consent of Key Media, subject to and conditioned upon compliance with the terms of this Order.

4. Information or material designated as "Confidential," or copies or extracts therefrom

and compilations and summaries thereof, may be disclosed, summarized, described, characterized, or otherwise communicated or made available in whole or in part only to the following persons:

a. The persons designated in paragraph 3(a) through 3(f), which, together with all subsequent paragraphs concerning their interpretation, are incorporated here;

b. the members or employees of the Committee whose assistance is needed by counsel for the purposes of this litigation.

* * * *

6. If any person is to be examined as a witness at trial or during a deposition concerning Designated Material, counsel for the Committee shall consult in advance with the Special Master and counsel for Key Media on how appropriately to proceed.

7. No document or item containing or referring to Designated Material shall be filed with the Special Master unless filed under seal in a manner to ensure that confidential information is disclosed only to persons designated in Paragraphs 3 or 4, above.

* * * *

12. The use of any information or material designated as "Confidential" and/or "Confidential - Attorneys' Eyes Only" in this action, any appeal therefrom, or any court proceeding, shall not cause the information or material to lose such status.

13. Documents and materials designated as "Confidential" or "Confidential - Attorneys Eyes Only" or information derived therefrom, shall be used by the Committee only for the purposes of preparing for and conducting this action.

14. Compliance with the terms of this Order shall not operate as an admission by any party as

> to the content or significance of any information or material, or its status (or not) as valuable proprietary, confidential or commercial information. Nor shall compliance with the Order prejudice any party's right to seek relief from this Order, as appropriate, before the Special Master in accordance with the procedures hereunder.

The order further provided that those given access to the Designated Material were required to execute a Confidentiality Order Acknowledgment Form, under which they agreed to be bound by its terms.

An additional conference call was conducted on August 20, 2007, for the purpose of monitoring discovery and scheduling additional hearings; by letter to all counsel dated August 21, 2007, the results of that conference call were summarized. Additional hearings were scheduled for October 9, 2007 through October 12, 2007, and for October 22, 2007 through October 26, 2007. Counsel for amicus curiae, The Federal Trade Commission, was copied in the event it elected to present evidence. Counsel were also notified that any objection to the application by the New Jersey Board of Attorney Certification to file an amicus curiae brief should be filed within ten days. Copies of the referenced discovery and confidentiality order executed on August 20, 2007 were provided to counsel.

By order entered on October 2, 2007, the application of the New Jersey Board of Attorney Certification to file an amicus curiae brief was granted.

Another conference call was conducted on October 3, 2007, concerning the designation of certain documents by Key Professional Media, Inc. as confidential.

On October 4, 2007, counsel for the Committee and counsel for petitioner Stuart A. Hoberman, Esq. and intervenor Woodward-White, Inc., publisher of "The Best Lawyers in America" submitted an agreed-upon proposed form of discovery confidentiality consent order. That order, executed on October 8, 2007, is virtually identical in form to the August 20, 2007 order. See Exhibit C-2.

Additional evidentiary hearings were conducted on October 9, 2007, October 10, 2007, and October 11, 2007. During the course of those three days, Key Professional Media, Inc. presented the testimony of William C. White, publisher of "Law & Politics" and "Super Lawyers" magazines, as well as the testimony of Cindy Larson, Research Director for Key Professional Media, Inc. Their testimony and the evidence adduced during these hearings is fully discussed below in Part V of this Report.

By letter dated October 15, 2007, counsel for Key Professional Media, Inc. advised that his client had elected not to introduce expert testimony, stating it

> reserves the right to call an expert in rebuttal to the State's case. We note that the State did not provide advance notification of expert testimony as required by the procedural order, but merely reserved its right to present an expert in the event that petitioner KPM did so.

As a result, by letter to all counsel dated October 16, 2007, the hearings scheduled for October 22, 2007 through October 26, 2007 were adjourned, and further hearings were rescheduled for November 19, 2007 through November 21, 2007, and for November 26, 27, 29 and 30, 2007. Again, counsel for all amicus curiae were copied on that correspondence.

At the request of counsel another conference call was conducted on October 22, 2007, on the issues of whether the Global Strategy Group certification contained in the reply appendix of Key Professional Media, Inc., see Pra 343-359, should be stricken from the record if Mr. Blackston was not called as an expert witness; whether Key Professional Media, Inc. should be precluded from reserving the right to call an expert in rebuttal to the Committee's case; and whether the Committee should be permitted to present expert

testimony. It was directed that a formal motion be submitted addressing those issues.

On October 24, 2007, counsel for the Committee and counsel for intervenor LexisNexis Martindale-Hubbell submitted for execution a form of discovery confidentiality order substantially similar in content to the August 20, 2007 and October 8, 2007 discovery confidentiality orders. That order was executed on October 25, 2007. See Exhibit C-3.

By letter dated November 7, 2007, counsel for petitioner New Jersey Monthly, LLC submitted and served an application for the admission into evidence of twenty-three exhibits that described other rating systems of attorneys, colleges, physicians, hospitals and nursing homes for the limited purpose of showing that these rating systems exist. The other petitioners and intervenors joined in this evidentiary offer; the Committee filed opposition. The application was scheduled to be argued and decided at a future hearing date.

Further evidentiary hearings were conducted on November 19, 2007, and November 20, 2007. During these hearings, intervenor-petitioner Woodward-White, Inc. presented the testimony of Steven Naifeh, President of Woodward-White, Inc. The evidence and testimony presented

during these hearings is fully discussed below in Part VII. Counsel advised that Woodward-White, Inc. would not be submitting expert testimony.

On November 27, 2007, the Committee served on all counsel a copy of report from its proposed expert, Professor Stanley Presser. On November 30, 2007, counsel for Key Professional, Inc. submitted a motion to strike any testimony from Professor Presser. On that same date, by email transmission to counsel, the Special Master requested responses to that motion within ten days, with argument and decision on same to occur at the next scheduled hearing.

The hearings scheduled to continue on November 29, 2007 were adjourned to January 7-8, 2008, and January 10-11, 2008, due to discovery issues. A formal notice of those hearings dated December 28, 2007 was mailed to all counsel, and they were noticed that both the application to supplement the record and the motion to preclude the Committee from introducing expert testimony would be heard and determined during those hearings.

Additional evidentiary hearings were conducted on January 7, 2008, and January 8, 2008. Intervenor LexisNexis Martindale Hubbell presented testimony from Carlton A. Dyce, Vice-President of Peer Review Rating and Client Review Services, and Louis F. Duffy, an

International Consultant and Senior Vice-President Emeritus. The testimony of these witnesses and the evidence submitted during these hearings are discussed below in detail in Part VII of this Report.

During the January 7, 2008 hearing, argument was heard on the motion to supplement the record with twenty-three exhibits, filed by petitioner New Jersey Monthly. LLC on November 3, 2007. In granting that application, the Special Master stated, in pertinent part:

> I'm satisfied for the reasons set forth by Mr. Chait, not only in his letter but orally here today, that this information [is not] hearsay . . . because it's not introduced for the truth of the matter contained therein; it's for other purposes, the purposes enunciated and outlined by Mr. Chait, particularly, to demonstrate what is out there, what's going on out in the world, the real world of publications, of rating services, all of which is of extreme import to, I'm sure the Court, and certainly to myself as Special Master to understand the breadth of what's going on. It's overwhelming when your consider . . . what is going on out in the public sphere and how to properly, if at all, regulate it and in what way, shape, manner or form. So I think it's important that this document be allowed into evidence and I'm going to mark it into evidence. I certainly will do it with the caveat that what weight [it] is [given], what value [it] is [given] in the overall picture certainly is debatable and certainly is going to be the subject of summations . . . and the ultimate arbiter of all this which is the Supreme Court, [which] will give it such weight and accord it such deference as [it] believe[s] is appropriate given the scope of the issues. But the issues

> are very broad in this case and I think it's very important that we make as comprehensive a record as possible.

At that same hearing, the application of petitioners and intervenors to preclude the Committee from producing expert testimony was argued and denied, on the basis that it had already been decided that any party would have the right to present expert testimony, subject, of course to the rules of evidence. There was some discussion as to whether the parties would stipulate into evidence all expert reports without formal proof, subject to consideration of their arguments concerning what weight they should be given.

A conference call was conducted on January 14, 2008, on the issues of whether expert testimony would offered; the further scheduling of hearings; and the timing of the submission of proposed factual findings and conclusions of law by counsel. On or about January 24, 2008, counsel advised they had reached an agreement concerning admission into evidence of the various expert reports. By letter to all counsel dated January 28, 2008, the Special Master confirmed that

> all parties have agreed to the entry into the record of all expert reports exchanged without the necessity of formal testimony with the

> stipulation that said experts' testimony would be consistent with the information contained in their reports.

Counsel were permitted to file and serve position statements concerning those expert reports by February 19, 2008. Copies of those position statements have been included in this Report as Appendix Q.

Written summations and proposed findings of fact and conclusions of law were to be simultaneously submitted by March 21, 2008. At the request of counsel, the time period was extended to April 2, 2008. Timely submissions were made.

III. REGULATION OF ATTORNEY ADVERTISING.

This section will review the history of the regulation of attorney advertising in this country by the various states through the balancing of the states' interest in protecting consumers of legal services from the dissemination of false or misleading information, with the right of the commercial speech under the First Amendment of the United States Constitution. The principles applicable to this balancing test have evolved through a series of United States Supreme Court decisions. Those principles have been applied in a variety of ways on a state-by-state basis, in large part guided by the efforts of the American

Bar Association in the adoption of a Model Code of Professional Responsibility (ABA Model Rules). The discussion and analysis in this section will also focus on the efforts of several states to provide ethical guidance for use of the type of attorney advertising at issue in this case within the context of those constitutional principles, each state's specific regulatory scheme, and the ABA's Model Rules.

The validity of state regulation of attorney advertising first received national scrutiny in the United States Supreme Court's landmark decision in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). Much has happened in this area during the past 31 years, and it is instructive to review in detail the history of the regulation of attorney advertising in order to provide context and guidance concerning the issues presented to the Court in this matter.

In Bates, supra, the issues presented were, (1) whether provisions of the Sherman Act, specifically 15 U.S.C.A. §§ 1 and 2, precluded state regulation of attorney advertising, and (2) whether a state disciplinary rule that prohibited advertising by attorneys violated the First Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment.

The Arizona disciplinary rule at issue contained a blanket prohibition of the publicizing by Arizona attorneys of themselves "through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity[.]" Id. at 355, 97 S. Ct. at 2694, 53 L. Ed. 2d at 818 (quoting Rule 29(a) of the Supreme Court of Arizona).

After rejecting the Sherman Act claim, the Court focused on the First Amendment issue, defined as follows:

> The issue presented 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 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. Second, we also need not resolve the problems associated with in-person solicitation of clients[.] . . . Third, we note that appellee's criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney's name, address, and telephone number, office hours, and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information, and more, in the classified section of the telephone directory. . . .

> The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed. . . .
>
> [Id. at 366-68, 97 S. Ct. at 2700-01, 53 L. Ed. 2d at 825-26 (emphasis added).]

Thus, the Bates Court did not address the issue of whether claims of quality in attorney advertising enjoyed commercial free speech, specifically noting that claims of quality were probably not susceptible of precise measurement or verification and might, under certain circumstances, be considered deceptive or misleading to the public. Ibid.

In Bates, the State advanced several arguments in support of its position that the ban on advertising contained in its rule should be upheld. Specifically, it contended price advertising would have an adverse effect on professionalism and "will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth[,]" would "erode the client's trust in his attorney[,]" and "tarnish the dignified public image of the profession." Id. at 368, 97 S. Ct. at 2701, 53 L. Ed. 2d at 826. In rejecting these assertions, the Court stated, in pertinent part:

> [W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At is core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. . . .
>
> Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community[.] . . . Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.
>
> [Id. at 368-71, 97 S. Ct. at 2701-02, 53 L. Ed. 2d at 826-28 (footnotes omitted).]

The State also "argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill." Id. at 372, 97 S. Ct. at 2703,

53 L. Ed. 2d at 828. After rejecting the first two contentions, the Court stated, in relevant part:

> The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative - the prohibition of advertising - serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. [478] at 769-70 [1976]. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.
>
> [Bates, supra, 433 U.S. at 374-75, 97 S. Ct. at 2704-05, 53 L. Ed. 2d at 829-30 (emphasis added; footnote omitted).]

Thus, the obligation of the attorney-advertising regulatory authority to prevent or regulate misleading advertising is generally better fulfilled by requiring more disclosure, rather than less, to assure that the public is

sufficiently informed to enable consumers to place advertising in its proper perspective.

In rejecting the State's further contention that attorney advertising would have the undesirable effect of stirring up litigation and encouraging fraudulent claims, the Court recognized a study by the American Bar Association concluding that many persons in our society are not being reached or adequately served by the legal profession, stating:

> Among the reasons for this underutilization is fear of cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2-1 (1976).
>
> [Id. at 376-77, 97 S. Ct. at 2705, 53 L. Ed. 2d at 831 (footnote omitted).]

The Court explained that it "often has recognized that collective activity to obtain meaningful access to the courts is protected under the First Amendment." Ibid.

In rejecting the state's claim that advertising costs would ultimately increase the costs of legal fees to consumers, the Court concluded that the tendency of advertising to increase competition might be expected to increase pressure on attorneys to reduce fees and "despite the fact that advertising on occasion might increase the price the consumer must pay, competition through advertising is ordinarily the desired norm." Id. at 377, 97 S. Ct. at 2706, 53 L. Ed. 2d at 832.

The Court was also unpersuaded by the contention that advertising would have an adverse effect on the quality of services provided by attorneys, noting that "[r]estraints on advertising, however, are an ineffective way of deterring shoddy work." Ibid. Finally, the Court rejected the state's position that the regulation of advertising, to protect a public that may be particularly susceptible to misleading or deceptive advertising because it lacks sophistication in legal matters, would be difficult stating in pertinent part:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn

> oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.
>
> [Id. at 379, 97 S. Ct. at 2702, 53 L. Ed. 2d at 833.]

In ruling that advertising by attorneys was a form of commercial speech protected by the First Amendment and may not be subjected to blanket suppression, the Court made it clear that did

> not hold that advertising may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.
>
> Advertising that is false, deceptive, or misleading of course is subject to restraint. . . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. . . . And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. . . In fact, 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. For example, 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. Similar objections might justify restraints on in-person solicitation, We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not mislead. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising flows both freely and cleanly.
>
> 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.
>
> * * * *
>
> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.
>
> [Id. at 383-84, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835-36 (citations omitted; emphasis added).]

The Court made it clear that false, deceptive or misleading attorney advertising may be subject to restraint. The Court explained that because the public

lacks sophistication concerning legal services it was particularly important that there be strict requirements for truthfulness. Specifically, the Court cited advertising claims as to the quality of legal services as an example of the need for truthfulness because such claims are not susceptible of measurement or verification.

Thus, although the Court held that a blanket ban on attorney advertising was unconstitutional, it placed upon the States the obligation to govern lawyer advertising in order to protect the interests of the public, providing only limited guidance, which "began an experiment to balance consumer protection with the flow of legal commerce that continues on a state-by-state basis today." William E. Hornsby, Jr., "Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing," 36 U. Rich. L. Rev. 49 (March 2002). Mr. Hornsby, staff counsel to the American Bar Association Commission on Advertising, noted with a tone of dismay:

> Despite the ABA's adoption of provisions addressing legal advertising and solicitation in the Model Code of Professional Responsibility (the "Model Code") and later the Model Rules of Professional Conduct (the "Model Rules"), the states have embarked on their own courses of rule-making, emphasizing and addressing different aspects of business development. While many states have adopted portions of the Model Rules governing the communications of legal services,

> no two states have identical ethics provisions in this area.
>
> * * * *
>
> The inherent stated-based regulation, the inconsistencies among states, and the high standards combine to make it difficult, if not impossible for the Twenty-first Century multi-jurisdictional law firm to fully comply.
>
> [Id. at 49-50 (footnotes omitted).]

See In re Felmeister & Isaacs, 104 N.J. 515, 532 (1986) (noting that Bates stands for the proposition that although the interest of the state did not warrant a total ban on legal advertising, the legal profession was sufficiently different from other activities as to warrant some regulation).

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 200 S. Ct. 2343, 65 L. Ed. 2d 341 (1980),[2] the Court provided the following test for assessing the constitutionality of the regulation of commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. 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. Next, we ask whether the asserted governmental interest is substantial.

[2] Central Hudson did not involve legal advertising, but rather the constitutionality of a state regulatory ban on promotional advertising by an electrical utility.

> 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.
>
> [Id. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351.]

In response to the Court's decision in Bates, the Missouri Supreme Court adopted Rule 4, which regulated advertising by lawyers and permitted attorneys to include only ten categories of information in a published advertisement. A challenge to that rule by an attorney who had included additional information in his advertisement, beyond that permitted, wound its way to the Supreme Court in the case of In Re R.M.J., 455 U.S. 191, 193, 102 S. Ct. 929, 932, 71 L. Ed. 2d 64, 68 (1982). In explaining its decision in Bates, and providing some additional guidance the Court stated:

> In short, although the Court in Bates was not persuaded that price advertising for "routine" services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for

professional services especially susceptible to abuses that the States have a legitimate interest in controlling.

Thus, the Court has made clear in Bates and subsequent cases that regulation -- and imposition of discipline -- are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. In Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 462 (1978), the Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited. And in Friedman v. Rogers, 440 U.S. 1 (1970), we held that Texas could prohibit the use of trade names by optometrists, particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names.

Commercial speech doctrine, in the full context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S. at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no

> broader than reasonably necessary to prevent the deception.
>
> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Central Hudson Gas & Electric Corp. v. Public Services Comm'n, 447 U.S. 557, 563-64 (1980). Restrictions must be narrowly drawn, and the State lawfully may regulated only to the extent regulation furthers the State's substantial interest. Thus, in Bates, the Court found that the potentially adverse effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech. 433 U.S. at 368-72, 375-77.
>
> [Id. at 203, 102 S. Ct. at 937-38, 71 L. Ed. 2d at 74-75 (footnotes omitted; emphasis added).]

The Court found Rule 4 to be an invalid restriction upon speech because they did not find the listing by the attorney in his advertisement to be misleading, nor had the State demonstrated that a substantial interest was being promoted by the rule restrictions. Id. at 205, 102 S. Ct. at 938, 71 L. Ed. 2d at 75.

Thus, in R.M.G., the Court seemed to draw a distinction between attorney advertising that is "inherently" misleading and that which is "potentially" misleading, stating that misleading advertising may be prohibited entirely; however, if potentially misleading information can be presented in a manner that is not

deceptive, an absolute prohibition is not permitted. The Court suggested that the requirement of a disclaimer or explanation is the preferable approach to attorney-advertising regulation that may otherwise be misleading, with any restrictions on attorney advertising being no broader than reasonably necessary to prevent deception.

This is the heart of the matter currently before the Court. The focal issue is whether there can be a blanket ban on comparative attorney advertising, particularly if it is "comparative by implication or inference," as here. Is a blanket ban on implied comparative advertising the least restrictive manner in which to regulate commercial speech in order to achieve the goal of consumer protection? Or, is the requirement of a disclaimer or explanation ——sufficient to negate the potentially misleading nature of such advertising——the more constitutionally-appropriate approach? And, if so, who will perform the "gatekeeper" function and how will it be accomplished? Or, is all comparative advertising doomed as constituting inherently misleading information because it is simply not susceptive to measurement or verification? These are not questions with easy answers.

Our Supreme Court explained the holding in the R.M.G. decision, as follows:

> While the Court's language at times appeared to allow only one restriction on attorney advertising, namely that it be truthful and non-misleading, the Court explicitly indicated that further regulation was possible if the regulation passed the Central Hudson test of serving a substantial state interest, directly promoting that interest, and being the least restrictive alternative available.
>
> [In re Felmeister & Isaac, supra, 104 N.J. at 532.]

In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985), an attorney appealed from disciplinary action taken against him for running an advertisement offering to represent defendants in drunk-driving cases and to refund fees if they were convicted of that offense, and another advertisement containing a drawing of a defective birth control device, advising users of the device it was not too late to sue for their injuries and offering to represent them on contingent fee basis. In reversing the disciplinary action taken, citing to Bates and R.M.G., supra, the Court held that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of

potential clients." Id. at 647, 105 S. Ct. at 2279, 85 L. Ed. 2d at 670.

The Court also rejected the State's contention that the attorney's use of a picture of the defective birth-control device in his advertisement had been properly banned, stating that "nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by means short of a blanket ban." Id. at 648, 205 S. Ct. at 2280, 85 L. Ed. 2d at 671. Again, regulation through use of disclaimers was preferred to an absolute ban.

In Felmeister, supra, our Supreme Court considered a challenge by a law firm to RPC 7.2(a), which had prohibited, in attorney advertising, "'the use of drawings, animations, dramatization, music or lyrics' and requiring that '[a]ll advertisements . . . be presented in a dignified manner.'" Id. at 516. The Court concluded

> that the public interest would be better served by a revised rule requiring that all attorney advertising be predominately informational, and limiting the present prohibition on the use of "drawings, animations, dramatization, music or lyrics" to television advertising. The requirement of presentation "in a dignified manner" would be eliminated, but advertisements relying in any way on the shock or amusement value of absurd portrayals wholly irrelevant to the

> selection of counsel would be prohibited. The unchallenged prohibition against false or misleading advertising would, of course, continue.
>
> [Id. at 516-17 (footnotes omitted).]

The Court noted its decision was based on both policy and federal constitutional grounds, explaining:

> We believe that attorney advertising without any restrictions whatsoever might seriously damage important public interests, but that excessive restriction might harm other public interests equally important. The goal, as we view it, is to strike the proper balance, one that results in the largest net gain for the public. The effort to do so, however, though guided by logic, necessarily suffers from inexperience; the modern era of attorney advertising, which commenced with Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), is less than a decade old. That effort is therefore undertaken with an open mind and a willingness to change as we learn more, as we learn, perhaps, of a better balance.
>
> [Id. at 517-18 (emphasis added).]

Thus, one of the issues here is whether or not the evolution of attorney advertising over the twenty-two years since the Felmeister decision warrants a reexamination of the regulation of attorney advertising in New Jersey.

In analyzing the various public interests involved in attorney advertising and its regulation, the Court stated, in pertinent part:

> The public would be well served by more information about the legal system in order to know its legal rights and to help it choose a lawyer to enforce those rights. In no small part because of the prior longstanding prohibition against attorney advertising, a substantial portion of the public is ill-informed about its rights, fearful about going to an attorney, and ignorant concerning how to choose one. Attorney advertising is perhaps the best way to meet these needs. . . .
>
> We also conclude that the public would be better served if it could obtain legal services at a lower price. Again, attorney advertising is one of the best ways to foster price competition.
>
> These twin goals, informing the public and making legal services affordable, are important not only because they increase access to and lower the price of a professional service. A legal system that leaves its citizens ignorant of their rights and how to enforce them, or puts the price of legal services beyond the reach of a substantial portion of its citizens, fails in securing one of society's most fundamental values: the attainment of justice. All members of society, not just the direct recipients and users of the messages, benefit from attorney advertising.
>
> [Id. at 524 (citations and footnotes omitted; emphasis added).]

The Court concluded that attorney advertisements can be devised in a manner that provides substantial information and are, at the same time, interesting without posing significant risks to the referenced twin goals. Id. at 525. The problem is preventing the interesting nature of the advertisement and its ability to attract and hold

the attention of the consumer, from becoming a vice. Ibid. Of particular import to the issues in this case was the Court's explanation that the content of the advertisement should be related to criteria that would assist the consumer in his or her selection of an attorney, explaining:

> In contrast to the kind of purely informational ad . . . , when an ad persuades the consumer to select a particular lawyer for reasons that have absolutely nothing to do with those qualities that are rationally related to the lawyer's competence, it may be interesting, but it performs a public *dis* service. Not only does it fail to perform the function of educating the consumer about the factors that reason tells us should be considered in making that choice, it affirmatively injects other factors into the process. . . . The most important factor, the competence of the attorney, would be left to chance; the public might more and more consider the selection of lawyers with less and less rationality; and lawyers themselves might come to regard success as depending not on their qualifications or performance as attorneys but on their ability to choose the most effective advertising agency.
>
> [Id. at 525-26 (emphasis added).]

The Court also noted that of principal importance to a consumer seeking legal services should be the performance of attorneys and the quality of the services they render. Id. at 526. More specifically, the Court stated that

> [t]he kind of information a sophisticated client

> wants -- and gets -- centers on the attorney's reputation; how he is regarded by his peers, how other attorneys whom the client already knows assess his ability, what his clients think of him, etc. Because of the inordinate difficulty of assuring the accuracy of such information, its advertisement may be prohibited. Yet, it is the most important information a consumer would need. That which is permitted, on the other hand, may tell very little on which one should rely.
>
> This inability to assure that advertisements include the really significant information about attorney competence makes it that much more important to control irrational factors in attorney advertising. The problem of insuring that consumers receive helpful information about legal services is only exacerbated when the admittedly inconclusive nature of much of the information is compounded by emotional, non-rational appeals that have absolutely nothing to do with the attorney's qualifications.
>
> [Id. at 527-28 (footnotes omitted; emphasis added).]

Thus, the Felmeister Court posed the same dilemma presented in this case. On the one hand, logic tells us that advertisements designed to persuade consumers to select a particular attorney should be related to those qualities that are rationally related to the lawyer's competence. On the other hand, the Court recognized that there is "inordinate difficulty of assuring the accuracy of such information[.]" For that reason, the Court concluded that such advertisement may be prohibited while, at the same time, lamenting that "it is the most important

information a consumer would need [to choose counsel]." Ibid. Simply put, the issue here is whether the type of quality information most needed by consumers can be conveyed through attorney advertising, while at the same time not being misleading or deceptive to the public.

The Court identified the State's interest in regulating attorney advertising as "assuring that citizens' decisions about their need for counsel and their selection of counsel are rationally rather than emotionally determined," id. at 535, later declaring that "[e]verything we know about the administration of justice and the representation of clients convinces us that rational selection of counsel serves not only the client's interest, but the public interest." Id. at 546.

The Court then went on to create the New Jersey Supreme Court Committee on Attorney Advertising and define its powers and responsibilities. Id. at 548-51; see R. 1:19A-1 to -8. The Court concluded, as follows:

> This Court's concerns that attorney advertising be restrained to the extent necessary to protect consumers and to preserve professional qualities beneficial to society are but small ripples in the waves of reform. We hope by these new rules to bring the benefits of attorney advertising to consumers of legal services: to help them better determine their need for and selection of counsel, and to encourage price competition among attorneys.

> We look to the day when justice will be done for all citizens, regardless of wealth. We know that advertising alone will not do it, but suspect that without advertising it will not be done.
>
> To us it is clear that the initiative of the United States Supreme Court that commenced with Bates will ultimately greatly benefit our citizenry. It is sobering to note that while that proposition seems so clear today, its opposite seemed equally clear not so long ago. This observation gives us cause to be cautious, cautious in both restraining advertising and in permitting it. The truth is we simply have much to learn about the impact of attorney advertising and the impact of restrictions on attorney advertising. At this point all we can be confident of is the need for advertising and those who would be helped by advertising to a policy limited not by their constitutional rights but by the public's need.
>
> [Id. at 552.]

In Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990), the Court reviewed an attorney's challenge to a state court decision publicly censuring him because his letterhead stated he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA), in violation of a rule contained in the Illinois Code of Professional Responsibility prohibiting a lawyer from holding himself or herself out as "certified" or a "specialist." Id. at 97, 110 S. Ct. at 2286, 110 L. Ed. 2d at 92. In applying standards applicable to the regulation

of commercial speech, the Court concluded that the attorney's statement on his letterhead that he was certified as a specialist by the NBTA was true and verifiable, was not misleading, and was not potentially misleading. Id. at 100-107, 110 S. Ct. at 2288-2291, 110 L. Ed. 2d at 94-99.

In specifically rejecting the State's contention that the statement of certification impliedly constituted a claim as to the quality of the attorney's legal services that might be likely to mislead, the Court stated:

> This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification by NBTA is 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 and a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, . . . but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.
>
> We must assume that some consumers will infer from petitioner's statement that his qualifications in the area of civil trial advocacy exceed the general qualifications for admission to a state bar. Thus, 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. In this case, there is no evidence that a claim of NBTA certification suggests any greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements. . . . We find NBTA standards objectively clear, and, in any event, do not see why the degree of uncertainty identified by the State Supreme Court would make the letterhead inherently misleading to a consumer. A number of other States have their own certifications plans and expressly authorize references to specialists and certification, but there is no evidence that the consumers in any of these States are misled if they do not inform themselves of the precise standards under which the claim of certification are allowed.
>
> [Id. at 101-03, 110 S. Ct. at 2288-89, 110 L. Ed. 2d at 95-96 (citations and footnotes omitted).]

In Peel, the Court drew a distinction between statements of opinion or quality, and statements of objective facts that support an inference of quality. The Court actually examined the manner in which the NBTA certification was conferred, finding significant the fact that the NBTA had certain objective requirements, made inquiry into a candidate's fitness, and had not indiscriminately issued the certification for a fee. The issue presented here is whether a peer-review rating system that results in compilation of a list of attorneys that carries a superlative title can fall into the same category, such that attorney advertisement of one's

inclusion in that list can be considered as non-misleading and not deceptive.

A recent comprehensive review of the commercial speech doctrine as applied to professional advertising was conducted and presented by R. Michael Hoefges, J.D., Ph.D., Assistant Professor of the School of Journalism and Mass Communication, University of North Carolina at Chapel Hill, in 24 Cardozo Arts & Ent. L.J. 953 (2007). At the outset, Professor Hoefges noted:

> The commercial speech doctrine has been described as a "notoriously unstable and contentious domain of First Amendment jurisprudence" and "no other realm of First Amendment law has proved as divisive [for the Court]." The doctrine has also been criticized on the basis that "the want of clarity and predictability is all the more unfortunate given the frequency with which speech restrictions are imposed," and that "despite a regular flow of opinions over two decades - typically at least one commercial speech decision per term - the Court's jurisprudence furnishes astonishing little guidance."
>
> [Id. at 954-55 (quotation cites in footnotes omitted).]

The accuracy of this portrayal by Professor Hoefges is evident from the discussion that follows.

Although there are certain guiding legal principles provided by these United States Supreme Court decisions, the interpretation and application of those principals

through ethics opinions and decisional law has varied greatly at the state level in the context of the varying rules of professional responsibility governing attorney advertising adopted by each state. In a truly global professional advertising environment, the diversity of approaches and lack of uniformity is troubling, as this diversity of state application provides significant variations of the type of information provided to the consumer of legal services.

The principles are rather clear; it is their application that is difficult. Professor Hoefges summarized the dilemma facing states in the regulation of attorney advertising by explaining that in Bates, the Supreme Court refused

> to extend First Amendment protection to false or misleading commercial speech, or to commercial speech involving illegal transactions, on grounds that these categories of unprotected expression have little if any constitutional value in the economic marketplace, and can be detrimental to consumers when making purchase decisions. Among these categories of unprotected commercial speech, the Bates Court in particular noted that defining the boundary between misleading and non-misleading commercial speech in professional services advertising was a critical and problematic issue to be explored in future cases,[3] and a prominent First Amendment scholar recently identified this

[3] (article footnote 476) Bates, supra, 433 U.S. at 384.

issue as one of the significant "battles in contemporary commercial speech litigation."[4] In addition, the Bates Court noted that issues remained to be resolved regarding the extent to which states could constitutionally regulate subjective claims in professional services advertising to alleviate the potential of consumers being misled.[5] The cases identified and reviewed in this article indicate that these issues remain mostly unsettled within the commercial speech jurisprudence of the Supreme Court and, thus, the lower federal and state supreme courts as well.

The distinction between misleading and non-misleading commercial claims remain perhaps the most critical issue in First Amendment commercial speech decisions involving the constitutionality of regulations of professional services advertising as indicated by the cases reviewed in this article. The Supreme Court has held that states may not constitutionally impose categorical bans on claims in professional services advertising without demonstrating that the regulated claims are misleading, which includes claims that are inherently misleading on their face or actually misleading to consumers in the marketplace in practice.[6] In the context of quality-of-service claims, the Bates Court suggested that states cannot categorically ban such claims constitutionally unless they are unverifiable and "so likely to be misleading as to warrant restriction."[7] However, the extent to which states can constitutionally regulate quality-of-service claims remains completely uncharted in the Court's commercial speech jurisprudence as the Court has yet to squarely address the issue since raising it in Bates in 1977.

In addition, the Supreme Court has made it clear that states cannot constitutionally ban claims in professional services advertising

[4] (article footnote 477) Rodney A. Smolla, "the Puffery of Lawyers," 36 U. Rich. L. Rev. 1, 11-12 (2002).
[5] (article footnote 478) Bates, supra, 433 U.S. at 383.
[6] (article footnote 479) In re R.M.J., supra, 455 U.S. at 204.
[7] (article footnote 480) Bates, supra, 433 U.S. at 383.

merely because they are potentially misleading to consumers. Potentially misleading claims are those that might be presented in a misleading format but also are capable of presentation in a non-misleading manner, the Court explained.[8] Such claims can be constitutionally regulated as long as the regulation "serves as an appropriately tailored check against deception or confusion."[9]

* * * *

In addition, the Supreme Court's commercial speech jurisprudence remains unclear regarding the extent to which states may constitutionally require disclosures in professional services advertising to prevent a potentially misleading claim from being presented in a misleading format to consumers. The Court has stated that disclosure requirements can be ruled unconstitutional if "unjustified" or "unduly burdensome."[10] However, as demonstrated in this article, the Court has not clearly defined these requirements, nor has the Court clearly explained whether these requirements operate independently from the requirements of the Central Hudson analysis. Arguably, the First Amendment would be better served if the Court would definitively establish the Central Hudson analysis as the appropriate constitutional test for disclosure requirements in the context of professional services advertising, and this seems especially important when a state-scripted disclosure is compelled. Under such an approach, states should be required to demonstrate that a regulated claim is misleading — either inherently or actually — without the required disclosure, and demonstrate with evidence that the required disclosure meets the efficacy and efficiency requirements of the invigorated third and fourth prongs of the Central Hudson analysis.

[Hoefges, supra, 24 Cardozo Arts & Ent. L.J. at 1021-25 (article footnotes moved to text and renumbered; emphasis added).]

[8] (article footnote 481) In re R.M.J., supra, 455 U.S. at 203.
[9] (article footnote 482) Ibanez v. Florida Dep't. Bus. & Prof'l Reg. Bd., 512 U.S. 136, 147 (1994).
[10] (Article footnote 491) Zauderer, supra, 471 U.S. at 651.

As noted by professor Hoefges, the extent to which quality-of-service claims in attorney advertising can be constitutionally regulated has not been addressed by the United States Supreme Court. Attorney advertising that extols inclusion in a listing and ranking of attorneys selected based on opinions of competence rendered in a peer-review survey of other lawyers is a quality-of-service claim. In a sense, it is the reporting of an objective fact, i.e., inclusion on the list, yet the underlying basis of the list or ranking is primarily the subjective opinions of competence expressed by those peer attorneys polled.[11] At issue here is the extent to which quality-of-service claims can be regulated or prohibited, whether they are inherently misleading, or whether their potential for misleading the consumer can be sufficiently alleviated by a disclaimer or qualifying language.

Each jurisdiction has similar, yet different, rules of professional responsibility governing attorney advertising. The variations are the product of measured design by each state individually, principally guided by the Model Rules of Professional Conduct concerning lawyer advertising

[11] The petitioners and intervenors, particularly Key Professional Media, Inc., have argued rather persuasively that their methodologies include measurement of attorney quality based several objective indicators such a professional achievement, verdicts and settlements, community service, education, and scholarly writings, among others.

adopted by the American Bar Association following the Bates decision.

The New Jersey Rules of Professional Conduct are based on the American Bar Association (ABA) Model Rules (1983), which replaced the ABA Code of Professional Responsibility (CPR), adopted in 1970. Baxt v. Liloia, 155 N.J. 190, 197 (1998). As with our RPC 7.2, ABA Model Rule 7.2 permits attorney advertising subject to the provisions contained in RPC 7.1, as to New Jersey, and in ABA Model Rule 7.1, which simply provides:

> A lawyer shall not make false or misleading communication about 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.

The Comment to ABA Model Rule 7.1 provides the following relevant guidance for application of the language contained in ABA Model Rule 7.1:

> [1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.
>
> [2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole

> not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.
>
> [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

Thus, ABA Model Rule 7.1 and its comments specifically incorporate the principles and guidelines provided by the United States Supreme Court in Bates, supra, 433 U.S. at 383-84, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835-36 (attorney advertising cannot be subject to a blanket suppression but can be regulated to prohibit false, deceptive or misleading advertising; limited supplementation to attorney advertisement by way of warning or disclaimer can be required to assure consumers are not mislead); in R.M.G., supra, 455 U.S. at 203, 102 S. Ct. at 937-38, 71 L. Ed. 2d

at 74-75 (the remedy in the first instance to potentially misleading information is not necessarily a prohibition but preferably a requirement of disclaimers or explanation, with restrictions on such advertising no broader than reasonably necessary to prevent deception and only to the extent that the restriction furthers the State's substantial interest); and Peel, supra, 496 U.S. at 101-03, 110 S. Ct. at 2288-89, 110 L. Ed. 2d at 95-96 (rejecting a ban on the listing in letterhead of an attorney's certification by a legal organization, explaining there is a distinction between "statements of opinion or quality and statements of objective facts that may support an inference of quality").

In New Jersey, RPC 7.1 is somewhat more restrictive than ABA Model Rule 7.1, because it specifically defines a false or misleading communication in RPC 7.1(a)(2) to be one that is likely to create an unjustified expectation about the results the lawyer can achieve, and in RPC 7.1(a)(3) to be advertising that compares the lawyer's services with other lawyers' services.

Although subtle in appearance, in practice the differences are significant. First, language in comments to a rule are generally considered to be only guidelines to the interpretation of the actual language contained in the

content of the rule itself. RPC 7.1 contains no official comment section. Under both rules, false or misleading statements are prohibited. ABA Model Rule 7.1 defines a false or misleading communication as one that:

- contains a material misrepresentation of fact or law; or
- omits a fact necessary to make the statement considered as a whole not materially misleading.

The Comments to ABA Model Rule 7.1 provide guidance to interpretation of that language by stating that a truthful statement that is misleading is one that

- omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading, or
- creates a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or lawyer's services for which there is no reasonable factual foundation.

Those Comments further state that a misleading communication is one that:

- makes an unsubstantiated comparison of the lawyer's services with the services of other lawyers if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.

The Comment to ABA Model Rule 7.1 also makes it clear that "[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."

However, RPC 7.1 specifically defines, in the body of the rule, a false or misleading communication as one that

- contains a material misrepresentation of fact or law, or
- omits a fact necessary to make the statement considered as a whole not materially misleading, or
- is likely to create an unjustified expectation about the results the lawyer can achieve, or
- states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- compares the lawyer's services with other lawyers' services.

There is no provision in the New Jersey Rules of Professional Conduct that permits a "substantiated" comparison of lawyers' services, or contemplates that "an appropriate disclaimer or qualifying language" in the lawyer advertisement might preclude a finding that the advertisement is likely to create an unjustified expectation or otherwise mislead. This latter concept, of

course, embraces the principle first articulated in Bates, supra, 433 U.S. at 384, 97 S. Ct. at 2709, 53 L. Ed. 2d at 836, and then explicitly stated in R.M.J., supra, 455 U.S. at 203, 102 S. Ct. at 938, 71 L. Ed. 2d at 75, that the remedy, in the first instance, when addressing potentially misleading information, is not necessarily a blanket ban, "but preferably a requirement of disclaimers or explanation[,]" and that restrictions placed upon the advertising of professional services where there is a potential for deception "may be no broader than reasonably necessary to prevent the deception."

A number of jurisdictions have applied this principle by requiring or suggesting the inclusion of disclaimers as a method of preventing an attorney advertising from being misleading to the public, as opposed to a per se ban. See, e.g., Texans Against Censorship, Inc. v. State Bar of Texas, 888 F. Supp. 1328, 1355 (E.D. Tex. 1995) (in reviewing Texas Disciplinary Rules, holding that required disclaimer in attorney advertising——where the lawyer lists an area of practice that he or she has not been certified as a specialist by the Texas Board of Legal Specialization——that he or she has not been certified by said Board, "is an appropriate mechanism to cure the false impression that may be created when a lawyer lists areas of

practice in his or her advertisement[,]" and noting further that "the amended rules do not prohibit lawyers from listing any area of practice in their advertisements, nor does it appear that such a broad rule would withstand constitutional scrutiny"); In re PRB Docket No. 2002.093, 868 A. 2d 709, 713 (Vt. 2005) (holding that any attorney advertisement using the term "specialist" or "specialty" in this sense (that it may imply expertise to the lay consumer) should be qualified by a disclaimer that the attorney has not been certified as a specialist by any recognized organization, in order avoid potential confusion to the consumer and to comport with Rule 7.1's prohibition against misleading communications); Walker v. Board of Prof'l Responsibility, 38 S.W. 3d 540, 548-49 (Tenn. 2001) (upholding a rule requirement that attorneys who advertise with regard to any area of law but are not certified by the State Bar in that area include a disclaimer that "they are not 'certified as a . . . specialist'"); Parmley v. Missouri Dental Board, 718 S.W. 2d 745, 752 (Mo. 1986) (holding that "[d]isclaimers are effective safeguards to dissipate 'consumer confusion or deception'" (quoting In re R.M.J., supra, 455 U.S. at 209, 102 S. Ct. at 929, 71 L. Ed. 2d at 64)).

As has been noted, there is a wide disparity between the States in the regulation of attorney advertising when compared with the ABA Model Rules of Professional Conduct. An excellent and recent comparison of these differences is contained on the website of The American Bar Association, and the relevant portions thereof pertaining to attorney advertising portions of the ABA Model Rules has been included in this report as Appendix B. See http://www.abanet.org/cpr/mrpc/rule 7_1.html.

The Model Code of Professional Responsibility was first adopted by the House of Delegates of the American Bar Association in 1969 and became effective January 1, 1970. See http:/www.abanet.org/cpr/professionalism/home.html for link to "Preface," ABA Model Code of Professional Responsibility. That Code was a revision of the Canons of Professional Ethics adopted by the American Bar Association in 1908. Following the United States Supreme Court's decision in Bates, the ABA Model Code underwent significant revision in the area of attorney advertising culminating in adoption of the 1980 version, which contained "Canons," "Ethical Considerations," and "Disciplinary Rules" in various areas, including attorney advertising. Ibid. Ethical Consideration 2-9 (EC 2-9) attempted to articulate considerations relevant to striking the balance between the

public interest in the regulation of attorney advertising and the right of commercial free speech, providing as follows:

> The lack of sophistication on the part of many members of the public concerning legal services, the importance of interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

The premise of this ethical consideration was that regulation of attorney advertising is necessary to assure that attorneys do not disseminate misleading information concerning themselves to the public; that the information contained in attorney advertising be relevant to the selection of a lawyer, be accurate and reliable; and that

there be no representations concerning the quality of service which cannot be measured or verified, and that these principles be applied in a manner that does not impede the flow of useful, meaningful and relevant information to the public.

In 1983, the House of Delegates of the American Bar Association adopted the Model Rules of Professional Conduct. The current version of ABA Model Rule 7.1, set forth above, is the result of an amendment made as a result of the American Bar Association's Ethics 2000 Commission Report. See http://www.abanet.org/cpr/e2k/e2k-report_home.html for link to the Ethics 2000 Commission Report. The prior version of ABA Model Rule 7.1, along with its official Comment, provided:[12]

> 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:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

[12] This version was amended as a result of the Ethics 2000 Commission Report and is discussed herein to demonstrate the shift in focus by the ABA Model Code in its approach to the regulation of attorney advertising.

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

The New Jersey version, RPC 7.1, is similar in content to the 1983 version of ABA Model Rule 7.1.[13] As a result of the 2000 review of its Model Rules, major changes were made to ABA Model Rule 7.1, moving much of the text of the rule to the Comment portion. In its report, the 2000 Ethics Commission provided its rationale for modifying the 1983 version of ABA Model Rule 7.1, as follows:

TEXT:

1. Modify to limit prohibition to false and misleading communications

[13] The most striking difference between the two, however, is that RPC 7.1(1)(3) prohibits comparative advertising, whereas the 1983 version of ABA Model Rule 7.1(c) permitted comparative advertising if the comparison could be factually substantiated.

The Commission has limited Rule 7.1 to a prohibition against false or misleading communications, defined in terms of the material misrepresentations or omissions that are the subject of current paragraph (a). **The categorical prohibitions in current paragraphs (b) and (c) have been criticized as being overly broad and have therefore been relocated from text to commentary** as examples of statements that are likely to be misleading. **The Commission believes this approach strikes the proper balance between lawyer free-speech interests and the need for consumer protection**.

2. Paragraph (b): Delete "is likely to create an unjustified expectation about results the lawyer can achieve"

The Commission recommends deletion of this specification of a "misleading" communication because **it is overly broad and can be interpreted to prohibit communications that are not substantially likely to lead a reasonable person to form a specific and unwarranted conclusion about the lawyer or the lawyer's services**. See Comment [2].

3. Paragraph (b): Delete "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law"

The Commission recommends that this portion of paragraph (b) be moved to Rule 8.4(e) because this prohibition should not be limited to advertising. Comment [4] provides a cross-reference.

4. Delete paragraph (c)

The Commission also believes that **a prohibition of all comparisons that cannot be factually substantiated is unduly broad**. **Whether such comparisons are misleading should be assessed on a case-by-case basis in terms of whether the particular comparison is substantially**

> **likely to mislead a reasonable person to believe that the comparison can be substantiated**. See Comment [3].
>
> [2000 Ethics Commission Report, Model Rule 7.1, "Reporter's Explanation of Changes," http://www.abanet.org/cpr/e2k/e2k-rule71rem.html (emphasis in bold added).]

As noted, the significance of moving language in the former version of ABA Model Rule 7.1 from the "text" to the "comment" portion is that language appearing in the "text" of a professional responsibility rule is authoritative, while the "comment" portion is intended to be explanatory and illustrative of the meaning and purpose of the rule to provide interpretive guidance. See Preamble [21] to ABA Model Rules. The overall expressed intent of these amendments was to provide States with a useful template that avoided categorical prohibitions——which could be construed to be overly broad——and instead substituting criteria that would permit a case-by-case approach to the issue of whether attorney advertising is false or misleading by properly balancing lawyer commercial free-speech interests and the need for consumer protection. Ibid.

The ABA Model Rules of Professional Conduct have been adopted, in one form or another, in all States except California, Maine and New York, as well as in the District

of Columbia and Virgin Islands. See American Bar Association website, Model Rules of Professional Conduct, http:www.abanet.org/cpr/mrpc/chron_states.html. New Jersey was actually the first State to adopt the ABA Model Rules, as modified, on July 12, 1984. Of the States that have adopted the ABA Model Rules, eight (8) States, including New Jersey, have not officially adopted the Comments to them, although three of those States (Illinois, Minnesota and South Dakota) have provided the Comments for interpretive guidance. Ibid. Although the New Jersey Rules of Professional Conduct were revised, in part, effective January 1, 2004, RPC 7.1 was last amended as of September 4, 1990.[14]

A number of jurisdictions have been confronted with attorney-advertising issues similar to those before the Court.

The Arizona Rules of Professional Conduct were adopted by the Arizona Supreme Court pursuant to Rule 42. The State Bar of Arizona Board of Governors created the Committee of the Rules of Professional Conduct to assist the State Bar and its members resolve questions of professional ethics. Upon inquiry, the Committee issues

[14] The 2006-2008 Rules Cycle Report of the Supreme Court Professional Responsibility Rules Committee (January 15, 2008) recommends additional changes to the Rules of Professional Conduct; however, none involve RPC 7.1.

formal opinions on issues of professional ethics. Those opinions are advisory only and are not binding in any disciplinary or other legal proceeding. See http://www.myazbar.org/Ethics/generalInfo.cfm.

Prior to December 2003, ER 7.1(c) of the Arizona Rules of Professional Conduct contained a provision stating that an advertisement by a lawyer was considered to be "false or misleading if it compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." In 1991, the Committee addressed the issue of whether it was ethical for an Arizona lawyer to advertise that lawyer's listing in The Best Lawyers in America or in Who's Who in American Law. In interpreting ER 7.1(c), the Committee concluded that a lawyer who states in an advertisement he or she is listed in the publication The Best Lawyers in America is necessarily attempting to convey that the quality of his or her services is superior to the quality of services of other lawyers and was as a whole unethical because, although the listing could be verified, the consequential implication of the superior quality of legal services could not be verified. Ariz. Comm. on Prof'l Conduct, op. 91-08.

Under the December 2003 amendment to ER 7.1, a prohibition against comparative statements that cannot be

verified was moved from the body of the rule to the comment section of ER 7.1. In defining what constitutes a "misleading statement," comment 3 thereof provides, inter alia, that "an unsubstantiated comparison of the lawyer's services . . . may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." It should be noted that comment 3 to ER 7.1 further provides that "[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." Note that Comment 3 to ER 7.1 is identical to Comment [3] to ABA Model Rule 7.1.

Following the amendment to ER 7.1, the Committee was asked to revisit the issue of whether it was unethical for an Arizona lawyer to advertise his or her listing in The Best Lawyers in America. In an opinion issued in July 2005,[15] the Committee concluded that

> it is not unethical for a lawyer to advertise the lawyer's listing in The Best Lawyers in America, as long as the advertised representation is truthful and includes the year in which and the specialty for which the lawyer was listed in the publication. Even if such advertised representation is construed as a comparison, the representation still is ethical because the

[15] A copy of that Opinion is contained in Appendix C.

> subjective basis for the implied comparison can be verified. In light of the 2003 amendment to ER 7.1 and this Opinion, Opinion 91-08 is no longer viable to the extent it conflicts with this Opinion.
>
> [Appendix C at A-139.]

In arriving at this conclusion, the Committee found significance in the fact that the "unsubstantiated comparison" provision had been moved from the body of ER 7.1 to the comment section, noting first that the Preamble to the Arizona Rules of Professional Conduct explained that the comments were not intended to add obligations to the Rules but rather were to provide guidance for practicing in compliance with the Rules. Id. at n. 4; see Ariz. R. Prof'l Conduct, Preamble ¶ 14. The Committee explained:

> The reference to comparative statements in comment 3 to ER 7.1., as amended, must now be viewed as a tool for engaging in proper analysis of the ethical requirements for advertising under ER 7.1, and not as a requirement per se. In that sense, where the prior version of ER 7.1 explicitly addressed any comparative statement that is not factual substantiated, comment 3 to the present ER 7.1 is more subtle. . . . As amended, then, ER 7.1 no longer decides that any factually unsubstantiated comparison is per se false or misleading. Instead, ER 7.1, as amended, now instructs that whether a factually unsubstantiated comparison is false or misleading should be decided under an objective standard, with the likelihood of such a statement being false or misleading increasing in conjunction with the specificity

of the statement.

[Appendix C at A-137.]

Accepting the proposition that an advertisement containing the verifiable statement that an attorney is listed in The Best Lawyers in America is necessarily attempting to convey that the attorney is one of the best lawyers in America, the Committee focused on whether a reasonable person would conclude from such an advertisement that it can be verified that the advertising lawyer is, in fact, one of the best lawyers in America. Ibid. The Committee noted that under ER 7.1, an implied comparison may not be misleading if the basis for the comparison can be verified. Id. at 2. The Committee stated:

> The Eleventh Circuit reaches a similar conclusion in Mason v. Florida, 208 F. 3d 952 (11th Cir. 2000). In Mason, the Eleventh Circuit concluded that a lawyer's advertisement representing his "AV rating, the Highest Rating" was not misleading.[16] The court explained that, while the AV rating system is not generally known to the public, the statement can be verified. "A rating, like a claim of certification, 'is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work.'" Id. at 957 (quoting Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 101 (1990)).

[16] This refers to the rating system of Martindale-Hubbell.

> Applying the above rationale to the inquiry at issue here, it is generally not unethical for an Arizona lawyer to refer to the lawyer's listing in The Best Lawyers in America in an advertisement about the lawyer. Like the factual statements included in the advertisement by the lawyer in Mason, the factual statement that a lawyer is listed in The Best Lawyers in America is an implied comparison with a subjective basis that can be verified. The possibility that a consumer may be unfamiliar with the publication is not sufficient enough of a concern to change the analysis. "Unfamiliarity is not synonymous with misinformation." Mason, 208 F. 3d at 957. A consumer who wishes to investigate the underlying basis for a lawyer's listing in The Best Lawyers in America can simply read the introduction to the publication[.]
>
> * * * *
>
> Based on this explanation of the process for compiling the listing, a consumer reasonably can determine how much value, if any to afford the advertising listing. . . .
>
> [Appendix C at A-138.]

In order to assure that such a permitted advertisement does not omit "a fact necessary to make the statement considered as a whole not misleading," the Committee required that the lawyer advertisement must provide the year for the listing in the publication as well as the specialty for which the lawyer was listed. Id. at 3.

There are, of course, notable and significant differences in New Jersey's RPC 7.1. First, RPC 7.1(a)(3) specifically defines a false or misleading communication in

an attorney advertisement to be one that "compares the lawyer's services with other lawyers' services[.]" This is a per se prohibition contained in the body of the Rule and, more significantly, does not permit such a comparison even if it can be substantiated, as do most States addressing the issue of comparison advertising. Additionally, there is no corresponding provision in RPC 7.1 suggesting that inclusion of an appropriate disclaimer or qualifying language in a lawyer advertisement may preclude a finding that the communication is misleading. Whether the Court concludes that comparative advertising should be permitted if there exists a subjective basis that can be verified, as long as it is accompanied by an appropriate and adequate disclaimer or qualifying language, is a policy decision that is subject, of course, to application of the constitution principles articulated in the decisions of the United States Supreme Court discussed above.

The Virginia Rules of Professional Conduct pertaining to attorney advertising provide, in relevant part:

> Rule 7.1. Communications Concerning a Lawyer's Services.
>
> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false,

> fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> (1) contains false or misleading information; or
>
> (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or
>
> (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or
>
> (4) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.
>
> [Va. Sup. Ct. R. Pt. 6, Sec. II, 7.1.]

On August 26, 2005, the Virginia Supreme Court approved Legal Advertising Opinion A-0114, issued by the Standing Committee on Lawyer Advertising and Solicitation of the Virginia State Bar.[17] The issue presented in Opinion A-0114 was "whether attorneys may advertise the fact that they are listed in a publication such as The Best Lawyers in America, and the extent to which communications containing such information may properly be the subject of characterization." In answering that question in the affirmative, the Committee stated, in pertinent part:

[17] A copy of the Opinion is contained in Appendix O.

Lawyers pay no fee for inclusion in this publication and are under no obligation to purchase the book as a condition for inclusion. There is no financial benefit or *quid pro quo* of any kind between the listed lawyer and the publisher of *The Best Lawyers in America*. The publication enjoys respect from bar leaders and can be found in most law school libraries and in numerous city, county and court libraries and libraries maintained by private law firms.

Based upon the foregoing, the Committee concludes that a lawyer may advertise the truthful fact that he or she or other members in his or her firm are listed in a publication such as *The Best Lawyers in America*. If, for whatever reason, a lawyer is de-listed by a publication such as *The Best Lawyers in America*, the statements or claims in the advertisement must accurately state the year(s) and/or edition(s) in which the lawyer was listed.

However, attorneys may not ethically communicate to the public credentials that are not legitimate. For example, if a particular credential or certification is based not upon objective criteria or a legitimate peer review process, but instead is available to any attorney who is willing to pay a fee, then the advertising of such credential or certification is misleading to the public and is therefore prohibited.

Similarly, characterizations that explain, and do not exaggerate the meaning or significance of specific credentials, or that merely provide descriptions of professional credentials in laymen's terms, or communicate a lawyer's credentials in a more effective or memorable manner, are permissible. Accurate, truthful characterizations of this type merely duplicate the same type of descriptions that attorneys commonly use when discussing their credentials with prospective clients in the course of in-person communication.

For example, in communicating the credential of an "AV" rating by Martindale-Hubbell, an

attorney may properly include the descriptive characterization that "AV" represents "the highest rating" that particular service assigns. Similarly, an attorney recognized by the reference book *The Best Lawyers in America* may properly note that their inclusion means that they are among those lawyers "whom other lawyers have called the best." In referring to their membership in recognized organizations which utilize a legitimate process of peer review, such as The American College or The International Academy of Trial Lawyers, attorneys may properly include characterizations or descriptive phrases such as "it means a lot, when the recognition that you receive comes from your peers."

When including such characterizations or descriptions in brochures or other forms of public communication, attorneys should exercise discretion in their choice of language to make certain that the communication of objective information is not misleading by the manner in which the information is characterized. For example, as noted above, although an attorney may properly characterize inclusion in the referenced work *The Best Lawyers in America* by stating that he or she is among those lawyers "whom other lawyers have called the best," an attorney may not properly characterize their inclusion with such statements as "since I am included in the book, that means that I am in fact the best lawyer in America." Attorneys must also use care in crafting language for advertising so as not to impute the credentials bestowed upon individual attorneys to the entire firm. For example, a law firm cannot make statements or claims that imply or suggest that the law firm has been rated "the best" in a practice area simply because some lawyers in the firm have been included in the publication *The Best Lawyers in America*. Such a statement or claim is also prohibited because *The Best Lawyers in America* only rates and lists individual lawyers, not law firms.

Rule 7.1(a)(3) prohibits communications that compare a lawyer's services with other

> lawyers, "unless the comparison can be factually substantiated." This provision is intended to prohibit misleading, unsubstantiated claims by lawyers that they are "the greatest" or "the best," or that their firm is the "premier" firm in Virginia. Any advertisement which makes statements or claims beyond the fact that the lawyer is listed in such a publication must comply with Rule 7.1.
>
> Accordingly, lawyers who choose to communicate information to the public concerning their services are not merely permitted, but indeed encouraged, to base their communications upon accurate, factual information describing legitimate credentials. This type of information is likely to assist consumers in making decisions with regard to available legal services. Descriptive characterizations on objective credentials are permissible, so long as the characterizations are accurate and truthful. Attorneys must take care that an otherwise permissible communication is not rendered unethical due to mischaracterization. Finally, <u>although qualitative statements are permissible within a context that demonstrates their factual basis, the same types of qualitative statements when made in absence of such context may be prohibited as unsubstantiated comparisons</u> of one lawyer's services with the services provided by other lawyers.
>
> [<u>Appendix O</u> at A-220-23 (emphasis added).]

On April 4, 2006, the Virginia Standing Committee on Lawyer Advertising and Solicitation issued Legal Ethics Opinion 1750,[18] which incorporated new rule amendments to the Rules of Professional Conduct and new ethics and

[18] This Opinion is also included in Appendix O.

advertising opinions, including Lawyer Advertising Opinion A-0114.

The obvious difference between the attorney advertising regulatory scheme in Virginia and that in New Jersey is that RPC 7.1(a)(3) prohibits comparative advertising by concluding that it is, per se, misleading, whereas the Virginia rule prohibits comparative advertising unless it can be factually substantiated.

In Michigan, its Supreme Court has adopted MRPC 7.1, which provides:

> A lawyer may, on the lawyer's own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or the lawyer's firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive. A communication shall not:
>
> (a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) be likely to create an unjustified expectation about the results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (c) compare the lawyer's services with other lawyers' service, unless the comparison can be factually substantiated.
>
> COMMENT:
>
> This rule governs all communications about

> a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "an unjustified expectation" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and would ordinarily preclude advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

The Michigan Committee on Professional & Judicial Ethics of the State Bar of Michigan may recommend amendments to the Michigan Rules of Professional Conduct and issue written informal and formal opinions concerning the propriety of professional and judicial conduct. On June 8, 2007, the Committee issued an informal opinion concluding that "[a] lawyer who is listed as a "Super Lawyer" in the Key Professional Media, Inc. publication "Michigan Super Lawyers" may refer to such listing in advertising that otherwise complies with MRPC 7.1." Mich. Comm. on Prof'l & Jud. Ethics, Informal op. RI-341.[19]

In its opinion, the Committee reviewed the underlying basis for inclusion in the Super Lawyer listing, as well as other peer-review rating systems, stating:

[19] A copy of this Opinion is contained in Appendix D.

Selection as a Super Lawyer is the result of a process that is claimed to include: a survey of Michigan lawyers licensed for five or more years who are asked to nominate lawyers; a search made by the publisher of databases, online sources, periodicals and trade journals; research by publication staff of the results of the search to evaluate peer recognition and professional achievement; and review by a selected peer review group of the results of the research. Selection is limited to the top 5% of lawyers nominated in the state. No lawyer can pay for designation as a Super Lawyer. Advertising in the publication has no relationship to the decision about who will receive the designation. The process has safeguards against ballot stuffing. The disciplinary records of the bar are reviewed, and procedures are in place to screen out lawyers with a disciplinary record or other facts that reflect adversely on the lawyer's fitness.

Super Lawyers is one of a number of lawyer-rating publications. Martindale Hubbell Law Directory ("Martindale Hubbell") has rated lawyers for many years, using rating of AV, BV or CV based on peer reviewed levels of experience . . . and legal ability; and only lawyers regarded as having very high ethical standards (the V) can be rated at all. Other publications that rate and even rank lawyers based on a process involving peer review include The Best Lawyers in America ("Best Lawyers"), Who's Who Legal, the International Who's Who of Business Lawyers ("Who's Who") and Chambers USA Listings ("Chambers"). Each of these publications is based on peer recommendations and peer review. Each list lawyers by specialty practice area. The publisher of Chambers conducts interviews with a broad base of recommended and recommending lawyers as part of its selection process; and then grades lawyers (and law firms) selected for listing on a scale of 1 through 6, selecting a few for a higher "standout" rating; and not ascribing a numerical rating to others at all.

[Appendix D, at A-140 (footnotes omitted).]

The Committee found that in states with rules of professional conduct similar to those in Michigan, the inquiry has focused on whether the advertised listing violates the prohibition against comparing the lawyer's services with those of another lawyer, noting that "[r]anking appears to distinguish the listed lawyer from an unlisted one, or a higher graded listed lawyer from a lower graded one." Id. at A-141. Citing to Peel, supra, 496 U.S. at 101, 110 S. Ct. at 2288, 110 L. Ed. 2d at 95, for the proposition that a claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact from which a consumer may or may not draw an inference of the likely quality of the attorney's work, the Committee stated, in pertinent part:

> Lawyers often refer to their Martindale Hubbell rating in advertising; and the permissibility of that was recognized in Mason v. Florida Bar, 208 F. 3d 952 (11th Cir. 2000). The Court in Mason quoted with approval the statement from Peel, and likened the rating to a claim of certification. Advertising that a lawyer is listed in Best Lawyers was approved by the Supreme Court of Virginia in August, 2005, in approving Opinion A-0114 of the Virginia State Bar, applying its rule of professional conduct identical to Michigan Rule 7.1(c), on the basis that the lawyer does not himself claim that he

> is a "best lawyer" because he is listed in the book, but merely states truthfully that he is listed as a best lawyer in that publication. Opinions to a similar effect, based on rules comparable to Michigan's 7.1(c) have been issued in Tennessee and Arizona as regards Best Lawyers. Similarly, advertising that a lawyer has been listed in Super Lawyers has received approval from Tennessee and Florida. There are no opinions holding otherwise.[20]
>
> [Appendix D at A-141 (footnotes omitted).]

The Committee then listed those factors it found were important when permitting attorney advertising of inclusion in publications that rate or certify lawyers:

1. The rating or certifying organization has made inquiry into the lawyer's qualifications, and considered those qualifications in selecting the lawyer for inclusion.

2. The rating or certification is issued indiscriminately. In the case of Super Lawyers, listing is limited to the top 5% of lawyers in the state measured by a selection system uniformly applied.

3. The rating or certification is not issued for a price; it may not be bought or conditioned on purchase of a book, plaque or other goods.

4. The rating or certifying organization provides a basis on which a consumer can reasonably determine how much value to place in the listing or certification.

[20] Footnote 13 to the Committee's opinion references the conclusion in Opinion 39 that advertising that describes a lawyer as included in the Super Lawyer or Best Lawyer publications violates the prohibition in RPC 7.1 of comparison and creating unjustified expectation about the results, but notes its implementation has been stayed by the Supreme court of New Jersey.

5. The basis of selection should be verifiable. That is, if peer review is claimed, it should be verifiable that it was conducted. This factor does not preclude subjective evaluation of the information about the lawyer by the rating or certifying organization. It is recommended by some that the lawyer include in his advertising a reference where the reader can ascertain the standards for inclusion.

6. The lawyer may state truthfully that he is listed in the specific publication (e.g., "2006 Super Lawyer, Super Lawyers Magazine"), and that he is thus included among those whom other lawyers have called the best; but may not state that because he is so listed, he is the best, or super.

7. If the lawyer is delisted, he must limit his claim to listing the editions or years of the listing.

Other bar opinions have noted the existence of peer review in the process of selection, but we cannot say that is a required factor in advertising listing in a publication. Peer review would permit a statement that the lawyer has been considered as a "super lawyer" by other lawyers, but is not essential to advertising a listing in a publication that has satisfied the research and evaluation criteria expressed.

[Appendix D at A-141-42.]

In New Jersey, of course, comparative advertising is considered per se misleading. RPC 7.1(a)(3). In Michigan, as with most states, it is considered misleading or deceptive unless the comparison can be factually substantiated. MRPC 7.1(c). Neither state provides in its rules for the potential use of a disclaimer or qualifying

language to mitigate what might otherwise appear to be misleading.

Should the Court be persuaded that attorney advertising of the lawyer's inclusion in a peer-review rating list should not be banned per se, the seven factors or criteria for determining whether to permit such advertising listed in Mich. Comm. on Prof'l & Jud. Ethics, Informal Op. RI-341 set forth above provide significant guidance.

On August 8, 2007, the Iowa State Bar Association Committee on Ethics and Practice Guidelines issued Opinion Number 07-04 (Ethics Opinion 07-04) to address "the propriety of allowing one's name to be included in lawyer referral books or law lists that purport to rate the quality of the lawyer and advertising that one is recognized thereby."[21] Ia.R. Prof. C 32:7.1 provides, as follows:

> (a) 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.
>
> (b) A lawyer shall not communicate with the public using statements that are unverifiable.

[21] A copy of that Opinion is contained in Appendix E.

In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services.

COMMENT

[1] This rule governs all communications about a lawyer's services, including advertising permitted by rule 32:7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful and verifiable.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] A lawyer should ensure that information contained in any advertising which the lawyer publishes, or causes to be published, is relevant, is dignified, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to make an informed choice about legal representation. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems that hinder rather than facilitate intelligent selection of counsel. Appeal should not be made to the prospective client's emotions, prejudices, or personal likes or dislikes. Care should be exercised to ensure that false hopes of success or undue expectations are not communicated. Only unambiguous information relevant to a layperson's decision regarding legal rights or the selection of counsel, provided in ways that comport with the dignity of the profession and do not demean the administration of justice, is appropriate in

public communications.

The Committee first noted that important to its analysis of whether lawyers may advertise to the public that they are included in law lists based on peer ratings "is whether the rating is truly independent and peer reviewed as a matter of fact." Ethics Opinion 07-04, at 3. Referencing Comment [3] to Ia. R. Prof. C. 32:7.1, the Committee concluded, in relevant part:

> The fact that a lawyer has been peer rated by an independent publication is certainly relevant to and would help ". . . facilitate the prospective client's ability to make an informed choice about legal representation. . " assuming, of course that the rating is in fact a peer rated and reviewed and the publication is truly independent. Otherwise, the so-called peer rating becomes extremely misleading and runs afoul of Ia. R. Prof. C. 32:7.1 (a) prohibiting ". . . false or misleading communication about the lawyer or the lawyer's services."
>
> A publication [which] rates only lawyers who have subscribed or otherwise paid a fee to be included in the list is not truly independent and potentially misleading and would violate Ia. R. Prof. C. 32:7.1(a) ". . . 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."
>
> For the term "peer reviewed" to have meaning, we believe that all members of the Bar should have the opportunity to be reviewed and not just an exclusive few. Furthermore, the rating process should include a significant portion of

> the Bar familiar with the lawyer and the lawyer[']s work, ethics and competency, otherwise the review is not by one's peers but by a select group which may or may not be representative of the profession.
>
> Martindale Hubbell and Chambers and Partners are two publications that are independent as described above and their rating and peer review process would be an example of such an acceptable peer review. Both are open to all Iowa lawyers regardless of whether the lawyer subscribes to their service. All members of the Bar have the potential to be rated and they are rated by a significant portion of the bar familiar with the lawyer[']s work. Consequently, an Iowa lawyer may include in their advertisements that they are rated by either publication, their rating and the meaning thereof.
>
> [Appendix E at A-145-46.]

On the heels of that opinion, on October 30, 2007, the Iowa Committee issued Ethics Opinion 07-09,[22] explaining that when Ethic Opinion 07-04 was issued it did not have information regarding the peer review process employed by Best Lawyers in America or Super Lawyers. The Committee concluded:

> Subsequently, both publishers have supplied the committee with the details of their peer review process. Upon examination it appears that both are open to all Iowa lawyers regardless of whether the lawyer subscribes to their service. All members of the Bar have the potential to be rated and they are rated by a significant portion of the Bar familiar with the lawyer[']s work.

[22] A copy of Ethics Opinion 07-09 is contained in Appendix F.

> Accordingly the peer review process engaged by Super Lawyers and Best Lawyers in America is deemed to have met the criteria established by the Committee in Ethics Opinion 07-04.
>
> Consequently an Iowa lawyer may include in their marketing and advertisements that they are rated by either publication, their rating and the meaning thereof.
>
> [Appendix F at 147-48.]

Again, the significant difference between the states is that New Jersey's RPC 7.1(a)(3) imposes a per se prohibition against comparative advertising, whereas Ia. R. Prof. C. 32:7.1 is silent on comparative advertising, focusing rather on the prohibition of truthful statements that are misleading.

Connecticut's Statewide Grievance Committee has issued a series of Advisory Opinions relating to the propriety of attorney advertising in connection with inclusion in a list of "Super Lawyers." Advisory Opinion #07-00188-A was issued by the Committee on October 4, 2007,[23] finding that

> the designation "Connecticut Super Lawyer" potentially misleading because it connotes a superior quality to an attorney in violation of Rule 7.1 of the Rules of Professional Conduct. Use of the designation in attorney advertisements requires an appropriate explanation and disclaimer in order to avoid confusing consumers and creating unjustified expectations. We also conclude, it is inherently misleading to claim

[23] See Appendix G, containing a complete copy of this Opinion.

> that the list of Connecticut Super Lawyers 2007 represents "among the best" and "the top 5%" of attorneys in the State of Connecticut, therefore we prohibit the claim under Rule 7.1 of the Rules of Professional Conduct.
>
> [Appendix G at A-162.]

The Committee described the proposed advertisement, which is attached to the Opinion, as follows:

> The proposed advertisement provides the following information in a box under a banner that states "Connecticut Super Lawyers 2007" in large type," the name of the lawyer and his picture; the name, address, telephone, fax number and website address of the law firm; the email address of the attorney and a description of the attorney's legal experience with three listed practice areas.
>
> Underneath the boxed information is the following statement:
>
> > Considered among the best in their profession, attorneys featured in Super Lawyers represent the top 5% of the practicing attorneys in Connecticut. The Connecticut Super Lawyers for 2007 were selected by their peers in an extensive nomination and polling process conducted by Law & Politics and published in a special advertising section in the February 2007 issues of Connecticut magazine and Connecticut Super Lawyers magazine.
>
> The name of Law & Politics and Connecticut Magazine appears underneath this description in large type followed by a statement of permission from the publisher to reprint the above information.
>
> [Appendix G at A-151-52.]

Conn. Rules of Prof'l Conduct 7.1, without any official "Comment," simply provides as follows:

> 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.

After a comprehensive and thoughtful analysis of applicable case law, the Committee noted that since Peel, supra, states have required disclaimers on potentially misleading attorney advertisements and have banned misleading and deceptive advertisements altogether. Appendix G at A-155. The Committee then concluded:

> Based on the case law, we find that statements made in attorney advertising may fall into one of three categories: 1) truthful and not misleading; 2) truthful but potentially misleading; and 3) actually or inherently misleading, false or deceptive. When an advertisement is truthful and not misleading it cannot be regulated or prohibited except when it harms the public. See Ohralik v. Ohio State Bar Ass'n., supra, 436 U.S. 447; Florida Bar v. Went-For-It, supra, 515 U.S. 618. When an advertisement is truthful but potentially misleading it can be regulated, generally with a disclaimer. Consumers Union of United States, Inc. v. General Signal Corp., [724 F. 2d 1044, 1053 (2d Cir. 1984)]. When an advertisement is inherently misleading, false or deceptive the State can prohibit it entirely. With regard to

> the latter point, we note even facially truthful statements can be actually and inherently misleading and can be prohibited under Peel and its progeny.
>
> We conclude that the proposed advertisement before us contains the three types of commercial speech: first, truthful that is not misleading and is permissible without restriction ("The Boxed Information"); second, speech that is facially truthful but is potentially misleading and thus subject to a disclaimer restriction ("The Banner Connecticut Super Lawyers 2007); and third, speech that is inherently misleading and therefore prohibited ("Statement Located Underneath the Boxed Information").
>
> [Appendix G at A-156-57.]

The "boxed information," described above, clearly did not violate the Connecticut Rules of Professional Conduct, and was of the type clearly permitted by New Jersey's RPC 7.2. Focusing on the banner Connecticut Super Lawyers 2007 appearing at the top of the ad, Advisory Opinion #07-00188-A found

> that the reference to an attorney as a "Super Lawyer" in an advertisement is potentially misleading and confusing to consumers. The word "super" is defined in the dictionary as outstanding, great or better than others of its kind, to a degree grater than normal. Webster's New World Dictionary (3d College Ed. 1988). Synonyms include: superior, greater, better, outstanding and distinguished. Roget's International Thesaurus (4th Ed. 1977). The common understanding of the word "super" instinctively implies the highest level of quality. Accordingly, we find the fact that one has been selected as a "Super Lawyer" by Connecticut Super Lawyers magazine leads to no

> other conclusion [than] the lawyer is superior to those lawyers not so selected. As a result, we find that the term "Connecticut Super Lawyers 2007" is potentially misleading because it creates an unjustified expectation as to the lawyer's ability to achieve particular results and amounts to an unsubstantiated comparison of the "Super Lawyer's" ability to the ability of one who is not a "Super Lawyer", in violation of Rule 7.1.
>
> [Appendix G at A-158.]

However, the Opinion then found that a disclaimer or explanation within the advertisement could alleviate the potentially-misleading nature of that banner, explaining:

> Any statement regarding the designation of "Super Lawyer" should be explained and placed in the context of a designation by a commercial magazine for a particular year. For example, an attorney can state that he or she has been designated a "Connecticut Super Lawyer" in Connecticut Super Lawyers 2007 magazine, but the attorney cannot state that he or she is a "super lawyer" without referencing this context. While a consumer may infer the quality of an attorney based in part on this designation, an attorney advertising the designation cannot conclude or give an opinion that this designation makes him or her more qualified than other attorneys.
>
> This disclaimer should detail the particularities of the selection process for 2007 and, at a minimum[,] include specific empirical data regarding the selection process. We considered whether a link to the Super Lawyers website would provide the consumer with the appropriate disclaimer regarding the Super Lawyers selection process. We conclude that this process is not appropriate in light of the information currently displayed on the Super Lawyers website.

> Super Lawyers, "Super Lawyers Selection Process" at http://www.superlawyers.com/about/selection_process.html (last visited October 1, 2007).[24] There, the process is described in general terms, but no specific empirical data is given for any jurisdiction, including Connecticut. Accordingly, we conclude that a link to the Super Lawyers website is insufficient to create an appropriate disclaimer.
>
> [Appendix G at A-158-59.]

The Opinion went on to find that the information contained below the boxed information, which includes a claim that, "[c]onsidered among the best in their profession, attorneys featured in Super Lawyers represent the top 5% of the practicing attorneys in Connecticut[,]" had insufficient factual support, was inherently misleading and was not entitled to protection under the First Amendment. Id. at A-159. The Opinion explained:

> The basis for this statement is the survey taken by Super Lawyers. That process, however, involves factors which exclude attorneys who are otherwise eligible. . . . Attorneys practicing less than 5 years, which the publisher estimates to be 20% of the practicing bar in each jurisdiction, are not mailed ballots. . . . Associates and attorneys practicing less than 10 years are "presumptively unlikely" to meet the selection criteria. . . . Despite balloting results, not more than 20% of lawyers at a large firm are normally allowed to be selected. . . . As noted above, only 331 lawyers took part in the initial survey and created an initial pool of 1,098 candidates. . . Super Lawyers then performed a

[24] A copy of that website link is attached as Appendix H, including the referenced link to both Connecticut and New Jersey (visited May 14, 2008).

"star search" to find lawyers who may have been overlooked by the initial vote. . . Super Lawyers chose approximately 700 attorneys for the magazine listing. That figure represents 5% of the approximately 14,000 ballots originally mailed. . . . In our view, the selection process does not attempt to rank every practicing Connecticut attorney and appears, in part, to be subjective and arbitrary.

Accordingly, we find that, in this context, and with the record before us, [this] statement . . . is inherently misleading and not entitled to protection under the First Amendment. We do not conclude here whether a bona fide analytical study of every practicing lawyer in Connecticut would still be prohibited by Rule 7.1.

We are not persuaded that when the Supreme Court decided Peel, it intended to protect designations of quality when they were used to create an exclusive and superlative designation as to unranked attorneys. Peel, supra, 496 U.S. [at] 100 (1990). Rather, we believe that the Peel holding is limited to the restatement of objectively verifiable facts. In Peel, supra, 496 U.S. [at] 101 n. 10, the Court disagreed with Illinois' position that a lawyer's claim of NBTA certification was a proclamation of superiority to those lawyers without the certification. In contrast to the attorney's claim of certification in Peel, the attorney in the proposed advertisement before us plans to proclaim himself "among the best" and "in the top 5%" of practicing lawyers. Applied to the proposed advertisement before us, Peel leads us to the conclusion that the claim . . . is inherently misleading.

We believe that a consumer is savvy enough to give the distinction "Super Lawyer" whatever weight it is worth, once the consumer is able to consider the methodology used by an appropriate disclaimer. However, when an attorney uses the election to Connecticut Super Lawyers magazine as the basis for trumpeting the quality of his services in comparison to others, we do not

> believe this claim is protected by the First Amendment. If the Supreme Court did not recognize a board certified trial specialist by the National Board of Trial Advocacy (NBTA) as a better lawyer than one without certification, we find that the statements of a for-profit magazine are not authoritative proof that the attorney listed is actually a better lawyer than 95% of his [or her] peers. To that end and in comparison, we observe that as detailed in Peel, supra, 496 U.S. [at] 95, n. 4, a certification from the NBTA requires extensive training, experience, continuing legal education courses, numerous references, a writing sample, and an actual exam rather than a peer review process.
>
> In our view, the claim that a "Super Lawyer" is "among the best" and represents "the top 5%" of practicing Connecticut attorneys violates Rule 7.1 of the Rules of Professional Conduct. This claim is not factually supported by either the selection process utilized by Super Lawyers or the data received for 2007. In reality it is an opinion as to quality, which is subject to prohibition in light of its inherent likelihood to mislead a consumer. In re R.M.J., supra, 455 U.S. [at] 200-201; Farrin[v. Thigpen, 173 F. Supp. 2d 427, 436-38 (M.D.N.C. 2001)].
>
> [Appendix G at A-159-62 (emphasis added).]

On October 5, 2007, Connecticut's Statewide Grievance Committee issued Advisory Opinion #07-00776-A,[25] which reviewed, inter alia, a proposed attorney law firm advertisement wherein one attorney lists the fact that he was chosen for 2007 Connecticut Super Lawyers and was named to the Connecticut Super Lawyers magazine "Top 50" list. Employing the same analysis contained in Advisory Opinion

[25] See Appendix I, containing a complete copy of this Opinion.

#07-00188-A, the Committee concluded that the statements contained in the proposed advertisement (the firm "congratulates its attorneys chosen for 2007 Connecticut Super Lawyers" and those "named to Super Lawyers top 50 list") were facially truthful, but potentially misleading and confusing to consumers, and were thus subject to a disclaimer restriction. Appendix I at 183. The Committee required that "[t]he listing of an attorney as having 'been named to the Super Lawyers top fifty list', should also detail the particularities of that selection process." Id. at A-185. The Committee explained:

> We note, as part of the record of this advisory opinion request, that the magazine has a disclaimer accompanying its Top 50 list. Connecticut Super Lawyers p. 18 (2007). It indicates that "[t]he following is an alphabetical listing of the lawyers who received the highest point totals in the 2007 Connecticut Super Lawyers balloting, research and blue ribbon review process." Id. The inclusion of a similar disclaimer or qualifying language explaining the basis for the top 50 listing, prevents the implication that the attorney is claiming he is one of the top 50 attorneys in Connecticut.
>
> [Appendix I at A-185.]

Finally, on November 16, 2007, Connecticut's Statewide Grievance Committee issued Advisory Opinion #07-01008-A,[26] addressing the propriety of proposed attorney print

[26] A complete copy of this Opinion is contained in Appendix J.

advertising scheduled to appear in the February 2008 issue of Connecticut Magazine in a special advertising section devoted to Connecticut Super Lawyers. The proposed advertisement was described as follows:

> The lower portion of the advertisement provides the following information: the name of the law firm, a logo depicting the scales of justice, two addresses, a list of the firm's attorneys, some of whom list other jurisdictions where they are licensed to practice, telephone and fax numbers, and email and website addresses.
>
> The top portion of the advertisement contains the caption in large, bold type, "Congratulations to Our Four Attorneys in Super Lawyers!" Underneath, in the smaller type size used throughout the advertisement, is the sentence, "[w]e are proud to announce that four of our lawyers are among those chosen by their peers to be recognized in Connecticut Super Lawyers. We congratulate them on this honor." The photograph, name and one practice area for each of the four attorneys named to "Connecticut Super Lawyers" are located beneath these statements.
>
> [Appendix J at A-189-90.]

Incorporating by reference its Advisory Opinions #07-00188-A and #07-00776-A, the Committee required that the proposed advertisement comply with their requirements and also "list the actual calendar year and practice area for which the four attorneys were selected for inclusion in Super Lawyers magazine." The Committee acknowledged the following:

We note that after the above-referenced advisory opinions were initially issued to the requesting attorneys, Key Professional Media, Inc., the publisher of Super Lawyers magazine revised its website to include the empirical data for Connecticut that had not been previously available to the public.

> Connecticut Selection Statistics —— 2007
>
> As part of the selection process conducted in 2007, Super Lawyers mailed 14,769 postcards to all active, resident Connecticut attorneys licensed for five years or more. This year, 331 (or 2.2%) returned ballots. That population provided 1,850 nominations. Since some lawyers receive multiple nominations, 1,098 lawyers were placed in the candidate pool.
>
> In addition, the "Star Search" process produced a pool of 611 names for the 2007 candidate pool.
>
> In 2007, 197 Connecticut attorneys were invited to participate as Blue Ribbon Panel members, evaluating candidates in their primary practice area. Over one-half of the attorneys participated contributing 2,696 evaluations of 746 candidates.
>
> The Final Selection for 2007, was made from a pool of 2881 attorneys, producing the final 2007 Connecticut Super lawyers list of 732 attorneys.

"Connecticut Selection Statistics-2007" available at http:www.superlawyers.com/connecticut last viewed on November 14, 2007.[27] We find that this information appropriately disclaims any potentially misleading statement suggested by the term Super Lawyers and conclude that a link to this webpage in the contemplated advertisement would provide

[27] A copy of this website link is attached as Appendix K; also contained there in is a copy of the Super Lawyers website link for New Jersey, which does not contain selection statistics.

> an appropriate disclaimer. The disclaimer link should be located within the advertisement when it will appear in any media other than the Super Lawyers magazine. For those advertisements appearing in the Super Lawyers magazine, a disclaimer link appearing on the same page would be sufficient.
>
> [Appendix J at A-191-92.]

In requiring inclusion in the attorney advertisement a listing of the actual calendar year and practice area for which the attorneys were selected for inclusion in Super Lawyers magazine, the Committee explained:

> This advertisement is potentially misleading because it fails to include a sufficient context as to what honor the attorneys have received. Any statement regarding the designation of Super Lawyers should be explained and placed in the context of a designation by a commercial magazine for a particular year. Any attorney that has been selected for inclusion in Connecticut Super Lawyers magazine cannot state that he or she is a "super lawyer" without referencing this context. Listing the year and the practice area for which the attorney has been selected avoids the implication that the attorney is a "super lawyer" compared to other attorneys and makes clear the limitations of the selection to the consumer.
>
> [Appendix J at A-193.]

The analyses contained in these Advisory Opinions issued by the Connecticut Statewide Grievance Committee are persuasive. The foundational difference, of course, between the rules of professional conduct in Connecticut

and New Jersey is that Connecticut's rules do not begin with the assumption that attorney advertising (or other "communication" concerning a lawyer's services) is per se misleading if it "compares the lawyer's services with other lawyers' services[.]" RPC 7.1(a)(3); compare Conn. Rules of Prof'l Conduct 7.1 (defining a "misleading" communication as one that "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading").

Rather, the Connecticut Grievance Committee, in applying the standards for regulation of commercial speech articulated by the United States Supreme Court, concluded that peer-rating processes are inherently comparative but discerned three categories of attorney advertising (truthful and not misleading; truthful but potentially misleading; and actually or inherently misleading, false or deceptive) to focus on the issue of whether an appropriate disclaimer or explanation, applied to those categories, is able to balance the state interest of protecting the consumer of legal services from harm, with the First Amendment right of commercial speech in a manner that will alleviate consumer confusion while at the same time

providing consumers with a wealth of information upon which they can evaluate and base their consumer choices.

Thus, unless the New Jersey Supreme Court accepts the argument of petitioners/intervenors that attorney advertisement of one's inclusion within the subject peer-review attorney rating systems is not comparative, but rather represents a statement of fact based upon a comprehensive peer-review system then, seemingly, RPC 7.1(a)(3) would have to be amended to permit adoption of an analysis similar to that employed by the Connecticut Statewide Grievance Committee, or perhaps be construed as only constituting a per se ban on "direct" comparative advertising as opposed to "implied" comparisons. Such an amendment could also remove the reference to comparative advertising completely, or adopt the approach suggested in Comment [3] of ABA Model Rule 7.1, under which "an unsubstantiated comparison of the lawyer's services . . . with the services . . . of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated[,]" with the qualification that "[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely

to create unjustified expectations or otherwise mislead a prospective client."

The Supreme Court of North Carolina has adopted N.C. Prof. Cond. Rule (PCR) 7.1, which provides, in pertinent part:

> (a) 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:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct; or
>
> (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The Comments to this North Carolina Rule are identical to Comments [1] to [4] to ABA Model Rule 7.1.

On January 25, 2008, the North Carolina State Bar Ethics Committee issued 2007 Formal Ethics Opinion (FEO) 14,[28] which answered in the affirmative the question of whether "North Carolina lawyers listed in North Carolina Super Lawyers, or similar publications with titles that

[28] See Appendix L, which contains a copy of 2007 FEO 14.

imply that the Lawyers listed in the publication are 'Super,' the 'best,' 'elite,' or a similar designation, can advertise or publicize that fact?" Appendix L at A-203. The Committee first noted that in 2003 it had established standards applicable to advertising by an attorney of his or her membership in an attorney organization with the self-laudatory title of "Million Dollar Advocates Forum," permitting same subject to satisfaction of the following conditions:

> 1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience of expertise indicated by the designated membership;
>
> 2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement;
>
> 3) the organization has no financial interest in promoting the particular lawyer; and
>
> 4) the organization charges the lawyer only reasonable membership fees.
>
> [Appendix L at A-203 (quoting 2003 FEO 3).]

Applying these standards, the Committee concluded that Super Lawyers appears to be a bona fide organization in

that it has objectively clear and consistently applied standards for inclusion in its lists, finding that

> advertising inclusion in the Super Lawyers list is not an opinion on the quality of a listed lawyer's work or a promise of success, it is information from which a consumer may draw inferences based upon the standards for inclusion in the list. The Ethics Committee therefore concludes that an advertisement that states a lawyer is included in a listing in North Carolina Super Lawyers, or in a similar listing in another publication, is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied[.]
>
> * * * *
>
> In addition, the advertisement must make clear that the lawyer is included in a listing that appears in a publication which is identified (by using distinctive typeface or italics) and may not simply state that the lawyer is a "Super Lawyer." A statement that the lawyer is a "Super Lawyer," without more, implies superiority to other lawyers and is an unsubstantiated comparison prohibited by Rule 7.1(3). Finally, since a new listing is included in each annual edition of the Super Lawyers supplement and magazine (and, it is presumed, in other publications), the advertisement must indicate the year in which the lawyer was included in the list.
>
> [Appendix L at A-204.]

The Committee also concluded that a lawyer may purchase a profile or display advertisement in a North Carolina Super Lawyers advertising supplement or magazine, or in other similar publication, as long as the standards

set forth in 2003 FEO are met and, "[i]f the standards for inclusion in the listing are published in the supplement or the magazine, the advertisement does not have to include information on how to obtain the standards." Appendix L at A-204. Finally, the Committee stated that a North Carolina lawyer may participate in the selection process for lawyers who are listed in such publications provided that "the lawyer's recommendations and evaluations of other lawyers are founded on knowledge and experience of the other lawyers, [are] truthful, and not provided in exchange for a recommendation from another lawyer." Ibid.

The only relevant difference between North Carolina PCR 7.1 and New Jersey's RPC 7.1 is that the former considers attorney advertisements comparing the lawyer's services with other lawyer's services misleading "unless the comparison can be factually substantiated[,]" PCR 7.1(a)(3), while RPC 7.1(a)(3), contains a per se prohibition against attorney advertising that "compares the lawyer's service with other lawyers' services[.]" In 2007 FEO 14, in addressing the comparative advertising issue, the Committee drew a discrete distinction between, (1) an attorney advertisement that states the attorney is included in a listing that appears in an identified publication (e.g., "John Doe is among those attorneys included in 2007

North Carolina Super Lawyers magazine), which is permitted, and (2) an attorney advertisement that the lawyer is a "Super Lawyer," which is prohibited, because without more it would constitute an unsubstantiated comparison prohibited by PCR 7.1(a)(3) by implying superiority to other lawyers.

This same distinction was made by the Board of Professional Responsibility of the Supreme Court of Tennessee in an unpublished Advisory Ethics Opinion, 2006-A-841 issued on September 21, 2006.[29] Referencing for authority its Formal Ethics Opinion 2004-F-149, the Board found that the it was unable to conclude that the selection methodologies utilized by Super Lawyers and The Best Lawyers in America "were indiscriminate, or that lawyers are conferred such distinctions for a price." Ibid. The Board then concluded:

> Accordingly, law firms and lawyers are permitted to advertise the facts that certain lawyers have been selected by and listed within the above publications, as long as the lawyers do not go further and refer to themselves subjectively as "super" or "the best" on the basis of such designations contained within these publications.
>
> [Appendix M at A-205 (emphasis added).]

[29] See Appendix M, which contains a copy of this Opinion.

Tenn. Sup. Ct. R. 8, Rule 7.1(c) is similar to RPC 7.1(c) in defining a false or misleading communication as one that compares the lawyer's services to other lawyers' services, but permits comparison if "the comparison can be factually substantiated."

As in New Jersey, the Supreme Court of Delaware promulgated Rules of Professional Conduct to govern the conduct of members of the Delaware Bar. Del. Sup. Ct. R. 61. The current version of Del. Prof. Cond. R. (LPRC) 7.1 is identical with ABA Model Rule 7.1 in every respect. A Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct was established by the Delaware Supreme Court. Del. Sup. Ct. R. 96. Guided by these Rules of Professional Conduct, the Delaware Bar is self-regulated and its Committee on Professional Ethics considers and issues non-binding opinions applying same.

In Opinion 2008-02, issued on February 29, 2008,[30] the issue presented to the Committee was

> whether it is permissible under the Delaware Lawyers' Rules of Professional Conduct to include on a lawyer's website or in email solicitation or newsletter that the lawyer has been designated "Super Lawyer" or "Best Lawyer" in a particular practice area.
>
> [Appendix N at A-207.]

[30] A copy of this Opinion is contained in Appendix N.

The Committee concluded, as follows:

> It is permissible for a lawyer to advertise that she has been designated a "Super Lawyer" or "Best Lawyer" as long as the lawyer states the year and particular specialty or area of practice of the designation and the advertising otherwise remains within the bounds of Rules 7.1, 7.2 and 7.3.
>
> [Ibid.]

In analyzing the issue, the description of the underlying peer-review rating methodologies questioned in Opinion 2008-2 was essentially the same as adduced by evidence compiled in the record in this case:

> A lawyer who is listed as a "Super Lawyer" or "Best Lawyer" is chosen based upon a methodology that each organization uses in selecting the lawyers. With respect to Super Lawyers, the Super Lawyers website provides information regarding the selection process used in designating a lawyer as a "Super Lawyer". The website states that the purpose of the selection process is to create a credible, comprehensive, and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel. The website also details how Law & Politics performs the selection process. The multi-step process begins when Law & Politics distributes a survey to lawyers throughout the state. A lawyer is only included in the survey if they have practiced for at least five years. The next step is Law & Politics' evaluation of several factors and an examination of the

> background and experience of the lawyers. Lawyers are then separated out into practice area and perform a peer evaluation. The peer evaluation is comprised of lawyers, who have received high votes, and they then review and score the list of candidates. The final selection groups the attorneys by practice area and selects those with the highest point totals as "Super Lawyers". This results in 5% of total lawyers within the state receiving the "Super Lawyer" designation.
>
> The Best Lawyers website provides information on the selection process used in determining lawyers for selection, which is based entirely on peer review. An attorney is nominated in three ways. First, lawyers in previous editions are automatically nominated. Secondly, Best Lawyers asks the voting lawyers to nominate outstanding lawyers who have not yet been nominated. Finally, Best Lawyers allows marketing directors to nominate lawyers from their own firms but stresses that they exercise prudence in doing so. The survey asks the voting lawyers to select which lawyer they would refer if they could not handle a case, and are asked to designate a letter grade to each referral. The letter grades are converted to a numerical equivalent, averaged, and from the results, Best Lawyer selects the lawyers for the list. Although the designation is ultimately based on the subjective judgments of fellow attorneys, the website states that the breadth of their survey, candor of respondents, and sophistication of polling methodology, largely correct for any biases. Best Lawyers' website asserts that their list represents the most reliable, accurate, and useful guide to the best lawyers.
>
> [Appendix N at A-208-09.]

The Committee reviewed the Peel and Mason decision, as well as the approach by the Arizona State Ethic Committee in Opinion 05-03 (2003), discussed above and included in

Appendix C herein. Appendix N at A-211-13. Citing to Peel, supra, 496 U.S. at 102, 110 S. Ct. at 2288-89, 110 L. Ed. 2d at 95-96, the Committee first concluded that the organization that issues the rating or certification "must not obtain an economic benefit from the Delaware attorney for recognizing her [or him] as a 'Super' or 'Best' lawyer." Appendix N at A-211-13. The Committee specifically found that neither Super Lawyers nor The Best Lawyers in America required lawyers to make payments for the designations they bestow, nor are they permitted to do so. Appendix N at A-214.

The Committee then found it was necessary to consider the details of the selection process actually used by the publications when determining whether it was permissible for a Delaware attorney to list in advertisements his or her selection as a "Super Lawyer" of "Best Lawyer." Id. at A-213. The Committee explained:

> An essential factor is whether the organization researches the lawyer's background and experience. Both Super Lawyers' and Best Lawyer's websites profess to examine the background of each candidate. Super Lawyer examines several factors including experience, honors, representative clients, and verdicts and settlements. Best Lawyer reviews the state bar sanction lists to confirm that the candidate is in good standing. By further

> examining the background of candidates, the organizations take measures to ensure that an unqualified lawyer would not receive the designation, thereby reducing the likelihood that the inclusion of the designation would be misleading.
>
> * * * *
>
> In both processes, there are several steps that are undertaken to determine the eligible lawyers. Furthermore, information on the selection process is available on both their websites making it accessible to the consumers in helping them to determine how the designation was made. Although consumers may not fully understand the process that is used, they can be informed and value the designation accordingly.
>
> [Appendix N at A-213-14 (emphasis added).]

Finding that the characteristics of these organizations support use of the Super Lawyer or Best Lawyer in America designations in attorney advertisements, the Committee further concluded that in order to assure compliance with LRPC 7.1, "if a Delaware lawyer includes the designation in an advertisement, he or she should also indicate the year they were listed and the area of practice of his or her listing." Appendix N at A-214.

After reviewing ethics opinions pertaining to attorney advertising involving Super Lawyers and The Best Lawyers in

America in Virginia, Michigan and Iowa,[31] the Committee concluded:

> In sum, other States' Ethics Committees have concluded lawyers may include the designation of "Super Lawyer" of "Best Lawyer" in an advertisement or other communication while remaining in compliance with the State[s'] Ethics Rules. This committee believes a Delaware lawyer may do the same. However, a Delaware lawyer should only state in the advertisement that s/he were included in the listing of "Super Lawyers" or "Best Lawyers" by the publication. The Delaware lawyer may not present such a designation in a light that implies s/he is superior or better than another member of the Delaware Bar. The Delaware lawyer should note the area of practice s/he was designated as a "Super Lawyer" or "Best Lawyer." It also should be noted that the Delaware lawyer should not use the "Super Lawyer" or "Best Lawyer" terminology in the abstract——that is, the term must be used only with reference to the listing publication, and contain the year(s) of listing. This Committee believes that a Delaware lawyer will not comply with LRPC 7.1 if they list a designation that they received simply because they paid a fee.
>
> [Appendix N at A-217.]

There are also significant differences between the Delaware Lawyers' Rules of Professional Conduct (LRPC) and New Jersey's Rules of Professional Conduct (RPC), the former being identical to the ABA Model Rules and thereby not containing a per se ban on comparative advertising, but

[31] The Committee also referenced Opinion 39, noting that "the New Jersey Supreme Court stayed the opinion and continues to do so." Id. at ll.

rather focusing on prohibiting unsubstantiated comparisons where a disclaimer or qualifying language cannot preclude a finding that the advertisement is likely to create an unjustified expectation or otherwise mislead a prospective client. Compare Comment [3] to LRPC 7.1 with RPC 7.1.

In May 2007, the Pennsylvania Bar Association Task Force on Lawyer Advertising issued a Report (Task Force Report) containing numerous recommendations to the Supreme Court of Pennsylvania for consideration, including proposed amendments to the Rules of Professional Conduct governing lawyer advertising. Pennsylvania Rules of Professional Conduct 7.1 (Pa. RPC 7.1) is identical to ABA Model Rule 7.1, both in its text and comments. The text of Pa. RPC 7.1 simply provides:

> 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.

The Task Force Report, at 69-70, recommends that Pa. RPC 7.1 be amended to read:

> 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:

> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about the results the lawyer can achieve, such as the amount of previous damage awards, the lawyer's record in obtaining favorable verdicts or client endorsements, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated as of the date on which the advertisement is published or disseminated; or
>
> (d) contains subjective claims as to the quality of legal services or a lawyer's credentials that are not capable of measurement or verification.

In addition to the four ABA Model Rule 7.1 Comments, the Task Force Report proposed the addition of a new Comment "to support amended paragraph (c) above:"

> [ ] While comparative advertising, such as peer ratings, may be useful to consumers of legal services, such advertising may be deemed misleading if founded upon purely subjective criteria or where the rating is contingent, in whole or in part, upon financial contributions or other illegitimate means. This concern is reduced where the advertising discloses in plain terms the criteria employed and selection process. The attorney who employs such advertising must be prepared to fully support the statements with the material underlying

facts relied upon to draw the comparison.

[Id. at 70.]

This approach is similar to that contained in the Advisory Opinions of the Connecticut Statewide Grievance Committee, discussed above, as well as that adopted in New York. See New York DR 2-101(B)(1) (permitting attorney advertisements that include information concerning a lawyer's bona fide professional ratings). In the body of its report, the Task Force provided the following rationale for this approach:

> There has been substantial controversy, particularly in New Jersey, over what has been referred to as "comparative" or "superlative" advertising. Such typically consists of ratings and quasi-awards ranging from those peer review designations traditionally issued by Martindale-Hubbell to The Best Lawyers in America and more recently, "Super Lawyers," an annual listing of lawyers appearing in a publication by Law & Politics, a division of Key Professional Media, Inc.
>
> In July 2006, the New Jersey Supreme Court Committee on Attorney Advertising concluded in Opinion 39 that lawyers could not advertise their selection by publications such a Super Lawyers on the ground that such designations are inherently misleading to the public. The Committee opinion prohibited lawyers from advertising in ratings publications predicated upon peer review surveys, such as The Best Lawyers in America and Super Lawyers, which the Committee concluded publish ratings "designed for mass consumption" that can create an

unjustified expectation of results for potential clients. According to the Committee, they target consumers directly with, in effect, comparative advertising of lawyers presented in a faux journalistic style that can be misleading.

The Task Force notes that bar ethics committee opinions in Pennsylvania and elsewhere have concluded that peer ratings are not inherently misleading to consumers, if the advertisements fairly and accurately reflect the process by which the ratings are generated, and lawyers touting their appearance in such ratings do not misstate or inflate their significance in a manner that would amount to a false or misleading communication within the meaning of Rule 7.1. As of the submission of this Report, the New Jersey ethics opinion is unique and the subject of a vigorous federal court challenge.[32]

Subsequent to the issuance of Opinion 39, New York incorporated into its disciplinary rules, effective February 1, 2007, an allowance for advertising of "bona fide professional ratings." The Task Force endorses such a clarification to the advertising rules, with the explanatory comment that comparative advertising of this sort cannot be contingent upon a lawyer or lawyer's firm payment for advertising space in the publication or other financial contribution. Thus, under proposed amended Rule 7.1(c), an advertisement or public communication may contain statements that compare a lawyer's services with the services of other lawyers so long as the comparison can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated. . . .

[Task Force Report, at 63-64 (footnotes omitted).]

[32] It is, of course, correct that Opinion 39 is unique, but is being subjected to challenge, at least at the moment, in the Supreme Court of New Jersey, not the federal courts.

One commentator summarized this recommendation, noting that Pennsylvania's position conflicts with that of New Jersey, stating:

> [T]he Task Force has recommended that the issue of professional ratings, such as "Best Lawyers," "Super Lawyers," and Martindale Hubbell, be addressed by changing Rule [7.1] to permit such ratings, so long as they are not subjective, nor made because of financial contributions to the endorsing organization. This rejects the position taken in New Jersey, but is consistent with the majority opinion that has considered the subject. So long as the endorsing organization is bona fide, such endorsements are acceptable.
>
> [Thomas L. Cooper, "The Wolf By The Ears: The PBA Copes With Lawyer Advertising," 9 Lawyers J. 6 (Sept. 28, 2007).]

New York's Code of Professional Responsibility simply prohibits false, misleading or deceptive advertising, N.Y. DR 2-101(A), and then, subject to meeting that requirement, lists the types of permitted advertising, including information pertaining to "bona fide professional ratings[.]" N.Y. DR 2-101(B). In discussing the New York approach in contrast to that taken in Opinion 39, one commentator has stated:

> States have taken different stances on whether publications like Best Lawyers in America and Super Lawyers are ethical. If

the opinion of the New Jersey CAA is enacted, it will stake New Jersey's claim as the only state to find it categorically unethical for an attorney to advertise her [or his] inclusion in one of these publications. Other states, including Florida, Arizona, and Pennsylvania, have taken a different approach, finding that advertisements that showcase inclusion in these publications are ethical when accompanied by a disclaimer. The third option, displayed by New York's updated Rules of Professional Conduct, is the best approach of the three.

By specifically allowing "bona fide professional ratings," New York's rules do not get caught up in individual publications, but astutely focus on the good faith of the selection process. New Jersey's Opinion 39 disregards the importance of the selection process. The state's attorneys have suggested that the selection process is irrelevant. . . . After admitting that one selection process is straightforward and the other is "unclear," the opinion still bans the inclusion of ratings from both publications in legal advertising.

Should New Jersey enact Opinion 39, it would effectively shut down the professional ratings industry in the state. New Jersey should not look to states like Pennsylvania, Florida, and Arizona, where the ratings industry is given free rein, as long as a disclaimer is attached. This policy puts no pressure on the professional ratings industry to conduct a legitimate selection process. New York's new advertising rules get to the heart of the issue by evaluating whether the process is legitimate or merely a "pay to play" sham. The New Jersey Supreme Court should therefore take a page from New York as it evaluates Opinion 39.

[Connor Mullin, "Current Development 2006-2007: Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers," 20 Geo. J. Legal Ethics 835, 841-42 (Summer, 2007) (footnotes omitted).]

Thus, New York focuses squarely on an analysis of whether the professional services rating system is bona fide, but does not seem to provide guidance or criteria as to what is or is not "bona fide."

It should also be noted that some states have created an advertising review commission to prescreen advertising, under the authority of the state's highest court. See, e.g., Tex. R. Prof. Conduct 7.07(a) (requiring the filing of proposed advertisements for review prior to publication with the Advertising Review Committee of the State Bar); Ky. SCR Rule 7.03(5)(d) (requiring prior approval of proposed attorney advertisements by the Attorneys' Advertising Commission of the State Bar). Such an approach was rejected by a committee reviewing lawyer advertising in Indiana based upon the resulting heavy work load that would have to be undertaken and the consequent significant costs of accomplishing such a task. See Report of the Special Committee on Lawyer Advertising, June 30, 2006, Indiana State Bar Association, at p. 4.

In a recent law review comment, the author supports the position taken by the New Jersey Committee on Attorney Advertising in Opinion 39, asserting that certain attorney advertising practices lie outside the realm of commercial speech protected by the First Amendment, and that bans of

the type of misleading advertising such as one's nomination as a "Super Lawyer" or "Best Lawyer in America" are not unreasonable. See Emily M. Feuerborn, Comment: "What's Not So 'Super' About Comparative Descriptions: The Need For Reform in Attorney Advertising," 45 Houston L. Rev. 189, 190-91 (Symposium 2008). The author asserts that the need to protect the public from misleading advertisements, the need to defend the reputation of the legal profession, and the need to protect small firms and solo practitioners from market exploitation compel this result, suggesting that Opinion 39 be utilized as a model for reform in the area of attorney advertising. Id. at 191. Posing the issue as being, "whether superlative designations provide consumers with relevant information or misleading information[,]" the author concluded that "[p]ersuasive reasons exist for states to follow New Jersey's lead and protect unwitting consumers with a bright-line rule banning misleading statements from attorney advertisements." Id. at 202 (footnotes omitted).

In addressing the need to protect the public from false or misleading information the author stated:

> First, the use of the words "super" or "best" in an attorney advertisement is facially misleading because it is an "unsubstantiated comparison" of one lawyer's services to that

> of another, violating MRPC 7.1. To state that one is "super" automatically implies that an attorney without the "super" designation is merely ordinary or of lesser quality. Second, Super Lawyers self-proclaims that the magazine is "a resource to assist attorneys and sophisticated consumers in the search for legal counsel." Yet, it appears few safeguards are in place to ensure that only "sophisticated" consumers are reading the magazine - especially considering that the publication boast an annual readership of 13 million. Third, attorney rating publications that manipulate inherently subjective opinion surveys into purportedly "scientific and objective" data can be misleading to the public. Even if one were to assume nominations are entirely based on objective facts, "merely because something is a fact does not make it verifiable. A statement, even if true, could be misleading."
>
> [Id. at 205 (footnotes omitted).]

The author also asserts that qualitative descriptions in attorney advertising should be disallowed to protect the reputation and integrity of the legal profession, stating:

> Studies suggest that indecorous advertising practices decrease the public's trust in both the legal profession and the justice system itself.[33] Research also shows that both lawyers and consumers prefer advertising that is in "good taste" and "dignified."[34] The public already

[33] (Article footnote 111) See Venderveer Custis, "The Place of Ethics in the Field of Advertising, " in The Ethical Problems of Modern Advertising 3, 15 (Henry Assael et al eds., 1978) (1931) (stating that false advertising "reduces public confidence in advertising and so makes it less effective"); ABA Center for Professional Responsibility, ABA Aspirational Goals for Lawyer Advertising: Preamble, http://www.ababet.org/cpr/professionalism/abaaspirationalgoals.html (last visited Feb. 29, 2008) ("Empirical evidence suggests that undignified advertising . . . detracts from the public's confidence in the legal profession . . . . ."); see also Christopher R. Lavoie, Note, "Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation," 30 Suffolk U.L. Rev. 413, at 433 ("The public . . . prefers dignified and tastefully presented lawyer advertisements over tacky, greedy, or unrealistic ones.").

[34] (Article footnote 112) See Comm'n on Advertising, Am. Bar Ass'n, Report on the Survey on the Image of Lawyers in Advertising at 55 (1990). According to the survey results, an indicator o a dignified

perceives lawyers as "greedy, dishonest and otherwise unprincipled."[35] This unsavory image will remain unchanged as long as misleading advertisements boasting self-laudatory accolades remain permissible.[36]

[Id. at 206 (article footnotes moved to text and renumbered).]

In addressing the need to protect small firms and solo practitioners from market exploitation, the author asserted:

"Commercial speech represents commercial power." Supposing that is true, the inverse is that lack of commercial speech represents lack of commercial power. Applying this paradigm to attorney rating publications, those lawyers who can afford to advertise their nomination naturally garner the most commercial power. Although attorneys nominated for recognition as a "Super" lawyer do not pay to be listed, those lawyers (or firms) who do pay for a "supplemental" advertisement within the magazine are typically listed in red and bold, whereas attorneys not paying for extra advertising are named in plain black, ordinary typeface. Furthermore, while all attorneys receiving the nomination are encouraged to advertise their services in the publications, the cost of placing an advertisement is not cheap, ranging from approximately $1,400 for a minimal "standard-profile" ad, to $23,000 for a "platinum-profile" two-page ad. Large to mid-size firms are more likely to be able to afford an advertisement in the publication, whereas small firms and solo practitioners often have smaller advertising

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advertisement is information that is "useful to legal consumers beyond merely promoting the lawyer or firm."

[35] (Article footnote 113) Eugene Gaetke, "Expecting Too Much and Too Little of Lawyers," 67 U. Pitt. L. Rev. 693, 696 (2006).

[36] (Article footnote 114) But see Rodney A. Smolla, "Lawyer Advertising and the Dignity of the Profession," 59 Ark. L. Rev. 437, 445 (2006) (asserting that the "management of good taste" should be assigned to "the forces of the marketplace, not the forces of government").

budgets.

> These discrepancies are important to recognize, not to demonize the print media's practice, but to gain awareness of the substantial difference in how attorneys are listed in Super Lawyers based on whether they purchase a supplemental advertisement or not. If all lawyers selected as "Super Lawyer" are equally deserving of the designation, it is unreasonable to list some lawyers in red and bold and others in plain typeface. This sends the wrong message to readers - namely that lawyers named in red or bold are more "Super" or distinguished than those lawyers listed in plain type.
>
> [Id. at 207-08 (footnotes omitted).]

The author of this article, apparently a law student, maintains that a ban on such qualitative attorney advertising touting one's selection for inclusion in publications such as "Super Lawyers" and "The Best Lawyers in America" satisfies the four-part test in Central Hudson, supra, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351, and therefore constitutes justified regulation, explaining:

> As to the first prong, the use of comparative designations is misleading to the public because the self-laudatory designations are not objective facts intended to inform the public of one's practice area or certifications; rather, the accolades are based on subjective opinion. Second, all states that produce publications such as Super Lawyer or Best Lawyer in America have a substantial interest in regulating self-laudatory speech to protect unwary consumers from erroneously relying on the publications as their main source for selecting legal counsel.

> Third, banning the use of comparative designations will further states' interests because the legal profession is a largely self-policed profession, meaning that states must rely on professional rules of conduct to ensure that the integrity of the legal profession is upheld. . . .
>
> Lastly, encouraging other states to follow New Jersey's proposed ban on "Super" and "Best" designations in attorney advertisements is not excessively restrictive because it does not preclude lawyers and firms from utilizing other forms of permissible advertising. . . . Furthermore, the ban would not impede the ability of potential clients to gather information regarding attorneys via other sources, such as state bar associations, referral services, attorney directories, and public complaints for malpractice. The critical issue is not whether lawyers may advertise their services, but the means by which they do so and the ethical boundaries of the privilege of commercial speech.
>
> [Id. at 209-10 (footnotes omitted).]

Lastly, addressing the Supreme Court's decision in Peel, supra, 496 U.S. at 101, 110 S. Ct. at 2288, 110 L. Ed. 2d at 94-95, the author argues that the peer-review rating process is not "just like" the NBTA certification in Peel, where such certification was an objectively verifiable fact, stating:

> To assert that a largely peer-based survey can be treated "just like" a certification obliterates facts that may support an inference of quality."[37] It is irrational to extend the

[37] (Article footnote 141) Peel, supra, 496 U.S. at 101.

> holding of Peel to include self-laudatory statements because such statements are exactly the types of qualitative statements the Court considers unprotected commercial speech.[38]
>
> [Id. at 211 (article footnotes moved to text and renumbered).]

This review of varying approaches adopted by other jurisdictions, and article commentary, provides a basis for proper consideration and analysis of the issues before the Supreme Court. Unlike New Jersey, these ethics opinions are generally advisory and non-binding in nature, issued by a committee of the state bar association under a self-regulating approach adopted by each state's highest court, and are generally separate from the state ethics-complaint process. In contrast, opinions issued by the Supreme Court Committee on Attorney Advertising are binding upon the inquirer and, if published, as here, constitute constructive notice to New Jersey attorneys of the contents thereof, with a violation of same being considered per se unethical. See R. 1:19A-3. Therefore, the rulings and determinations of Opinion 39 are binding on all New Jersey attorneys.[39]

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[38] (Article footnote 142) See Peel, supra, 496 U.S. at 101 (distinguishing qualitative claims from statements of underlying fact) Bates v. State Bar of Arizona, 433 U.S. 350, 366 (1977) (noting that statements relating to the quality of services may be deceptive or misleading).

[39] As noted, by Order of the Supreme Court dated August 18, 2006, a stay of Opinion 39 was granted pending further Order of the Court.

In summary, the template for regulation of attorney advertising in the context before the New Jersey Supreme Court is found in the United States Supreme Court's holdings in R.M.J., Zauderer, Peel and Ibanez, where the Court has made it clear that state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine. Clearly, mere consumer unfamiliarity with a privately-conferred honor or designation does not establish that advertising such honor or designation is actually or inherently misleading so long as the honor or designation is actually issued by a legitimate professional organization with verifiable criteria that are available to consumers. See Peel, supra, 496 U.S. at 102-03, 110 S. Ct. at 2288-89, 110 L. Ed. 2d at 95-96; Ibanez, supra, 512 U.S. at 147, 114 S. Ct. at 2091, 129 L. Ed. 2d at 128-29; Hoefges, supra, 24 Cardozo Arts & Ent. L.J. at 981. As noted by Professor Hoefges:

> On the other hand, it seems equally clear, when claims in professional services advertising are potentially misleading and not actually or inherently misleading, they cannot be

> constitutionally banned merely on grounds of preventing the possibility of consumer deception. Almost always, it seems, the government will have a more narrowly-tailored and less speech-restrictive regulatory option – like requiring an effective and reasonable disclosure – than imposing a categorical ban.
>
> [Hoefges, supra, 24 Cardozo Arts & Ent. L.J. at 981-82.]

An analysis of the record developed in this matter, to which the principles established by the United States Supreme Court must be applied, and the manner of their application to be considered, follows.

IV. NEW JERSEY MONTHLY, LLC.

At the June 12, 2007 hearing, New Jersey Monthly, LLC produced testimony from Kate S. Tomlinson, Publisher and Editor-in-Chief of New Jersey Monthly magazine. New Jersey Monthly magazine has a paid monthly circulation of between 93,000 and 94,000. Paid circulation consists of three components: (1) subscriptions paid for by consumers; (2) copies bought on newsstands; and (3) single-copy sales, typically sold directly from the magazine by mail, and occasionally in person. Ms. Tomlinson explained that New Jersey Monthly, LLC estimates that the magazine's total audience is approximately 515,000 people monthly. Total audience includes anyone who sees the magazine, whether it be in a public place such as the waiting rooms of doctors,

dentists, hair salons, or other offices. Additionally, it is expected that if a copy of the magazine is brought into the household through subscription or newsstand purchase, more than one person in that household will read it. Based solely on their paid circulation, New Jersey Monthly is the largest general-interest publication in New Jersey.

Ms. Tomlinson stated that the target reader market of New Jersey Monthly is "primarily people who are interested in New Jersey and want to live there, to go to restaurants here, and . . . the magazine also attracts people who are relatively affluent." New Jersey Monthly, LLC commissions subscriber demographic studies each year that are used for marketing purposes in selling advertising and for internal use by the editors "to give them a sense of who are readers are." The annual subscriber demographic study commissioned for New Jersey Monthly is presently being done by the City and Regional Magazine Association. The study reflects that approximately 60% of the magazine's subscribers are female, 40% male. The median average age of subscribers is 55.8 years; 73% are married, 8% single and 10% widowed, separated or divorced.

The most recent study, see Exhibit NJM-5, compares the subscribers of New Jersey Monthly to mean averages for consumers nationwide (MRI U.S. Adults). For example, the

study states that 63% of the subscribers have a college degree, with 30% having a post-graduate degree, as compared with the national consumer average of 24% being college graduates and 8% having a post-graduate degree. The average annual household income of subscribers is $181,800 as compared with a $63,000 nationwide consumer average. This study certainly supports Ms. Tomlinson's assertion that the magazine attracts subscribers who are "relatively affluent." Of course, the subscriber statistics, designed to gather statistics of the 93,000 to 94,000 monthly subscribers do not necessarily reflect the demographics of the total monthly audience of 515,000.

Ms. Tomlinson explained that New Jersey Monthly embarked on the practice of publishing peer-rated rankings of lawyers because "[p]eer rankings and other types of ratings are extremely popular with the readers of city and regional magazines[.]" The first peer-review rating of attorneys was published by New Jersey Monthly in 1997, and was based on a study conducted by The Best Lawyers in America. Thereafter, the magazine published additional attorney peer-review ratings in 2003, with the underlying survey again being completed by The Best Lawyers in America. Ms. Tomlinson emphasized that ratings and rankings of professionals, businesses, restaurants,

institutions, services and products have become extremely popular with readers of city and regional magazines, and are a common staple and recurring feature of such magazines. She also testified that the publication of peer-review ratings and rankings is an important component of service journalism to the consuming public by providing information that assist consumers in making more informed decisions. Rankings of high schools, physicians, dentists and towns have also been published in various editions of New Jersey Monthly.

Although New Jersey Monthly LLC occasionally compiles its own ranking lists, such as its "doctors list," they usually contract with an outside source to produce peer-review rating lists. On April 30, 2004, New Jersey Monthly, LLC entered into a "Publishing Agreement" with Key Professional Media, Inc., d/b/a Law & Politics, with an addendum thereto dated July 21, 2005, for the purpose of producing a special advertising section to be entitled "New Jersey Super Lawyers." See Exhibit AG-2. Prior to selecting Key Professional Media, Inc. to conduct a peer-review ranking study of New Jersey attorneys, Ms. Tomlinson explained:

> We vetted their work very carefully. I had a number of presentations from the

> President of Key Professional Media explaining the methodology used in the survey and also the other information that they gathered on the -- the independent research that they conducted. I was also given written statements of their methodology.
>
> * * * *
>
> I was very impressed with the degree of care that they took to make sure that the list was truly the outstanding lawyers in New Jersey.

Ms. Tomlinson testified that she and her staff were satisfied that the polling, screening and selection methodology utilized by Key Professional Media, Inc. were thorough, the results of the polling data were closely scrutinized and cross-checked, and that the resulting special advertising sections contained in New Jersey Monthly complied with guidelines promulgated by the American Society of Magazine Editors (ASME).

In accordance with the Publishing Agreement, special advertising sections entitled "New Jersey Super Lawyers" and "New Jersey Super Lawyers, Rising Stars," have been included in several editions of New Jersey Monthly. Specifically, these special advertising sections were included in the May 2005 edition (Exhibit NJM-1); the April 2006 edition (Exhibit NJM-2); the August 2006 edition (Exhibit NJM-3); and the April 2007 edition (Exhibit NJM-

4). The pages of these "New Jersey Super Lawyers" and the "New Jersey Super Lawyers, Rising Stars" sections are labeled, at the top, "SPECIAL ADVERTISING SECTION." Ms. Tomlinson explained that this designation conforms to the advertising guidelines published ASME, and that these special advertising sections also include an explanation of the selection process utilized in compiling the list.

Ms. Tomlinson expressed concern that, prior to issuance of Opinion 39, the Committee had made no inquiry to New Jersey Monthly, LLC or Key Professional Media, Inc. seeking information about the peer-review rating system, polling data, or the screening and selection methodology utilized, nor were they given an opportunity to explain or defend same. That is certainly true.

Referring to the May 2005 edition of New Jersey Monthly, see Exhibit NJM-1, The New Jersey Super Lawyers 2005 special advertising section begins on page 80, immediately followed by page S-1 and runs for a total of 86 pages through page S-85. Inclusive of the inside-cover pages and these 86 pages, the entire May 2005 edition of New Jersey Monthly consists of 196 pages, plus the front and back covers. The front cover of the May 2005 edition of New Jersey Monthly showcases the feature "TOWNS WE LOVE" and makes no reference to the New Jersey Super Lawyers

Special Advertising Section, nor does the magazine's table of contents pages.

Page 77 of that magazine, which does not contain the "Special Advertising Section" label, contains a full-page advertisement of a law firm with large-type letters across the middle entitled "JUDGED THE BEST" and, at the top contains the statement that the firm

> is proud to announce that eight lawyers at our firm were recently recognized as New Jersey's best, according to the votes of their peers in a poll conducted by *New Jersey Super Lawyers*® magazine. If you seek the best representation, call . . .

Page 79 of that same edition, also without the "Special Advertising Section" label, contains a full-page advertisement of another law firm, but there is no reference therein to the Super Lawyers survey or any descriptive adjective such as "best."

Of the aforesaid 86 pages, 10 of those pages do not contain the label "Special Advertising Section." Within those 86 pages are full- and partial-page advertisements of attorneys and law firms that refer, in one way or another, to their inclusion in the New Jersey Super Lawyers 2005 list. Page S-1 is a full page that states, in large bold-face colored print, "INTRODUCING" "NEW JERSEY SUPER LAWYERS

2005" as "The Guide to The Top Attorneys in New Jersey" with the photograph of a judge's gavel and the circled statement "PLUS A LEGAL PRIMER FOR CONSUMERS Estate Planning, jury duty, bankruptcy and more."

There are wide variations of content in the full-page and two-page firm advertisements. For example, pages S-2 and S-3 of that edition is a two-page, side-by-side advertisement of a law firm with the following words across the middle of the two pages, in bold, large-type print, "SUPER IMPRESSIVE" and announces the firm has "23 Super Lawyers in 15 practice areas," proclaiming "Super service. Super talent, Super people." Contrast this with the two-page, side-by-side firm advertisement contained on pages S-8 and S-9 where, other than the "NEW JERSEY SUPER LAWYERS 2005" banner at the top left of page S-8, there is only one statement within the small print of the multi-paragraph text, that "Our 18 Super Lawyers are testament to our commitment to delivering the best, always." The two-page, side-by-side law firm advertisement on pages S-10 and S-11 contains no reference in the text to the inclusion of any of its lawyers in the New Jersey Super Lawyers 2005 list, containing only the seemingly standard "NEW JERSEY SUPER LAWYERS 2005" banner at the top left of page S-10, even though a review of the list itself discloses the inclusion

in the list of several lawyers from that firm. The same can be said for the full-page firm advertisement appearing on page S-15. These are but a few examples; the advertisements contained in this 86-page Special Advertising Section contain many permutations and ranges concerning their reference, overt or subtle, to New Jersey Super Lawyers 2005 list inclusion. One particularly creative entry is a one-third page, top-to-bottom advertisement appearing on page S-34, the bulk of which depicts a telephone booth, empty but for a hanging shirt and tie, the "Superman" character of comic book, television and movie fame being the clear implication being conveyed to the consumer, followed by, in large bold-face type just beneath the telephone booth, "SUPER LAWYERS," followed by the names of the firm attorneys selected for inclusion in the New Jersey Super Lawyers 2005 listing. The heading at the top of that advertisement states "Identities Revealed."

Page S-5 contains a one-page firm-profile advertisement about a selected attorney, in the format of an article, explaining the attorney's background and experience, style, clientele and that attorney's designation as a Certified Criminal Trial Attorney by the Supreme Court, a listing in "Who's Who in New Jersey," and maintenance of "a coveted 'AV' rating from Martindale-

Hubbell." Although there is no specific mention in the text of that advertisement of the attorney's selection to the Super Lawyer 2005 list, the top of that page contains the banner "NEW JERSEY SUPER LAWYERS 2005," and it is evident from a reading of the balance of pages in the Special Advertising Section that this attorney was, indeed, selected for inclusion within that list.

Page S-7 of the May 2005 edition is entitled "HOW SUPER LAWYERS ARE SELECTED," describing the process as consisting of the following steps:

> 1. THE GENERAL SURVEY.
>
> In October 2004, Law & Politics mailed more than 35,000 ballots to attorneys across New Jersey who have been licensed for five years or more. Law & Politics asked the attorneys to name the best lawyers they had personally observed in action. The intent was to discourage lawyers from voting for others based purely on reputation.
>
> Each lawyer was given a score based on the number and type of votes received. Votes received from lawyers in other firms were awarded significantly more points than votes received from lawyers in the same firm.
>
> 2. THE RESEARCH PROCESS.
>
> The research department at Law & Politics carefully reviewed balloting results. All nominee data was verified by direct contact with the nominee or their firm. The balloting results were reviewed for evidence of ballot manipulation and any such balloting was eliminated from consideration.

The research staff also reviewed the credentials of New Jersey attorneys nominated in the general survey and assigned points based upon defined evaluation criteria.

Each candidate's record was reviewed with the New Jersey Office of Attorney Ethics Web site for evidence of disciplinary history.

3. THE BLUE RIBBON PANEL REVIEW.

The lawyers under consideration were grouped into more than 60 areas of practice. A blue ribbon panel consisting of the top point-getters from the general survey and research process were assembled for each area of practice. The blue ribbon panel members reviewed and scored the list of nominees in their area of practice.

4. THE FINAL SELECTION PROCESS.

The point totals from the general survey and blue ribbon panel review were added to arrive at a final point total for each candidate.

Candidates were grouped by firm size (small, medium, and large), and the research staff selected the top attorneys from each group as Super Lawyers.

In addition to attorneys in private practice, the list includes prosecutors, in-house counsel, and public service lawyers.

New Jersey Super Lawyers are listed in a special advertising section of the May 2005 issue of *New Jersey Monthly* and *New Jersey Super Lawyers* magazine. All Super Lawyers are also listed on the Web site superlawyers.com, where they can be searched for by name, practice area, and city.

Throughout the Special Advertising Section pages there are scattered, amid the firm or attorney advertisements,

lists of attorneys selected for inclusion in the New Jersey Super Lawyers 2005 listing, by category. For example, page S-14 of the May 2005 edition contains a list entitled "The Top 50 Female New Jersey Super Lawyers 2005," the small print at the top right of that page stating that "the following is an alphabetical listing of the female lawyers who received the highest point totals in the 2005 New Jersey Super Lawyers balloting, research and blue ribbon review process." There is also a notation at the end of the list that, due to ties, there are actually 53 lawyers on the list. Page S-12 contains a listing entitled "The Top 100 New Jersey Super Lawyers 2005," described in small print at the top right of the page as an alphabetical listing of lawyers who received the highest point totals, with a notation at the end of the listing that, due to ties, 101 lawyers are contained within the list. At the bottom of page S-12 is a listing of lawyers entitled "The Top 10," consisting of the top ten vote-getters.

Beginning on page S-16, and continuing on non-sequential pages thereafter and ending at page S-68, is a listing of all attorneys selected for inclusion in the New Jersey Super Lawyers 2005 list, by primary area of practice, indexed, and covering 61 categories of practice.

In small print just under the index of categories, the following explanation appears:

> This is a listing of all 2005 New Jersey Super Lawyers arranged by primary area of practice. Names and page numbers in RED BOLDFACE indicate a profile on the specified page.

Also scattered throughout the 86-page Special Advertising Section are 6 "legal primer" features at the bottom left of 6 separate pages, approximately one-third of the page in size, highlighted in beige, that are entitled "Ask a Super Lawyer…" followed by a question, each answered under the byline of a lawyer who is included in the list of New Jersey Super Lawyers 2005. The questions posed are: "What are the different types of bankruptcy? (page S-20);" "Can my employer monitor what I do on my computer at work? (page S-24);" "Why do you need a will and estate planning? (page S-28);" "What happens if I am a defendant in a trial? (page S-32);" "Can I get out of jury duty? (page S-36);" and "What is my case worth? (page S-54)"

Also strewn throughout the 86-page Special Advertising Section are statements of statistical information concerning the list of New Jersey Super Lawyers 2005. For example, on page S-30 in the very center of the page is a 2" by 2.5" rectangle highlighted in yellow, containing in

very large print, "5%," underneath which appears in large but smaller print "OF ATTORNEYS IN NEW JERSEY ARE SUPER LAWYERS." Similarly, on page S-50, there appears a similar rectangular-shaped blue-highlighted message in very large print "THE LARGEST PRACTICE AREAS," underneath which appears in large but smaller print "FOR NEW JERSEY SUPER LAWYERS: BUSINESS LITIGATION, FAMILY LAW AND GENERAL LITIGATION." A similar blocked message appears on page S-58, this time in red highlighting, informing the reader that 55 is the average age of New Jersey Super Lawyers. The yellow-highlighted message on page S-62 states that 35,000 ballots were sent to New Jersey attorneys in October 2004 to start the research process. The blue-highlighted message on page S-66 informs the reader that 8% of New Jersey Super Lawyers practice in Morristown and, finally, the red-highlighted message on page S-68 states that 7.5 million is the number of readers nationwide who see Super Lawyers.

Lastly, there are eight pages (S-70; S-72; S-74; S-76; S-78; S-80; S-82; and S-84) devoted to attorney-profile advertisements of attorneys contained within the New Jersey Super Lawyers 2005 list, each comprising approximately one-tenth of a page (9 per page, with 3 on the last page). These attorney-profile advertisements have a photograph of

the lawyer, and list the attorney's name and contact information, practice areas and a promotional description of the attorney.

The April 2006 edition of New Jersey Monthly, see Exhibit NJM-2 contains the New Jersey Super Lawyers 2006 Special Advertising Section. The front page of the April 2006 edition showcases the feature "THE BEST PLACES TO LIVE," and provides no reference to inclusion of the Super Lawyers section, nor does the magazine's table of contents. The Super Lawyers Special Advertising Section is comprised of pages S-1 through S-104, with page S-1 immediately following page 136 of the magazine.

In contrast to the May 2005 edition, the April 2006 edition begins on page S-1 with the photograph of one of the "Top 100 New Jersey Super Lawyers 2006." In bold and very large print, beneath the "NEW JERSEY SUPER LAWYERS 2006" banner, is the statement "THE TOP ATTORNEYS IN NEW JERSEY," followed by large, but smaller print, "REPRESENTING MORE THAN 55 AREAS OF LAW." In a circle at the bottom left of the page is the statement "PLUS A Legal Primer for Consumers starts on page S-18." Again, there are many variations between the numerous law firm advertisements and firm or attorney profiles contained within the Special Advertising Section with respect to

their reference to inclusion in the New Jersey Super Lawyers 2006 list.

Page S-6 contains the "NEW JERSEY SUPER LAWYERS 2006" banner across the top of the page in vary large, color print, followed by the statement:

> SOMEDAY, YOU OR SOMEONE YOU KNOW WILL NEED A LAWYER. Imagine if you could ask nearly every attorney in New Jersey to recommend a great lawyer. Law & Politics has done the work for you (see details below). The following pages introduce the 2006 New Jersey Super Lawyers —— the top 5 percent in the state —— arranged by primary area of practice.

Page S-6 also contains a section entitled "HOW SUPER LAWYERS ARE SELECTED," which contains more information and detail concerning the selection process than that contained on page S-7 of the May 2005 edition. See Exhibit NJM-1. Specifically, there is more detail in the April 2006 edition concerning the in-firm nomination process, explaining that while lawyers may nominate others in their firm, they may only do so if they nominate an equal or greater number of attorneys from other firms, and that votes for attorneys outside the nominee's firm are weighted greater than votes from within the firm. In describing the research process, it is explained therein that the research team of Law & Politics conducts interviews, performs independent research, verifies data collected, and then

reviews each candidate's record through the New Jersey Office of Attorney Ethics' website. The description of The Final Selection Process is slightly different, in that attorneys are still grouped by firm size, but now also by geographic location.

As in 2005, New Jersey Super Lawyers 2006 lists the "Top 100" and "Top Ten" Super Lawyers, see page S-8, the "Top 50 Female" Super Lawyers, see page S-10, and those selected for inclusion in New Jersey Super Lawyers 2006 are listed, by primary area of practice, in non-sequential pages, around which are interspersed attorney and law firm advertisements. The primary practice areas were reduced to 57 in 2006, from 61 in 2005. Again, the names of chosen lawyers who advertise with an attorney profile are listed in red boldface type with a corresponding page reference to the advertisement.

There are five "Legal Primer for Consumer" sections of approximately one-half page each that begin with the phrase "ASK A SUPER LAWYER …," containing a photograph and name of a featured lawyer who is contained on the "Super Lawyers" list, providing the answer to various questions posed. They begin on page S-18, posing and answering the question, "If my husband and I divorce, how can I be sure he hasn't stashed away assets to prevent me from getting my share?;"

page S-22, "If I experience a side effect after taking a prescription drug, how can I successfully sue the pharmaceutical company that manufactured the drug?;" page S-26, "How do the new bankruptcy code amendments affect Chapter 11 business-reorganization cases?;" page S-36, How do I draft a will with the uncertainty regarding the future of federal estate tax and the differing exemption amounts in New Jersey and federal law?;" page S-42, "Why should a business with only a few employees have an employee handbook?;" and page S-52, without a photograph, "How can one ensure a prenuptial agreement will be valid?"

A review of the lawyer advertisements contained within the Special Advertising Section in the April 2006 edition discloses that more advertisements contain little or no direct reference to their selection for inclusion in the list than in the May 2005 edition. Notably, one attorney who was selected for inclusion in the New Jersey Super Lawyers 2006 listing elected to have his advertisement appear in the April 2006 edition outside the Special Advertisement Section, and it contains no Super Lawyer reference. See Exhibit NJM-2, p. 62.

The August 2006 edition of New Jersey Monthly magazine, see Exhibit NJM-3, contains a Special Advertising Section entitled New Jersey Super Lawyers Rising Stars

2006. The feature on the front cover of that edition states "232 Hot Restaurants" and "8 Towns For Foodies, From Hoboken to Cape May," and contains no reference to the aforementioned Special Advertising Section, nor is there a reference to same in the magazine's table of contents appearing on pages 9 and 11.

This Special Advertising Section begins on page S-1, immediately following page 122 of the magazine, and runs for 32 pages through page S-32. Page S-1 contains a banner at the top in large bold-face, color print entitled "NEW JERSEY SUPER LAWYERS RISING STARS 2006," below which is the photograph of a selected "Rising Star" lawyer, to the left of which, in large lettering, is the statement, "The Top Young Lawyers in New Jersey," below which in large, but smaller lettering is the phrase, "REPRESENTING MORE THAN 50 AREAS OF LAW." Again, each page, with the exception of page S-2, contains the words at the top of thereof, "Special Advertising Section."

Page S-3 of the August 2006 edition is the survey explanation page, headed by a banner in very large print, "NEW JERSEY SUPER LAWYERS RISING STARS 2006," under which is contained the following statement:

> SOMEDAY, YOU OR SOMEONE YOU KNOW WILL NEED A LAWYER. Imagine if you could ask nearly all New Jersey

> Super Lawyers to recommend an outstanding attorney who is 40 years old or younger, or who has been in practice for 10 years or less. In the following pages, you'll find the 2006 New Jersey Rising Stars —— the top 2.5% in the state —— arranged by primary area of practice.

Below that statement, in large, underlined print is the statement, "HOW RISING STARS ARE SELECTED." The selection process, as described on this page, is similar to that contained on page S-6 of the April 2006 edition, see Exhibit NJM-2, with the exception that the "Rising Star" ballots are mailed only to "all New Jersey Super Lawyers, asking them to nominate the best up-and-coming attorneys they've *personally observed in action*. The intent is to discourage votes based purely on reputation."

Again, there are "firm profile" and individual or law firm advertisements of varying size, as well as one-tenth page "attorney profile" advertisements, interspersed among and around the pages containing the listing of the lawyers selected for inclusion in the New Jersey Super Lawyers Rising Stars 2006 list, which are grouped by primary area of practice with an index thereof on page S-6. As in the previous editions on New Jersey Monthly discussed above, these "firm profile" advertisements are in "feature article" format, reminiscent of the "informational" advertising seen on some television channels, featuring

that particular firm, with each page being headed by the phrase "Special Advertising Section." As contrasted with the New Jersey Super Lawyers 2006 listing in the Special Advertising Section of the April 2006 edition of New Jersey Monthly, there is no "Top 100" or "Top 10 List" provided. Again, the listing of the selected "Rising Star" lawyers is color-coded in red boldface print with the names of those who have purchased advertisements appearing within the Special Advertising Section. Again, the degree to which the attorney advertisements contained in the Special Advertising Section reference selection for inclusion in the "Rising Stars" list varies from advertisement to advertisement. Generally, in the "firm profile" advertisements, there is simply a "Rising Star" reference in the body of the "informational-format" article; each page, of course is headed by the words "Special Advertising Section" along with the bold-face, color banner "NEW JERSEY SUPER LAWYERS RISING STARS 2006" at the top. Some firm or individual advertisements have no reference to the words "Super Lawyer" or "Rising Stars" (see e.g., page S-6), although the "NEW JERSEY SUPER LAWYERS RISING STARS 2006" banner appears at the top of the page, separately from the advertisement itself.

The "Legal Primer for Consumers" feature is also contained within the Special Advertising Section of the August 2006 edition in half- or quarter-page format, with the statement "ASK A RISING STAR…," containing a question with an answer provided by a selected "Rising Star" depicting the photograph and name of that lawyer. On page S-8, the question asked is "Why does so much controversy surround immigration law?; there are two on page S-12, "What can I do if I can't afford a medical malpractice lawyer?" and "How will my assets be distributed if I don't have a will?;" there are two on page S-20, "How cam employers manage office romances?" and "How private is my workplace e-mail?;" and on page S-24, "How do I negotiate our child's college expenses with my ex-spouse?"

The April 2007 edition of New Jersey Monthly, see Exhibit NJM-4, contains a 65-page Special Advertising Section on pages S-1 through S-65 entitled, "NEW JERSEY SUPER LAWYERS 2007," that begins following page 148 in the magazine. The cover of the April 2007 edition contains the feature "Best Downtowns," and contains no reference to that Special Advertising Section, nor does the magazine's table of contents on pages 9 and 11.

Each page in this Special Advertising Section, except for pages S-2, S-3, S-4, S-9, S-43, and S-59 (all of which

contain full-page law firm advertisements with what can be categorized as a passing reference to "Super Lawyer" selection) contains the words "SPECIAL ADVERTISING SECTION" scrolled across the top of the page. Page S-1 contains the NEW JERSEY SUPER LAWYERS 2007 banner in very large, bold, color print across the top, followed by the photograph of a featured "Super Lawyer" and in large print the words "The Top Attorneys in New Jersey," under which is contained the phrase, in smaller letters, "REPRESENTING MORE THAN 55 AREAS OF LAW." There is also a circled statement on page S-1 that the section contains "A Legal Primer for Consumers."

Page S-5 of Exhibit NJM-4 is the informational page that begins with the NEW JERSEY SUPER LAWYERS 2007 banner at the top, next to which is printed in large red lettering, "A RESOURCE DESIGNED TO EMPOWER AND INFORM CONSUMERS OF LEGAL SERVICES." The text reads:

> Finding and selecting an attorney can be disquieting to the most sophisticated of consumers. In simpler times, communities were smaller and more closely-knit. Community members knew one another well, and the selection of an attorney was based upon personal knowledge and reputation. In today's more complex world of Internet connectivity and vast stores of online data, the consumer is faced with an overwhelming array of information.

> In selecting an attorney, gathering and evaluating information relevant to one's circumstances and needs is a daunting task. If you are a sophisticated consumer in need of an attorney, we believe you will find **New Jersey Super Lawyers** a good place to begin your search. But don't base your decision solely on this, or any other source. There are many fine lawyers that may not be included. You need to do your homework. And most important, you need to feel comfortable with the person you choose to represent you.
>
> [Bold in original; emphasis added.]

The actual "SELECTION PROCESS" utilized to develop the New Jersey Super Lawyers 2007 list is set forth below this statement, and is substantially more detailed than that appearing in the prior Special Advertising Sections contained in the prior editions of New Jersey Monthly. See Exhibits NJM-1; NJM-2; and NJM-3. The "Selection Process" set forth in the April 2007 edition reads as follows:

> Law & Politics strictly adheres to a rigorous selection process directed at casting as wide a net as possible, evaluating quality in the most objective possible terms and verifying and validating all data. The only way a lawyer can be listed in **Super Lawyers** magazine is through this selection process. The determination of whether a lawyer will be placed on the **Super Lawyers** list is independent of advertising or any other payments.
>
> No other legal publisher identifies qualified candidates by using a multi-step evaluation process that incorporates peer recognition and professional achievement. Law & Politics uses a system of balloting, peer evaluation and internal

research, which acts as a system of checks and balances. The resulting product is a diverse and comprehensive listing of outstanding lawyers.

STEP ONE: CREATION OF THE CANDIDATE POOL

Statewide Survey of Lawyers

- Law & Politics mailed more than 32,000 ballots to active lawyers in New Jersey.
- Lawyers were asked to nominate the best attorneys they've personally observed in action.
- Nominees need not be in private practice. Lawyers were able to nominate legal aid attorneys, prosecutors and in-house counsel.
- Lawyers were able to nominate attorneys in their own firm, but those nominations counted only if each in-firm nomination was matched by at least one out-of-firm nomination,
- Each nomination carried a point value. An out-of-firm vote had substantially greater point value than an in-firm vote.
- Lawyers were not able to vote for themselves.
- Utilizing our database, researchers kept track of who voted for whom, a process that helped detect attempts to manipulate the balloting.

Independent candidate search

- Law & Politics' research department also searched for outstanding New Jersey lawyers by:
  - Reviewing national and local periodicals as well as legal trade journals
  - Searching professional databases and online sources
  - Conducting in-person and telephonic meetings with law firms
- This step was designed to identify practitioners who may have been missed in the balloting process, particularly highly talented lawyers in specialty areas or those with low-visibility, yet high-quality practices.

STEP TWO: EVALUATION OF CANDIDATES

- Law & Politics' research department examined the background and experience of candidates, evaluating indicators of peer recognition and professional achievement.
- Factors considered in evaluating candidates were:
  - Verdicts and settlements

-Transactions
-Representative clients
-Experience
-Honors and awards
-Special licenses and certifications
-Position within law firm
-Bar and/or other professional activity
-Scholarly lectures and writings
-Education and employment background
-Other outstanding achievements

STEP THREE: PEER EVALUATION BY PRACTICE AREA

- Those candidates with high point totals from the balloting and qualitative evaluation steps were asked to be on a blue ribbon panel for their practice area.
- Panelists reviewed and evaluated candidates from their practice area.
- Panelists added candidates who were then passed along to research for evaluation.

FINAL SELECTION

- Law & Politics divided candidates according to their firm size: large, medium and small (size categories vary from jurisdiction to jurisdiction), and selected those with the highest point totals from each category. Only 5 percent of the total lawyers in New Jersey are listed in **Super Lawyers**.

BEFORE PUBLISHING

- Law & Politics' research staff checked each candidate's standing with the local licensing authority.
- Candidates were asked to aver that they have not been subject to disciplinary or criminal proceedings, and to confirm the accuracy of contact and practice area information.
- Final Internet searches were performed on each candidate to ensure there were no outstanding matters that would reflect adversely on the lawyer.

As with the prior Special Advertising Sections, there are two-page sided-by-side, full-page and partial-page law

firm and individual practitioner display advertisements interspersed throughout the section, as well as the "informational" firm profile advertisements, and the attorney-profile section, all with varying references to the "Super Lawyer" listing and, in some cases only footnote or no references thereto at all. The pages on which these advertisements appear, however, contain the NEW JERSEY SUPER LAWYERS 2007 banner scrolled across the top. See pages S-6/S-7, S-9, S-11, S-13 and S-15 for some examples of those variations.

As with the prior Special Advertising Sections, there is a "Top 100 NEW JERSEY SUPER LAWYERS 2007" list, as well as a "Top 10" listing, and a "Top 50 WOMEN SUPER LAWYERS 2007" list. The same format in the earlier editions exist with respect to listing of the selected lawyers by practice areas, indexed, with those lawyers purchasing an attorney advertisement having their name and ad-page reference appearing in red boldface print.

The "Legal Primer for Consumer" sections, generally a half-page each, are interspersed throughout the Special Advertising Section, titled this time as "ASK SUPER LAWYERS," with a selected "Super Lawyer," identified by photograph and name, providing an answer to questions posed, as follows: page S-14, "How can I prepare for

mediation?;" page S-16, "My lawyer defrauded me. What recourse do I have under New Jersey's consumer protection laws?;" page S-20, "What are my responsibilities as an estate executor?;" page S-30, "If an employee smokes, how can I manage his or her break time?;" page S-36, "Who is liable if my child is injured on a school trip?;" and page S-46, "After becoming intoxicated on too many comped drinks as a casino, my husband gambled away our life savings. What can I do?"

Also dispersed throughout the listing of the selected lawyers by practice area, are pieces of information or statements in large bold-faced type contained in approximately 2" by 2.5" squares in the center of certain pages, stating:

> The decision to hire a lawyer is an important one: Do not base your decision solely on advertising or an attorney's inclusion in *Super Lawyers* [page S-28].
>
> *Super Lawyers* is a source of information for sophisticated consumers of legal services in New Jersey [page S-34].
>
> No lawyer pays to be listed in *Super Lawyers*. Selection is based exclusively on the methodology stated on page S-5 [page S-38].
>
> All candidates are evaluated on 12 indicators of peer recognition and professional achievement [page S-42].
>
> Ballots were mailed to more than 32,000 lawyers

in New Jersey [page S-44].

Candidates are evaluated by a panel of peers in their primary area of practice [page S-48].

"Truth is the glue that holds government together, not only government but civilization itself." ——Gerald R. Ford (1913-2006) [page S-50].

"The good lawyer is not the man who has an eye to every side and angle of contingency, … but who throws himself on your part so heartily, that he can get you out of a scrape." ——Ralph Waldo Emerson (1803-1882) [page S-52].

"Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong." ——Theodore Roosevelt (1858-1919) [page S-54].

New Jersey Monthly, LLC also placed into evidence a copy of the June 18, 2007 edition of New York magazine, see Exhibit NJM-6, as illustrative of other types of published surveys of licensed professionals that are conducted and provided for consumer consumption. The cover of that magazine is entitled "BEST DOCTORS" and covers the New York City and surrounding area, including portions of northern New Jersey. The article indicates it is "Our Tenth Annual Selection," page 51, stating on page 52 that "A panel of anonymous physicians coughs up secrets of the trade."

Subsequent to the conclusion of the hearings in this matter, the April 2008 edition of New Jersey Monthly has been issued, which contains the New Jersey Super Lawyers

2008 Special Advertising Section. Although not admitted into evidence during the hearings, in order to provide the Supreme Court with as complete a record as possible, it is important to take judicial notice of same and supplement the record with this edition, which will be marked as Exhibit C-7.

As with the other editions of New Jersey Monthly, neither the front cover nor the table of contents of the magazine make any reference to New Jersey Super Lawyers 2008, which consists of a 65-page Special Advertising Section that follows page 132. All but pages S-2, S-3, S-4, S-7, S-11, and S-53 contain the phrase "SPECIAL ADVERTISING SECTION" at the top of the page. Page S-1 contains a full-page photograph of one of the lawyers selected for inclusion in the 2008 list under a banner in large, bold-face color type "NEW JERSEY SUPER LAWYERS 2008." Toward the bottom to the right of the attorney's photograph appears the phrase "THE TOP ATTORNEYS IN NEW JERSEY" in large white-type print, below which is the phrase in somewhat smaller letters, "REPRESENTING MORE THAN 60 AREAS OF LAW." As with other editions, the feature "ask *Super Lawyers*, A Legal Primer for Consumers" is also referenced on page S-1.

The April 2008 edition contains the same type of attorney advertising and features as do the prior editions. Again, many of the advertisements contain minimal or footnote reference to inclusion in the New Jersey Super Lawyers 2008 list, and some have no reference to same. See e.g., the full-page advertisement appearing on page S-7, and the half-page advertisements on pages S-24 and S-26. As in past editions, there is a "Top 100," "Top 10" and "Top 50 Women" listing, along with a complete listing of selected lawyers, by the 62 practice areas covered, with the red boldface print and page reference indicating a purchased advertisement appearing in the Special Advertisement Section. Law Firm and individual attorney profiles are, again, included. As with the April 2007 edition, there are "ask *Super Lawyers*" features appearing throughout the Special Advertising Section, with the photograph of a lawyer included on the New Jersey Super Lawyers 2008 list providing an answer to the following posed questions on pages S-16, S-22, S-28, S-36, S-54 and S-56: "How can I check my anger during mediation?"; "What defines intellectual property, and why should it be protected?"; "How should I prepare for my custody hearing?"; "I've come up with a solid invention. Now what?"; "What is the No. 1 rule of cyber etiquette?"; and

"I won big on an Internet gambling site, but am having a hard time collecting. What can I do?"

The "Selection Process" contained on page S-6 of the April 2008 edition is the same as that described in the April 2007 edition. However, a new, separate, full-page section is included in the April 2008 edition on page S-15, entitled "Selecting an Attorney in New Jersey," which provides as follows:

> **So you need an attorney, and you wonder how to** go about selecting the right one for your specific needs. If it's any consolation, this is a daunting task even for attorneys who seek legal counsel for their personal matters. They experience the same apprehension and uncertainty as you: Whom should I see about this matter? How experienced is he or she with my legal problems?
>
> **The good news** is your potential for making a wise choice is much better than it once was. Throughout the past 30 years, efforts by the U.S. Supreme Court, the U.S. Federal Trade Commission and the American Bar Association have increased the transparency of the legal profession and provided consumers with more of the details needed to approach the selection of legal counsel with confidence. In the past 10 years, the Internet's omnipresence has transcended self-serving paternalistic regulations, greatly enhancing your access to a wide range of essential consumer information, including legal professionals' credentials.
>
> **Do Your Homework**
>
> Legal Services of New Jersey, an independent, non-profit organization, offers a variety of free online guides at www.lsnj.org. You will find

these guides a great starting point that provide general information about common consumer legal issues, including selecting and working with an attorney. This site is very user-friendly, and an outstanding resource for New Jersey consumers; it includes links to a variety of other related government, professional and private consumer resources.

The New Jersey Bar Association offers a list of local bar associations that provide attorney referral at www.njsba.com. Generally the local bar associations provide referrals, on a rotating basis to attorneys who pay to participate in the services, and who practice in the area of law that fits your needs. Generally the participating attorneys agree to provide an initial 1/2-hour consultation for a comparatively nominal fee. Participating attorneys also conform to other requirements of the local bar for participation. The service will be helpful if you have relatively uncomplicated legal needs that would benefit from a brief interview at a moderate fee. For more complex legal needs, this type of service will usually not provide the depth of information necessary for a prudent selection of counsel.

For more sophisticated legal needs, the New Jersey Board of Attorney Certification offers lists of attorneys certified in the areas of civil trial, criminal trial, matrimonial law, and workers' compensation at www.njbac.org. Attorney listed have met certain state-designated standards in a particular area of law. If your needs are in any of these practice areas, this will be a good place to start your search.

After using these sources to narrow your search, your next step should be to visit the prospective law firms' Web sites to find details of each candidate's experience and background. Most law firms offer extensive biographical online information that will be an invaluable aid in selecting the attorney most suitable for your needs.

A Word of Caution

It's important for you to exercise caution by checking each candidate's professional reputation. You can find disciplinary information about candidates on the New Jersey Office of Attorney Ethics online site at www.judiciary.state.nj.us/oae/. A general Internet search will also be helpful in finding information about a candidate that has not found its way through the state disciplinary process. Depending on your needs, you may wish to consider requesting written representation from the attorney of the details of any disciplinary, criminal or other legal sanctions to which he or she has been subject as an additional precaution.

Or Have *Super Lawyers* Do The Homework

Should you find yourself in need of legal counsel, we hope you will find our attorney listings helpful. The *Super Lawyers* selection process is described on page S-6. Our comprehensive and multifaceted approach includes:

1 soliciting nominations from all New Jersey attorneys licensed for five years or more,

2 searching more than 50 professional databases for candidates,

3 a blue ribbon panel peer review by practice area for each candidate,

4 an evaluation of each candidate on 12 criteria designed to evaluate peer recognition and professional achievement,

5 a check of the New Jersey Office of Attorney Ethics Judicial Branch disciplinary database for each candidate,

6 and obtaining written confirmation of any disciplinary, criminal or other legal sanctions, and conducting a general Web search for adverse matters for each candidate.

We hope you find this guidance helpful and reassuring; and best of luck in your search for

legal counsel.

——*Chuck Thell, cthell@superlawyers.com*

Also placed into evidence by New Jersey Monthly, LLC, for the same purpose, is a copy of portions of a January 2005 insert in the New Jersey Law Journal entitled "NEW JERSEY SUPERIOR COURT JUDICIAL SURVEY," see Exhibit NJM-7, detailing the results of a survey conducted by the publication through use of a questionnaire sent to selected attorneys in accordance with a methodology set forth therein. Id. at page S-5. Additionally produced by New Jersey Monthly, LLC is a copy of a letter received by Mr. Chait concerning his selection for inclusion in Strathmore's WHO'S WHO, see Exhibit NJM-8, again illustrative of other professional rating or listing services operating in the public consumer domain.

New Jersey Monthly, LLC also proffered for introduction into evidence twenty-three separate exhibits that portray and describe various other rating systems of attorneys and law firms; colleges; doctors; nursing homes; and hospitals. They were offered, not for the truth of material contained therein, but for the purpose of establishing that there are many rating systems that permeate the marketplace that disseminate information

utilized by consumers. The other petitioners and intervenors joined in that request; the Committee opposed the proffer. After considering and hearing argument on the matter, these twenty three exhibits were marked and accepted into evidence. See Exhibits JP-1 through JP-23. The acceptance into evidence serves several purposes. First, they are not hearsay because they have not been introduced for the truth of the information contained therein. Second, they constitute a valuable source of information that demonstrates the true breadth of survey and rating systems pertaining to lawyers and other professionals with which the consumer marketplace is flooded, other than by Key Professional Media, Inc., The Best Lawyers in America and LexisNexis Martindale-Hubbell, as well as the survey methodologies employed therein. Lastly, acceptance into evidence of the existence of these other survey and rating services provides the fullest possible record for consideration by the Supreme Court in evaluating the issues presented.

More specifically, LexisNexis Martindale-Hubbell maintains two websites, lawyers.com and attorneys.com, see Exhibit JP-1, which are paid advertising sites that provide listings and profiles of attorneys and law firms, peer-review Martindale-Hubbell ratings and links to websites of

those attorneys and law firms. Lawyers.com is free to members of the public visiting the site and is described on page 3 of JP-1 as follows:

> Lawyers.com was designed specifically for individuals and small businesses that need an attorney or law firm and provides unique tools that make searching simple.
>
> - **Side-by-Side Results Comparison** - a one-page geographical view of key factors that help consumers decide which lawyer to choose, including whether the lawyer/law firm offers a free initial consultation, office location, firm size, etc.
>
> - **Peer Review Rated Lawyers** - part of a century-long tradition and exclusive to Martindale-Hubbell, Peer-Review Ratings are invaluable when evaluating a lawyer because a Peer Review Rating attests to a lawyer's legal ability and professional ethics.
>
> If a lawyer is Peer Review Rated (has PRR next to his/her listing) it 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.

Attorneys.com defines itself, comparing it to lawyers.com

> as a new streamlined website from Martindale-Hubbell that matches people's desire to quickly and easily find and then contact attorneys. Like lawyers.com, attorneys.com features a searchable database of lawyers and law firms. Attorneys.com focuses on the heart of the matter by helping you to define your situation in your own words then offering the opportunity to select

> and contact attorneys right away - by phone or by email. Lawyers.com offers a wider array of content to help people learn about their legal situation, the process of hiring and working with a lawyer and the opportunity to interact with others - so consider dropping by lawyers.com as well.
>
> [http://www.attorneys.com/am/utility.howItWorks.php]

Both websites contain disclaimers, stating the information provided is not legal advice, and that the listings contained therein "are paid attorney advertisements and do not in any way constitute a referral or endorsement[.]" See Exhibit JP-1, pages 2 and 4. The peer review rating and process utilized by Martindale-Hubbell is described is some detail on its website, see Exhibit JP-1, pages 15 through 24, and will be discussed below.

Another free website readily available to consumers that offers ratings of lawyers, which includes paid attorney advertisements is *Lawyer*RatingZ.com, see Exhibit JP-2, pages 1 through 10; however, that website does not presently cover New Jersey lawyers. Lawdragon.com does cover New Jersey and professes to give consumers "the ultimate guides to the best lawyers in the nation," see Exhibit JP-3, page 16, providing lawyer ratings "through a unique combination of online balloting and independent

research." Id. at page 1. Attorney rankings of lawyers in New Jersey and elsewhere are also available from Chambers and Partners, either through its hard-cover publications or its website. See Exhibit JP-4. Its research and ranking methodology is detailed on page 15 of that Exhibit; see also Exhibits JP-5 and JP-6 (detailing the Chambers USA system for rating and ranking lawyers).

Other publications and websites advertising or recommending lawyers based on ratings or rankings in the marketplace available to consumers are included in Exhibit JP-7 (Legal500.com); Exhibit JP-8 (legalmatch.com); Exhibit JP-9 (The National Law Journal, publishing, inter alia, the most influential lawyers in America); Exhibit JP-10 (The American Lawyer); and Exhibit JP-11 (boardmember.com rating the top ten law firms). The remaining JP Exhibits also contain examples of lawyer advertisements of awards or recognitions bestowed upon lawyers, and ranking and rating systems for other professions, all being widely available to consumers.

V. KEY PROFESSIONAL MEDIA, INC., d/b/a "LAW & POLITICS" and "SUPER LAWYERS."

Key Professional Media, Inc. provided testimony from William C. White. Mr. White is the publisher of Law & Politics and Super Lawyers magazines, which are

headquartered in Minneapolis, Minnesota. Mr. White is a licensed attorney, but does not actively practice law. He began publishing Law & Politics magazine in 1990 in Minnesota, and Super Lawyers became an annual special section inside the magazine beginning with the August 1991 edition, and has since been continuously so published in the Minnesota version of Law & Politics.

Mr. White explained that Key Professional Media, Inc. is owned by the Opperman family, which for decades owned West Publishing Company, until 1996 when West was sold to Thompson Publishing. Vance Opperman is the Chairman of the Board and Chief Executive Officer of Key Professional Media, Inc., which purchased Law & Politics magazine in July 2006. Law & Politics also has offices in Seattle, Washington, where the database and website development and maintenance operations are located, and in Newark, Delaware, where the magazine layout and production operations are located.

Mr. White explained that Law & Politics magazine was created for lawyers and provides information on serious subjects as well as on humorous topics. Super Lawyers became a stand-alone magazine in November 2002 with the publication of Texas Super Lawyers, and had previously been included as an annual special section in Washington Law &

Politics magazine.[40] At time Mr. White testified in October 2007, Super Lawyers magazines were being published in 47 states and the District of Columbia, and there were plans to publish in the remaining states by October 2008. In addition to being published as a stand-alone magazine, Super Lawyers is distributed as an insert to certain newspapers, and as a special advertising section in various magazines including New Jersey Monthly.

Marked into evidence were the stand-alone New Jersey Super Lawyers magazines for 2005, 2006 and 2007. See Exhibits PK-4, PK-5, and PK-6.[41] The first portion of each of these stand-alone magazines contains feature articles about several New Jersey lawyers. Mr. White explained the purpose of these articles as follows:

> Well, I guess we're trying to tell great stories about lawyers. We're trying to humanize the profession, . . . put certain personalities on display. Our feeling is editorially that there are a lot of great stories to be told about lawyers. Lawyers are intelligent, passionate, driven people, sometimes quirky, sometimes colorful. They have interesting lives sometime outside the law. They are passionate about their causes. So . . . basically we have a Peoples magazine, Vanity Fair approach to our editorial, but we focus instead of on celebrities, on lawyers, and we tell some interesting stories about lawyers. That's what we try to find. And I should mention

[40] This refers to Washington State, not the District of Columbia.

[41] Since the completion of testimony, the stand-alone New Jersey Super Lawyers 2008 magazine has been issued. In order to provide the Court with as complete and comprehensive record as possible, this magazine has been included in the record as Exhibit C-8.

> the lawyers we write about are lawyers who have been selected for inclusion [in Super Lawyers].

There are lawyer advertisements strewn throughout these stand-alone magazines, as well as the firm profile and individual lawyer profile advertisements. As with the Special Advertising Sections contained in the various editions of New Jersey Monthly discussed in Part IV above, the "Selection Process" for determining lawyers to be included in a "Super Lawyer" list for a particular year is set forth. Again, the "Top 100," "Top 10," and "Top 50 Female Lawyers" lists are included for each year. In addition to the listing of those lawyers selected for list inclusion by practice area, there is also an alphabetical listing of all lawyers included in the list. Unlike the Special Advertising Sections that appear in the discussed editions of New Jersey Monthly, the "Legal Primer for Consumers" feature is absent.

Mr. White explained his intent in creating the Super lawyers selection process, as follows:

> Well, when I developed the selection process, I wanted to accomplish several things. First, I wanted to come up with a process that was more inclusive, that was open to virtually every lawyer in the State. So we invite lawyers across the State to participate in the process. So we wanted to be inclusive on the selection

> side. In terms of the list, we're looking for diversity. We wanted to have a list that had diversity in terms of the types of lawyers listed. We list lawyers in nearly seventy practice areas to-date. And, we wanted to have lawyers represented from solo firms, small firms, mid-size firms to the usual suspects in the silk-stocking law firms. But we just didn't want to focus on all large firms.
>
> We also wanted to have a system of sort of checks and balances, we call it, where we wanted to have a multi-faceted selection process so that if there are weaknesses in one step, they would be compensated in the other steps. So that's a system of checks and balances we'll talk about later.
>
> We also wanted to have a list that was prestigious. Our list represents five percent of the lawyers in the State. I kind of came up with that number based on the fact when you're in law school, if you graduate in the top ten percent of your class, it's a great thing. Here, it's top five percent of the entire profession in your State.
>
> So those are some of the things I had in mind in creating the selection process.
>
> * * * *
>
> . . . Our research process is really an elaborate search, multi-faceted search for evidence of peer recognition and professional achievement. So we look for objective indicators of those factors.

Mr. White further testified that each of these stand-alone Super Lawyers magazines is divided into two sections —— editorial content and advertising. The editorial portions are the feature articles, the Super Lawyers selection process, and the listing of included lawyers. He

explained that the editor assigned to the magazine makes story assignments for the feature articles, which are then written for the magazine by freelance writers. Mr. White emphasized that decisions for the content of the editorial part of the magazine, i.e., which lawyers are featured, are not influenced by lawyer advertising. He stated that a lawyer cannot pay to be in a feature story or included in the Super Lawyers listing, or in any other editorial portion of the magazine. Mr. White testified that the selection process for the Super Lawyers lists is completed prior to the selling of any advertising, stating, "[j]ust so I'm clear, we freeze the list, complete selection before ads are sold." There is a sales department, completely separate from the research department, that handles advertising once the selection process has been completed.

Mr. White also testified that purchasing an advertisement in one year does not enhance the chances of a lawyer being selected for inclusion in the Super Lawyers list for subsequent years. He asserted that the numbers bear that out, stating:

> In New Jersey, 246 lawyers who were on the Super Lawyers list in 2005 were, because of our new [not different] selection process, were dropped from the list in 2006. In other words, these lawyers were on the list in 2005, were not on the list in 2006. Of those lawyers who were

> dropped, 72 were advertisers. Nearly a third of the lawyers who were dropped from the list were advertisers. So for those lawyers who purchased ads in 2005, it certainly didn't help them.

Mr. White testified there are basically three type of advertisements that appear in the Super Lawyer publications, whether it be the stand-alone magazine or the Special Advertising Sections: (1) full-page platinum, where the lawyer or firm is given 350 words to describe background and experience; (2) a prominently-placed display advertisement for a firm or attorney, which usually come camera-ready; and (3) the standard attorney-profile advertisements, nine per page, where the attorney is given 100 words to describe his or her background and experience. Following the Super Lawyer selection process and freezing of the list, the attorneys who are selected and their firms are contacted to determine if they desire to purchase one of these three types of advertisements.

Mr. White testified that the stand-alone magazines are sent only to lawyers, with approximately 32,800 mailed to New Jersey attorneys and copies sent to law school

libraries and about 4,000 copies to in-house counsel of Russell 3000 companies nationwide.[42]

Mr. White stated that the magazine has a policy with respect to use of the name "Super Lawyers." Referencing Exhibit PK-16, entitled "USE OF THE TERM 'SUPER LAWYERS,'" Mr. White explained that this two-page document is "a guideline that we distribute to lawyers, to advertisers, to ad agencies, to public relations people, and we also distribute this policy internally to our editorial department and other departments within our organization." The policy is intended to prevent use of the term "Super Lawyers" in a singular form or applied to a group of attorneys in a manner that reflects a superlative title or be interpreted as an accreditation by Super Lawyers magazine. As an example, "Mr. McNulty is a Super Lawyer" would be incorrect, whereas, "Mr. McNulty is included in the list of New Jersey Super Lawyers 2007," would be a correct use of the term "Super Lawyers." Mr. White admitted that this policy is not always properly applied. Mr. White noted that Exhibit PK-16 was promulgated following the issuance of Opinion 39, and was not in effect at the time the 2005 and 2006 Super Lawyers lists were

[42] The "Russell 3000" is a list of the 3000 largest U.S. Companies, representing approximately 98% of the investable U.S. equity market. See http://www.russell.com

published. During cross-examination of Mr. White there were several advertisements referred to in the New Jersey Monthly Special Advertising Section that he admitted would not presently comply with the policy respecting us of the term "Super Lawyers." Mr. White also noted that Super Lawyers magazine does not police other portions of advertisements that may or may not violate provisions of the New Jersey Rules of Professional Conduct.

Mr. White further testified at length concerning the attorney advertisements on the Super Lawyers website, stating that those advertisements are included in the price of the print ad. He explained that users of the website can search for attorneys in a geographical region by practice area. If the search engine returns a list of seven lawyers, those who have purchased an advertisement are placed at the top of that list.

Mr. White was asked several questions revolving around the issue of whether the Super Lawyers selection process contains an inherent bias in favor of lawyers who are members of large firms. Mr. White testified that in both the 2006 and 2007 selection processes, approximately 34% of the attorneys selected for inclusion in the New Jersey Super Lawyers lists practice in settings where there were one to ten lawyers in the firm. For 2006, 28% of the

selected lawyers practiced in firms with eleven to thirty-nine lawyers (29% in 2007); 13% in firms with forty to seventy-four lawyers (14% in 2007); and 25% in firms with seventy-five or more lawyers (23% in 2007).

The Committee marked into evidence Exhibit AG-3, which is the 2006 State of the Attorney Disciplinary System Report, prepared by the Office of Attorney Ethics in the Administrative Office of the Courts. Page 104 thereof details the size of private law firms in New Jersey based on the 32,775 attorneys engaged in the private practice of law. According to that Report, approximately 68% of lawyers are engaged in the private practice of law in firms with between one and ten lawyers. When asked whether the Super Lawyers selection process demonstrated a bias in favor of large firms in the light of this statistic, Mr. White stated:

> No. Our process, we invite virtually every lawyer in the State to nominate. And when I say "virtually," we don't invite lawyers who are just out of law school. So lawyers with less than five years experience are not invited. But the other -- all the lawyers in the State who have been practicing at least five years are invited to nominate individuals. So we cast as wide a net as possible to bring individuals into our process. And we have other ways that lawyers come into the process. Our own independent research will find lawyers who may be overlooked in the nomination process. But, anyway, we cast an extremely wide net to

> bring as many lawyers into our process. And once they're in our process, there's no bias because, as I mentioned earlier, we divide lawyers by firm size. Given the process, the result is what happens.

As to the balloting process, Mr. White also explained that attorneys who receive votes from other attorneys in their firm are weighted less (multiplied by a lower number) than votes received by that attorney from attorneys outside their firm (multiplied by a higher number).[43]

Counsel for the Committee also questioned Mr. White concerning whether there was a bias in the selection process against female lawyers, noting there were no female attorneys in the "Top 10" New Jersey Super Lawyers list for years 2005, 2006 or 2007, and there were ten or less women in the "Top 100" New Jersey Super Lawyers lists for those same years.[44] Mr. White stated the results are what they are but there is nothing in the process itself that skews the survey gender-wise. Mr. White also testified that the balloting process is not the only method by which an attorney can be entered into the candidate pool. He stated there is the "Star Search" process whereby the company's research team seeks qualified candidates, as well as the

[43] The actual formula utilized is protected by the Confidentiality Order, see Exhibit C-1, and should remain protected as proprietary information, as its disclosure would add nothing to the Court's analysis of the issues presented.

[44] The New Jersey Super Lawyers 2008 list contains one female attorney in the "Top 10" list and ten female attorneys in the "Top 100" list. See Exhibit C-7.

"Blue Ribbon Panel" process. As to the Star Search process, Mr. White explained that the company subscribes to just about every legal periodical in the country. The research staff monitors those publications and selects candidates from them, as well as from a number of other legal database sources, such as The American College of Trial Lawyers and The American Academy of Matrimonial Lawyers. He also stated the research teams look for those attorneys who are certified through the State certification procedure yet not contained within the nomination pool.

Exhibit PK-18 is a document that accompanies the Super Lawyers attorney-selection notifications and is entitled "How were you selected for *Super Lawyers*? Is this a popularity contest for lawyers? And who's behind all this? Answers to these and other frequently asked questions." This exhibit essentially outlines the selection process discussed above and informs selected attorneys concerning limitations on their use of the term "Super Lawyers." Exhibit PK-19 is a sample of the actual letter and advertising packet sent to attorneys who were selected for inclusion in the New Jersey Super Lawyers 2005 list; Exhibit PK-20 is that same letter packet with respect to selection for inclusion in the New Jersey Super Lawyers 2006 list; and Exhibit PK-21 is the letter and packet sent

to each lawyer selected for inclusion in the New Jersey Super Lawyers 2007 list.

Key Professional Media, Inc. also produced testimony from Cindy Larson, its Research Director. Ms. Larson functions as editor of the Super Lawyers list and oversees the Super Lawyers selection process. She stated that their overall approach "to the selection process is to strive to do what an educated consumer might do when they're looking to evaluate a lawyer." The evaluation process used is based on a point structure where lawyers receive points through the various steps, connecting the balloting, the research, and the Blue Ribbon Panel evaluations.

Ms. Larson explained that the first step in the selection process is when lawyers are brought into the candidate pool through the balloting, which results in a point score. Ballots are mailed to lawyers who area resident, active and licensed attorneys for five or more years. They also invite managing partners of law firms in the State to give them nominations of no more than 10% of the lawyers within their firm. The candidate pool is also increased through the "Star Search" program, the independent candidate search described by Mr. White. Ms. Larson stated there were 30,398 ballots mailed to New Jersey lawyers on August 15, 2005, for the New Jersey Super

Lawyers 2006 survey. See Exhibit PK-8 (the United States Postal Services receipt for that mailing). There were 32,082 ballots mailed on September 1, 2006 for the New Jersey Super Lawyers 2007 survey. See Exhibit PK-9 (same). A copy of the ballot, and accompany correspondence providing guidance and instructions for the balloting procedure, mailed on August 15, 2006, is contained in Exhibit PK-10.

The instructions provided make it clear that, inter alia, voting should be based on first-hand knowledge rather than reputation; that voters should feel free to nominate non-private practice lawyers such as in-house counsel, prosecutors or legal aid attorneys; that they may vote for up to seven lawyers in his or her own firm but those votes only count if they vote for an equal or greater number of lawyers from outside his or her own firm, for a maximum of fourteen nominations; that an attorney cannot pay to be included in the Super Lawyers list; that the list will be limited to five percent of the licensed active attorneys in the State; and that advertising sales do not begin until after the selection process has been completed.

The ballot sent to each attorney, which contains a tracking number for internal database purposes, requests the attorney to vote based on the following question: "Of

the New Jersey lawyers whose work you have observed first-hand, who are the current best?" The voting portion of the ballot contains two sections, and appears essentially as follows:

A. Lawyers in your firm or organization These nominations are counted only if you nominate an equal or greater number of lawyers in Section B below	**Office (if different)**	**Practice Area**
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

B. Lawyers outside your firm or organization	**Firm/City**	**Practice Area**
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Need more space? Fax additional nominations on firm stationary. Maximum of 14 nominations.

At the bottom of the ballot, the voting attorney is requested to return the ballot by facsimile transmission by a certain deadline; provides Ms. Larson's name and phone number as a contact for posing any questions; and sets forth an e-mail address as an alternative method for returning the ballot.

Ms. Larson testified that this paper-ballot method was utilized in New Jersey for the 2005, 2006 and 2007 surveys, but that the balloting process for the New Jersey Super Lawyers 2008 list has now been converted to an entirely

online system. A separate nominations and balloting website has been created, my.superlawyers.com, that is independent of the Super Lawyers website. Instead of mailing a ballot, an oversized postcard is mailed to each lawyer, containing an access code for making secured nominations online. Ms. Larson explained: "Each lawyer has an individual access code which is tracked in our database, and they can't enter into that nomination page until they enter in their access code."

Ms. Larson stated that the response rate of New Jersey attorneys for the New Jersey Super Lawyers 2006 list was 4.8%, i.e., approximately 1,456 completed ballots were returned, which yielded in excess of 9,000 attorney nominations, which placed approximately 2,844 lawyers in the nomination pool. The paper ballots for the 2005, 2006 and 2007 lists were returned, by facsimile transmission, to the Seattle office, where they were reviewed by a team captain assigned to New Jersey. The team captain reviewed each ballot for any indicators of ballot manipulation, and then forwarded them to the data-entry personnel for entry into the database system. She explained:

> It doesn't happen frequently but it can happen that lawyers will try to game our system or manipulate the balloting process. And it is most evident when we receive photocopied ballots

> or ballots that are handwritten in the same hand, duplicated with different lawyers' signatures, that sort of thing. And we have determined that a human being is the best way to detect that by physically looking at those ballots and seeing patterns.

Ms. Larson stated that their quality-control system will be even better with the secured online balloting process. The ballots are then tabulated and a vote total for each nominated attorney is calculated.[45]

Independent of the attorney-balloting process a managing partner survey is sent out to the attorney in each law firm identified as managing the firm seeking the nomination of outstanding lawyers in their firm with a limit on the nominations to not more than 10% of the lawyers in the firm. See Exhibit PK-11. Ms. Larson explained the philosophy behind the managing-partner survey, as follows:

> Well, we view the managing partner as the voice of the firm and it's a great way for us to ask that firm representative, who is in a unique position to know the lawyers in the firm and how they're doing and how they're fairing. It's a great way for us to get information about who are the key players.

[45] Ms. Larson also testified to the specifics of the ballot-counting process with respect to the different weighting of in-firm and out-of-firm ballots, the capping of the number of in-firm ballots a particular attorney may receive, and other proprietary ballot-weighting and quality-control information protected by the existing Confidentiality Order, Exhibit C-1. It is the existence of these control methods, not the specifics, that is relevant, and suffice it to say that these quality-control methods are clearly designed to achieve the objectives expressed by Key Professional Media, Inc.

> We've also realized that sometimes it's a great way to get folks into the candidate pool that might be operating a bit under the radar and not be nominated in the general nomination process. The managing partner will know who's doing great work.

Managing-partner votes are also weighted in a manner that is proprietary to the process developed by Key Professional Media, Inc. Again, this information is protected by the Confidentiality Consent Order, see Exhibit C-1, and the relevancy of this information is its existence, not in its detail. Ms. Larson testified that for the New Jersey Super Lawyers 2006 survey, approximately 450 to 500 managing-partner surveys were mailed, and 280 nominations were received. Ms. Larson was quick to add that that does not mean that 280 lawyers were added to the nomination pool through that process because some of those same 280 lawyers may have received nominations in the general nomination process. Upon inquiry, Ms. Larson confirmed, however, that it was likely that the managing partner of a law firm had received a general nominating ballot as well, explaining:

> Well, a managing partner -- in our process we do consider the managing partner survey to be essentially the voice of the law firm as opposed to the individual nominee. If the managing partner were to give us individual nominations, it would be under the guidelines of the ballot,

> no more than seven in the firm, seven out [of the] firm, and the managing partner of a larger firm might be able to provide us additional names for evaluation in the candidate pool.

Ms. Larson testified that the Star Search program was an additional method for a lawyer to be nominated for inclusion in the list, described by her as

> a systematic process that we have identified to try to identify lawyers who are doing great things, lawyers who might be missed, maybe not missed but might be missed in a general nomination process, and lawyers who we want to get into the candidate pool for further evaluation.

Ms. Larson testified that a person on their research team is assigned to search "a discrete group or subset of resources that we want to use in the star search process."[46] Among those resources are the American College of Trial Lawyers, the American Academy of Matrimonial Lawyers, the State-based attorney trial certification programs, legal periodicals and journals, merit-based organizations and many others. Under that procedure, which identifies lawyers who are placed into the candidate pool, Ms. Larson explained that those "lawyers will be awarded points in the

[46] See Exhibit AG-10, which is a list of those resources utilized in the Star Search process, as last updated on June 27, 2007; AG-11 is a list of Star Search resources as last updated on December 12, 2006; AG-12 is an earlier version of that same list. Exhibits AG-13 and AG-14 are the actual results of the Star Search process for the 2006 list, and Exhibit AG-15 constitutes the results of the Star Search process with respect to the 2007 list. Exhibit AG-17 is a document used to conduct the search of periodicals used in connection with the Star Search procedure.

research evaluation for the items that we find as part of the Star Search process." Ms. Larson stated that for the New Jersey Super Lawyers 2006 survey, 922 New Jersey lawyers were identified by application of the Star Search process. However, she made it clear that an attorney does not automatically get points assigned just because he or she is found as a result of the Star Search procedure; instead, each attorney found receives a full research evaluation, which can lead to the awarding of points.

Ms. Larson stated that once the candidate pool for a particular year has been determined, the next step is an evaluation of those candidates by the research team. The factors that are considered in this step, as to the New Jersey Super Lawyers 2007 list, are listed on page 23 of Exhibit PK-6, the stand-alone New Jersey Super Lawyers 2007 magazine. Those listed factors are:

-Verdicts and settlements
-Transactions
-Representative clients
-Experience
-Honors and awards
-Special licenses and certifications
-Position within law firm
-Bar and/or other professional activity
-Pro bono and community service
-Scholarly lectures and writings
-Education and employment background
-Other outstanding achievements

In her testimony, Ms. Larson detailed how each of these factors is applied to each candidate, stating these were good indicators of both peer recognition and

professional achievement. A complex but uniform point-value system is then applied to each of these factors to arrive at assigned point totals given each candidate. A research manual has been developed that details the number of points that any one researcher can give in these categories. See Exhibit AG-19. Again, the research manual and point system is proprietary information protected by the Confidentiality Consent Order, see Exhibit C-1, and it is not necessary to delve into that proprietary information in order to determine the nature of the survey methodology. In terms of how members of the research team actually apply these listed factors during the evaluation process, Ms. Larson stated in pertinent part:

> It's really -- actually, it's very difficult to describe the sophistication of our database. Each lawyer record has a lot of built-in drills. For example, every lawyer record will have a little Google box next to it. And if one of our researchers clicks on that Google item, it will auto[matically] fill the name of the lawyer into that. So it's a one-click do a Google check on that lawyer and we can really get to that information fast.
>
> We also have direct links to law firm websites so that a researcher can go directly to a biography of a lawyer, this is online. That's usually the first place that we go. We go to a law firm and see if -- the first thing we do is try to find out whether or not a lawyer has a website, go to the law firm, look at the law firm biography, do Google checks. We also have an expansive usage of the Westlaw database. And again we have tools built

into the database to allow the researchers to very efficiently do their Westlaw searches.

* * * *

Well, Thompson West and Westlaw has many different features. It's not just finding a case or, I guess we used to call it shepardizing or whatever. It's not just used for that anymore. There is a profiler database that is the one that we use primarily. And in the profiler database, it pulls up all of the information that Thompson West has on an individual lawyer. So, typically by doing even just a Westlaw search we can find a profile which will have generally the background information about the lawyer, where they're practicing, their primary area of practice. Not every one will have that profile, but it's a great resource.

There are also separate databases -- I'm not a technical person this way -- but there are fields within this profiler database that allow us to look at dockets, reported cases, typically appellate cases, and a feature that Thompson West captures which is called cases and settlements, I think. And there are just different ways for us to track current activity that a lawyer is involved with.

Ms. Larson stated that the researchers also utilize bar association websites, state licensing authorities, legal organizations, legal periodicals and other publicly-available information. Ms. Larson testified that "[u]ltimately, a research score is developed for each candidate lawyer, which is an aggregate score of all the activity that had been captured during the research

evaluation[,]" which is in addition to the balloting and managing-partner score, if any.

The next step involves a peer evaluation, by practice area, conducted by Blue Ribbon Panels consisting of lawyers in each practice area who were the top vote getters at that stage.[47] A list of the practice areas for the New Jersey Super Lawyers 2006 survey is set forth in Exhibit PK-13, consisting of approximately 60 different practice areas; the list is reviewed and updated each year. Each identified Blue Ribbon panelist in each practice area is mailed a letter and a sheet containing names of nominated lawyers in that practice area, requesting the panelist to assign a score of 1 to 10 to those lawyers they know, and further states the panelist may add names of any lawyers not on the list who he or she thinks may deserve recognition. See Exhibit PK-12 (a copy a letter and ballot sent to a Blue Ribbon panelist for the 2006 survey).[48] Ms. Larson testified that for the 2006 New Jersey survey, 339 attorneys were invited to participate as Blue Ribbon panelists, with 181 worksheets being returned containing, in the aggregate, approximately 6,000 attorney evaluations, as there are multiple names on each worksheet. A

[47] Ms. Larson stated that, depending on the size of the practice area, the top 10% to 20% vote getters in each practice area are identified as Blue Ribbon panelists.
[48] Exhibits AG-20 and AG-21 are samples of Blue Ribbon Panel worksheets.

multiplier is then applied to the evaluation scores in a manner that assigns more weight to the Blue Ribbon Panel votes than votes in the overall selection process, except that the multiplier is only applied to lawyers who have a Blue Ribbon Panel score or average of more than a 5, and it is not applied if there is only one Blue Ribbon Panel evaluation of a lawyer. Ms. Larson explained that since a score of 5 on a scale of 1 to 10 is considered only an average score, the thinking is that an average score is not deserving of a multiplier factor, and if there is only one evaluation they do not want to over-weight that single evaluation.

Ms. Larson also explained that there are many quality-control measures applied to the voting process, including a "back-scratch factor," where researchers "look for lawyers voting for lawyers and receiving reciprocal votes." She stated that the database automatically generates a percentage of reciprocal votes received; where that percentage is high, the researcher manually pulls and reviews the ballots to determine whether to disregard some or all of the balloting or provide it a different weighting. "Block voting," where identical slates of votes are submitted, e.g., all the same in-firm and the same out-firm voting, is examined and sometimes disqualified. Where

it is discovered lawyers have engaged in the e-mail solicitation of votes, those ballots would be disqualified as well. There were also a number of other quality-control measures to which Ms. Larson testified that are not necessary to discuss and which are part of the record. Suffice to say, the selection procedures employed by Key Professional Media, Inc. are very sophisticated, comprehensive and complex. The Committee has contended there exists inherent biases in this selection methodology that weigh in favor of lawyers from large firms. That contention will be discussed below.

The final selection involves the tiering of lawyers into various firm sizes, and the application of additional quality control measures such as checking for disciplinary histories, standing with local licensing authorities, sending out fact-verification forms, and Google searches to identify any disqualifying information. Four law-firm tiers were developed for New Jersey, consisting of firms having 1 to 10 lawyers (tier 1); firms having 11 to 39 lawyers (tier 2); firms having 40 to 74 lawyers (tier 3); and firms having 75 or more lawyers (tier 4). There were different point thresholds for list inclusion established for each tier, with lower point thresholds for tier one and

progressively higher up to tier four.[49] Ms. Larson explained the reason for the tiering, as follows: "We want the small firms to compete against the small firms, the larger firms to compete against the larger firms." In addressing the issue of whether their process has a large-firm bias, Ms. Larson stated:

> Well, our statistics show that more lawyers are selected from the smaller tier than are selected from the larger tier. And I believe the numbers are tier one, which is the one to ten lawyers, had a 34% selected rate in both 2006 and 2007. And I believe that in 2006 the largest tier, the 75-plus lawyers, had approximately a 25% selected rate and in 2007 it was a 23% selected rate.

Copies of various checklists utilized in the final selection process were also admitted into evidence. They include list-cutting procedures, see Exhibits AG-22, AG-23 and AG-24, as well as selection and list-freezing guidelines, see Exhibit AG-25, and a confidential summary of the final selection process. See Exhibit AG-26. Again, these exhibits are proprietary information, and in the absence of clear bias, their relevancy is not in the details of the system——which can always be subject to debate in terms of whether one aspect of the selected

[49] The record reflects that these point thresholds change each year, depending on the number of votes received.

procedure could be better or improved, or one category of votes weighed more heavily than others——but rather is relevant in the existence or not of a comprehensive and sophisticated attorney-evaluation system, and whether there can be sufficient and adequate disclosure of that system in an advertisement in a manner that does not make an advertisement concerning inclusion in a Super Lawyers list, misleading or deceptive.

Ms. Larson stated that once the final selection process has been completed, they send each lawyer a data verification form that checks all of the facts in their database, such as the area of practice, firm identification, contact information, and a requested certification from the attorney that he or she has not been subjected to attorney discipline nor has she or he been charged with or convicted of a crime. See Exhibit PK-14 (copy of cover letter and data verification form). Attorneys who fail to execute and return the data verification form are dropped from the list unless the requested information can be independently verified.

During cross-examination of Ms. Larson, counsel for the Committee established that the number of attorney ballots mailed for the New Jersey Super Lawyers 2006 survey were 30,398, and that the total number of votes received

from the approximately 1,456 ballots that were returned was 6,034. See Exhibit AG-6 and Exhibit AG-8.

For the New Jersey Super Lawyers 2007 survey, there were 32,082 ballots mailed to New Jersey lawyers, with a total number of votes received from the 714 ballots that were returned was 4,732. Thus, only approximately 2.2% of the ballots mailed for the 2007 survey were returned with votes, whereas approximately 4.8% of the ballots mailed for the 2006 survey were returned with votes. Ibid. The testimony clarified that the number of ballot votes reflected in AG-8 for the 2006 survey, 9,054, includes ballot votes for the New Jersey Super Lawyer 2005 survey, so that the difference between actual votes received as a result of the mailing for the 2006 survey, 6,034, and the 9,054 ballot votes listed on AG-8, or, 3,020, represents the number of ballot votes received from the mailing for the New Jersey Super Lawyers 2005 survey. Ms. Larson explained that those attorneys in the candidate pool for the 2005 survey are considered again in the candidate pool for the 2006 survey, stating

> in the overall selection process we keep the nomination points that come in through the nomination process and we do archive them but discount them. We don't disregard the research scores or evaluations that were given to lawyers in the prior year. And so those lawyers who had

> then [been] researched and received research evaluations as well as those lawyers who received nominations would stay in the candidate pool.

However, it would seem appropriate, as was required in Connecticut, for the statistical basis of a given Super Lawyers list to be disclosed to the consumer, particularly where those lists are based upon such a low percentage of ballots mailed. That conclusion is notwithstanding the statement in the Global Strategy Systems report, Key Professional Media, Inc., expert, discussed in Part VIII of this Report, that such a low sample will still provide a valid statistical result. The logic set forth in Connecticut Statewide Grievance Committee's Opinion #07-0076-A, see Appendix I, discussed in Part III of this Report, for disclosure of the statistical basis and empirical data used for the compilation of the Super Lawyers list is persuasive. Specifically, disclosure to the consumer of this information is needed to counterbalance the superlative nature of the advertisements themselves so that the consumer is made fully aware that the survey balloting portion of the methodology is based on a rather low return rate. Additionally, the consumers are told that ballots were mailed to every practicing lawyer in New Jersey who has been admitted for five or more years, so

it seems only fair and logical they be informed of the return rate.

Exhibit AG-16 is a CD-Rom disc reproducing an Excel spreadsheet that contains the database of Key Professional Media, Inc. for the 2005, 2006, and 2007 New Jersey Super Lawyers' surveys.[50] There are 7,447 entries over approximately 155 spread-sheet pages that identify, by number only, the name of each attorney in the database system; the firm of that attorney, again by number; the firm size and tier; the primary practice area; the votes each attorney received, as well as the detailed breakdown of the source of those received votes, including in-firm and out-of-firm votes; the scores from all sources, including ballots, research, Star Search, Blue Ribbon panelists; whether the attorney was selected, by year, for inclusion in the list; the gender of each attorney, the law school attended, the year admitted; and whether an advertisement was purchased. The information contained on Exhibit AG-16 is confidential, proprietary and protected from public disclosure by the Confidentiality Consent Order. See Exhibit C-1.

[50] Exhibit AG-16 was created by Key Professional Media, Inc. as part of its response to the Committee's demand for production of documents.

During the early stages of the cross-examination of Ms. Larson concerning the information contained in Exhibit AG-16, it became evident that due to the volume and complexity of that information, as well as its form (CD-Rom), it would be virtually impossible for counsel for the Committee to effectively and efficiently probe certain issues, including whether the methodology employed by Key Professional Media, Inc. has resulted in any biases in terms of selection for inclusion in the Super Lawyers lists, such as a bias in favor of those attorneys who practice law in large firms. In an effort to preserve and parse the confidentiality and proprietary nature of much of the information contained in Exhibit AG-16, while at the same time presenting a full and complete analysis of its data, counsel for both Key Professional Media, Inc. and the Committee on Attorney Advertising were able to enter into a document entitled "Stipulations of Fact Regarding *Super Lawyers*®," which is dated February 19, 2008 and contains fifty-two (52) separate stipulations of fact. See Appendix P. It was agreed that these stipulations would be sealed and remain confidential under the terms of the Confidentiality Consent Order, see Exhibit C-1, pending review and further order of the Special Master.

Recognizing that some of these stipulations contain

information that is proprietary in nature and whose public divulgence could adversely affect, damage, and compromise the business of Key Professional Media, Inc., and weighing the need for public disclosure of information that will properly permit an informed analysis of the methodology utilized by Key Professional Media, Inc., which operates in a public-regulated context, those stipulations contained in Appendix P that should remain confidential as proprietary have been redacted. The redactions, in fact, are minimal, are designed only to protect the details of the proprietary methodology employed by Key Professional Media, Inc., and there is nothing in those excluded items that would add or contribute to the full and proper analysis of the methodology employed by Key Professional Media, Inc., in the light of the issues before the Court. Naturally, the original, un-redacted version of Appendix P has been supplied to the Court and it is possible this issue will be revisited by the Court at the appropriate time.

Pursuant to the balloting process adopted by Key Professional Media, Inc., each ballot has a limit of up to 14 total nominations, and in-firm nominations are only counted to the extent there are an equal number of out-of-firm nominations. In the questioning of Ms. Larson, she admitted that if an attorney practices law in a firm with

eight lawyers, that attorney could nominate all other seven members of his or her firm, as long as he or she nominated seven out-of-firm attorneys, whereas a solo practitioner, who cannot nominate himself or herself, is only able to nominate out-of-firm lawyers. And, if the lawyer practices in a firm of three attorneys, the most in-firm votes could be two. Ms. Larson also agreed it is possible that an attorney could receive all in-firm votes and no out-of-firm votes, yet still make the list; however, she explained that there is a limit as to the number of in-firm votes a candidate is permitted to receive each year.

The "Super Lawyers Research Scoring Guide," see Exhibit AG-18, and the "Super Lawyers Research Manual, July 2006 version," see Exhibit AG-19, were received into evidence but remain protected from disclosure as proprietary information under the Confidentiality Order. See Exhibit C-1. These documents contain the specifics concerning the scoring and weighting methodologies utilized by Key Professional Media, Inc., and appropriately should not be subjected to public disclosure because to do so would potentially seriously undermine its proprietary interests, while adding little, if anything, meaningful to consideration of the issues before the Court. Although the general methodologies utilized in the selection process and

the sampling taken in the development of those lists are certainly relevant when considering application of the principles that have evolved in our jurisprudence over the thirty years since the Bates decision, the point-by-point details that are contained in this proprietary information are remotely or incidentally relevant, if at all, in the consideration of the application of those principles.

As noted, the Committee contends that the methodology utilized by Key Professional Media, Inc. is flawed because its application results in a bias favoring inclusion of lawyers who practice in large firms in its lists. In support of that contention, the Committee introduced the 2006 State of New Jersey Attorney Disciplinary Report, see Exhibit AG-3, discussed above, which contains statistical information concerning the percentages and numbers of lawyers engaged in the practice of law in different firm sizes. The Committee then contrasts those numbers with the percentages of lawyers who attained inclusion in the Super Lawyers lists from various-size law firms to illustrate that the list contains a disproportionately high percentage of lawyers who practice in large-firm settings, and a disproportionately low percentage of those on the list who practice in a small-firm setting. Although that is statistical correct, there is a substantial disconnect to

such an analysis, as it assumes that lawyer quality (or subjective opinion of same) is also proportionately dispersed among all law-firm sizes. There is nothing in the record that would support such a conclusion, including Dr. Presser's expert report. See discussion in Part VIII.

It is true that permissible in-firm balloting provides more opportunities for lawyers from large firms to vote for their colleagues. However, the methodology does contain several safeguards. In-firm votes cannot be counted unless they are accompanied by at least an equal number of out-of-firm votes, with a limit of fourteen total votes per ballot, and in-firm votes are weighted significantly less than out-of-firm votes. There is also a limit of how many in-firm votes each nominated attorney can receive. Although it is statistically possible for a lawyer to make the list with only in-firm votes, in almost every case examined lawyers making the list possessed sufficient points for selection even if the in-firm votes were not counted at all, and 66% of selected lawyers received no in-firm votes. See Appendix P, ¶¶14-25.

An additional concern is the solicitation of law firm managing-partner votes. It seems a logical conclusion that managing partners would be anxious to nominate and vote for notable lawyers in their firms to enhance the prestige of

the firm, and the record reflects that managing partners would have already had the opportunity to vote through the general peer-review survey. However, it appears that the effect of managing partner nominations is minimal, with only 90 managing-partner nominations being received in the 2007 survey, accounting for 0.4% of total points awarded, see Appendix P, ¶6, and approximately 94% of attorneys selected who had managing partner nominations would have met the point thresholds for inclusion in the list even if the managing partner nominations were subtracted. Id. at ¶10. Moreover, 98% of the attorneys contained on the New Jersey Super Lawyers 2007 list would have met the point threshold even if all in-firm and all managing partner nominations were subtracted. Id. at ¶13.

The firm tier-size system built into the selection process, which provides different point thresholds at each tier, also provides a check and balance assuring that the list contains significant numbers of lawyers from all firm sizes. Id. at ¶37 (25% of selected lawyers practice in firms of more than 75 lawyers; 11% in firms of between 40 and 75 lawyers; 31% in firms of 10 to 39 lawyers; and 31% in firms between 1 and 9 lawyers).

Notwithstanding, if the Court concludes that attorneys may advertise their inclusion in the Super Lawyers

listings, the disclosure of the methodology should include sufficient information demonstrating these findings to assure that consumers are fully informed concerning the in-firm and managing-partner nominating and balloting process, and its potential and actual impact on the selection process.

Likewise, there is no empirical evidence in the record supporting the assertion there is something flawed in the actual methodology of Key Professional Media, Inc. itself that results in or supports a bias against women lawyers in the selection process. Certainly there is a disproportionately lower number of women lawyers on the list when compared with the number of women attorneys practicing law. To the extent there are biases in those who vote, it would seem no methodology could adequately correct same. Key Professional Media, Inc. does publish a "Top 50" women attorneys listing within its Super Lawyers lists.

VI. WOODWARD-WHITE, INC., PUBLISHER OF "THE BEST LAWYERS IN AMERICA."

Woodward-White, Inc. is the publisher of The Best Lawyers in America, a two-volume hard-cover listing of attorneys selected for inclusion based on a peer-review rating system, covering all 50 States and the District of

Columbia. Steven Woodward Naifeh provided testimony on behalf of Woodward-White, Inc. Mr. Naifeh is a graduate of Princeton University and Harvard Law School, and also has a Master of Fine Arts degree from Harvard University. His career has been in publishing and writing. His partner in both those careers has been Gregory White Smith, one of his classmates at Harvard Law School.

Mr. Naifeh testified that Woodward-White, Inc. was formed in 1981 by Mr. Naifeh and Mr. Smith using a combinations of their middle names for its nomenclature. They have also authored a publication called Best Doctors.

Mr. Naifeh explained that he supervises the entire publication of The Best Lawyers in America, and oversees the selection process. Woodward-White, Inc. also has a Board of Advisors consisting of distinguished people in the legal profession, providing consultation on a variety of issues. He stated that their publication "is intended to be used by people who are looking for a lawyer to represent them." Therefore, if a lawyer is in the public sector, he or she is not listed. Mr. Naifeh agreed that the description of their selection process contained in their publication or on their website does not explain that public lawyers are not included in the list.

The 2006 and 2007 two-volume sets were marked into evidence. See Exhibits BL-1 and BL-2, respectively. The "Introduction" to the 2007 edition, in volume I, states in pertinent part:

> In an age when almost anything is for sale, we are proud that the print edition of The Best Lawyers in America is still the only advertisement-free peer-reviewed listing of attorneys available anywhere. Lawyers who are listed in Best Lawyers are not required or allowed to make payments to be listed; nor are they required to make any purchase to be listed. We independently verify all of the information included in our listings; lawyers are not required to verify or respond in any way to be listed. Best Lawyers also undertakes the process of checking its selected lawyers against bar association sanction lists independently to make sure that every lawyer is in good standing with the ethics committee of his or her state at the time of publication.
>
> [Exhibit BL-2, volume I, pages vii-viii.]

Lawyers are listed in The Best Lawyers in America under specialties; in New Jersey, the lawyers are listed in 51 different specialties. Mr. Naifeh referred to the "Introduction" section in Volume I of the 2007 edition, which essentially explains the methodology utilized for compiling the list, as follows:

> The method used to compile Best Lawyers is fundamentally the same as it was when the first edition was completed more than two decades ago. Lawyers are chosen for inclusion

based solely on a vote of their peers. . . .

The survey for the 2007 edition began with a nomination pool of (1) all lawyers whose names appeared in the [2006] edition of Best Lawyers; (2) lawyers who had been nominated but not listed in the previous edition (except in cases where the votes are very low, lawyers nominated but not listed remain in the nomination pool for two editions, at which time, if they have not been voted onto the list, they are removed from the pool); (3) new nominations solicited from the 24,000 attorneys listed in the previous edition; (4) nominations solicited from marketing officers at firms with marketing departments (limited according to the size of the firm); (5) lawyers who had been nominated sua sponte during the year since the previous survey. Nominees for the 23 new specialties were solicited from previously-listed attorneys, marketing directors at firms with listed lawyers, and nominees in the new specialty who received multiple nominations.

The voting pool for Best Lawyers is far more transparent that that of any other peer-review survey of the legal profession. For the [2007] edition, the pool consisted of all the lawyers listed in the previous edition. Nominees who received multiple nominations in the 23 new specialties also voted within their specialties. Best Lawyers polls only a select group of prominent and respected attorneys. We believe that the quality of a peer-review survey is no better than the quality of its voting pool. A referring lawyer or potential client wants to know whom the top lawyers in the relevant field would recommend. This has been the basis of Best Lawyers' polling method since its introduction in 1983.

Each year, half of the voting pool receives fax or email ballots; the other half is asked to vote by phone. For this edition, the following states were polled by fax and email: . . . New Jersey . . . (New specialties are polled by phone in all states.)

* * * *

As in previous surveys, we provided voting lawyers with only the following general guideline for determining if a nominee should be listed among "the best": "If you had a close friend or relative who needed a real estate lawyer (for example), and you could not handle the matter yourself —— for reasons of conflict of interest or time —— to whom would you refer them?" All votes and comments were solicited with a guarantee of confidentiality —— a critical factor in the viability and validity of Best Lawyers surveys.

To ensure the continued rigor of the selection process, we urged lawyers to use only their highest standards when voting, and to evaluate each attorney based only on his or her individual merits. The additional comments allowed us to more accurately compare and weigh voting patterns. Over the years, we have developed methodological tools to identify and correct for anomalies in both the nomination and the voting process, including the distortive impact of partner votes.

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

[Exhibit BL-2, Volume I, pages viii-x.]

Mr. Naifeh testified that a version of this methodology also appears on their website,[51] as well as being a part of any contract with any entity which licenses their publication, either without compensation for editorial use or in a special advertising section of a printed publication. He explained that they "try to make it clear every time that a peer-review publication, like a membership in an organization, is to some extent affected by subjectivity of the opinions of the people . . . who either do the ratings or who establish the membership of the organization."

A copy of the voting ballot and correspondence accompanying same was marked into evidence. See Exhibit AG-34. The ballot requests the voter to assign letter grades for listed attorneys, ranging from "A" being "excellent," down to "F" meaning "poor." The voter is also given the option of grading "DK" for "Do Not Know," or "DKM" for "Do Not Know Work," and the there is space for the voter to provide a comment about that lawyer. Candidates who were listed in the previous edition are indicated by an asterisk. The information contained on Exhibit AG-34 is essentially the substance of what is asked of a voter when the polling is done telephonically. The

[51] See http://www.bestlawyers.com

voter is also given the option to vote online, where a similar version of Exhibit AG-34 appears. There is a deadline or cut-off date beyond which votes are not considered in the survey then being conducted.

Prior to the voting there is a nomination process. As a result of the notice to produce served by counsel for the Committee, Woodward-White, Inc. produced information derived from The Best Lawyers in America database that reflects the nomination of attorneys for inclusion in the New Jersey section of the 2006 and 2007 Best Lawyers' lists, in addition to those attorneys appearing in the then-current version of Best Lawyers, who are already in the nominal pool.

Exhibits AG-28 and AG-29 reflect nominations made by already-listed lawyers for inclusion in the 2006 and 2007 voting pools, respectively. A review of those Exhibits discloses that the majority of nominations made by lawyers who are already included within the then-current Best Lawyers list are for lawyers in their own firm. Exhibit AG-28 reflects, for example, that for the 2006 Best Lawyers nominating process, 92 New Jersey lawyers provided 394 nominations, of which 307 were from the nominating lawyer's own firm. It should be noted, however, that many lawyers received more than one nomination, having been nominated in

more than one specialty. Notably, one lawyer from a firm with more than 50 lawyers in that firm, provided 62 nominations, all for members of his or her firm; actually 38 lawyers were nominated, as many received nominations in more than one specialty. However, it should also be noted that a nomination does not count as a vote if the nomination is by a lawyer from the same firm.

Exhibit AG-29 reflects that for the 2007 Best Lawyers nominating process 39 New Jersey lawyers made 137 nominations, of which 89 were from the nominating lawyer's own firm. Notably, one lawyer from a law firm with more than 50 lawyers provided nearly a third of the total nominations, 41, all of whom were for lawyers within his or her own firm. Again, many lawyers received more than one nomination because they were nominated for inclusion in more than one specialty, and nominations by a lawyer from the same firm do not count as a vote.

Exhibits AG-30 and AG-31 reflect nominations made by law firm marketing directors for inclusion in the 2006 and 2007 lists, respectively. Exhibit AG-30 reflects that for the 2006 nominating process, 9 law firm marketing directors provided 81 nominations, and Exhibit AG-31 shows that for the 2007 nominating process, 6 marketing directors provided 44 nominations. Naturally, all of those nominations were

from the marketing directors' law firms, but none counted as votes.

Exhibits AG-32 and AG-33 reflect circumstances where an attorney nominates himself or herself (or is nominated by a staff person, friend or relative of that lawyer) for inclusion in the 2006 and 2007 lists, respectively. There were 97 New Jersey lawyers who nominated themselves for inclusion in the 2006 list, some for more than one specialty, and only 14 New Jersey lawyers who nominated themselves for inclusion in the 2007 list, 6 of those for more than one specialty. Naturally, none of those nominations constituted votes.

It again should also be clarified that the nominations reflected on Exhibits AG-28 through AG-33 only reflect "additional nominations," because the existing pool of nominees already includes all those who are on the then-existing list, as well as those who have been previously nominated, except where a nomination has been listed two additional times (a total of three voting cycles) and failed to make the list, in which case that latter category of nominations is dropped from the nominating pool.

Mr. Naifeh testified that when one lawyer nominates multiple lawyers from his or her own firm "it hurts their chances of getting appropriate votes from lawyers of the

other firms. They get irritated when this happens." He also noted that "a nominee who's been nominated by someone from outside their firm has extra weight given to their vote average in the calculation process."

The ballots for the actual voting process, see Exhibit AG-34, are constructed by grouping various specialties together and listing those attorneys in the nominating pool within those specialties. When all ballots have been cast, the letter grades are converted into numerical grades, partner/associate votes are deleted, and an average vote is calculated for each lawyer. The specific formula utilized is proprietary and protected by the Confidentiality Consent Order, see Exhibit C-2. Moreover, the actual formula is irrelevant to an understanding of the selection process utilized by The Best Lawyers in America in compiling its lists.[52]

Mr. Naifeh explained that once the votes have been converted to a numerical value the attorneys are grouped by specialty and are ranked from the highest number to the lowest. There is no specific general cut-off score utilized for inclusion on the list. Each specialty is examined individually before a cut-off score is established

[52] In his testimony, Mr. Naifeh described the formula in some detail but that portion of the transcript should also remain within the ambit of the Confidentiality Order unless otherwise ordered by the Court.

for that specialty. Using the specialty of Administrative Law by way of example, Mr. Naifeh outlined the methodology he employs in arriving at a cut-off score in a particular specialty, as follows:

> It's essentially [done] on a curve, by which I mean when I look at the spreadsheet for Administrative Law in New Jersey and I see the votes there, I look at the votes and see where is the logical cut-off point in terms of the average votes that are given, say, twenty nominees in Administrative Law in New Jersey.

He testified that he generally performs this function for the New Jersey list and bases his determinations on his twenty-five years of experience. The actual voting data for the 2007 survey is contained in Exhibit AG-35, representing those attorneys who were selected for inclusion and in Exhibit AG-36, consisting of those attorney who were not selected for inclusion in the 2007 Best Lawyers list. This raw data is also proprietary and protected by the Confidentiality Order, see Exhibit C-2, and was described in some detail by Mr. Naifeh during his testimony. Suffice it to say that a great deal of subjective, educated judgment is utilized in analyzing these votes.

Mr. Naifeh emphasized that there is no attorney advertising in the two-volume print editions of The Best Lawyers in America, which is available for purchase much like any other book. He outlined the sources of revenue derived from The Best Lawyers in America, as follows:

> We generate revenue from a variety of sources, We generate it from book sales. We generate it from sales of plaques to listed lawyers. We generate revenue from links that we sell to lawyers who -- listed lawyers are allowed to link from their listing on our website back to their web pages. We sell a certain number of subscriptions to the website. We -- and more recently in the wake of Super Lawyers we have made some revenue from a licensing fee that we charge to either magazines which create their own special advertising sections based on our list or allow a third party, exclusively American Lawyer Media, to create special advertising sections.

During Mr. Naifeh's testimony, thirty-two pages of material appearing on the Best Lawyers website were marked into evidence, consisting of a print-out of every page contained on that website. See Exhibit BL-3; and http://www.bestlawyers.com. The same attorney listings that appear in the two-volume printed version are contained on the website, however, the website is updated periodically to account for lawyer deaths, merger of law

firms and any other changes that may occur in a lawyer's listing.

Access to the site is given free to subscribers of the printed version; users of the website who are not subscribers are charged a subscription fee. A document shown to Mr. Naifeh during his cross-examination, which is provided to lawyers and law firm marketing directors, states that in 2006, the Best Lawyers website "received more than 2.8 million hits; performed more than 1.9 million lawyer searches." See Exhibit AG-27.

The website contains information about The Best Lawyers in America and its balloting and list-selection procedures; a listing and biographical profile of each member of the Advisory Board; a search page (subscribers see all lawyers listed in Best Lawyers, whereas non-subscribers only see the names of attorneys who have purchased links to their firm websites); an "Experts Database" search page that allows subscribers to search for "Best Lawyers Recommended" experts in 63 separate categories; a "Clients' Comments" section containing client comments concerning listed lawyers that have been provided to Best Lawyers by those lawyers;[53] a "News" section that provides users recent developments pertaining to The Best

[53] This page lists seven states (not including New Jersey) that prohibit client testimonials and endorsements.

Lawyers in America; a "Bookstore" page where the two-volume print version and plaques may be purchased; a "Downloads" page where lawyer nomination forms, logos, and other information may be downloaded; a "Guidelines" page providing rules and regulations for the use by lawyers of information pertaining to their selection for list inclusion; and several other features. See Exhibit BL-3. Sample "search results" are also provided in BL-3. Mr. Naifeh noted that Best Lawyers recently arranged to put all of their listings on 260,000 Bloomberg terminals that reach many hundreds of thousands of people who have access to Bloomberg terminals.[54]

Subscriptions to the Best Lawyers website are provided free to the top 1500 general corporate counsel in the United States and, through an arrangement with the National Post, are given free to its 160,000 subscribers, are free to subscribers of the two-volume print version, and free to any law firm or corporate officer who provides comments for a listed lawyer. Notably, the purchase of a subscription has no effect on the selection process for compilation of the list. Mr. Naifeh stated that most subscribers to the website have obtained that subscription as a result of

[54] The "Bloomberg Terminal" is a computer system that enables financial professionals to access Bloomberg Professional Service" through which users can monitor financial and other business-related activity. See http://en.wikopedia.org/wiki/Bloomberg_Terminal.

their purchase of the two-volume print edition or through the means stated above; consequently, the number of people purchasing a subscription solely to gain access to the website is under one thousand.

Best Lawyers does not accept lawyer advertising per se on its website. However, lawyers may purchase links from their listing on that website to the attorney or law firm's website. If a firm or attorney purchases such a link, the firm or attorney may place a firm or lawyer profile on the Best Lawyers website.

The actual selection process utilized to compile its list is described in more detail on the website than it is in the two-volume print version. In addition to that appearing in the print version, quoted at length above, the website provides the following additional detail:

> Whether by telephone, e-mail, or fax, we ask voting lawyers the same question, "If you could not handle a case yourself, to whom would you refer it?" Lawyers are asked to give nominees A-B-C letter grades —— A for a lawyer the voter would certainly refer a case to, B for a lawyer the voter would probably refer a case to, and C for a lawyer the voter might hesitate to refer a case to. Lawyers are allowed to give pluses or minuses in order to make their votes more precise.
>
> Once all of the evaluations have been compiled, the letter grades are converted into numerical equivalents and then averaged. Eccentric votes —— far better or far worse than others —— are

> excluded from this calculation. The numerical average required for inclusion varies according to the average for all the nominees within the specialty and the geographic area. In close cases, the editors make final decisions based both on comments that are made about a nominee during the polling process and on the grades of the voting lawyers (votes can be given more or less weight depending on the voter's own grades and how closely that voter predicts the outcome for the other nominees in the specialty).
>
> [Exhibit BL-3, page 20.]

One of the areas explored in cross-examination was the nominating of lawyers by marketing directors of law firms. The selection process set forth in the two-volume print edition states that these nominations are "limited according to the size of the firm." Mr. Naifeh explained that Best Lawyers has no specific limit or quota on the number or percentage of lawyers who may be nominated by law firm marketing directors and, instead, it is handled on a case-by-case basis, stating

> it is not that scientific a process because most of the people who make nominations do so in a responsible manner, or at least what appears to us to be a responsible manner. We know that because when the people are doing the voting, they will -- when we have not exercised this policy and too many lawyers from a firm are nominated it is mentioned to us by the people who are doing the voting. During the process of the voting they'll say, "You have too many lawyers from such and such a firm," and that comes to our attention.

Mr. Naifeh testified that The Best Lawyers in America has an ongoing relationship with American Law Media, publishers of Corporate Counsel and American Lawyer magazines. He explained that he was approached by New York magazine concerning a special advertising section concerning lawyers in that magazine. He contacted American Law Media, which then entered into an arrangement with New York magazine to utilize the Best Lawyers list in creating such a special advertising section. Best Lawyers has also entered into similar arrangements with other publications.

The July 2-9, 2007 edition of New York magazine contains a "Special Advertising Section" based on The Best Lawyers in America list, which is entitled "The New York Area's Best Lawyers 2007 Edition," beginning following page 148 of the magazine and covering 76 pages (pages Bl-1 through BL-76), touted as "The Definitive Guide to Legal Representation in New York, New Jersey and Connecticut." See Exhibit BL-4. The advertising and attorney-listing format of that section in New York magazine is similar to the New Jersey Super Lawyers "Special Advertising Sections" that have been appearing in New Jersey Monthly magazine. There are full-and partial-page lawyer advertisements; firm profile articles written by those firms; individual lawyer profiles; and a listing, by specialty, of those lawyers

included in the list, an index of same, and highlighted listings and reference-back pages for those taking advertisements. The selection criteria and procedure for The Best Lawyers in America outlined above appears on page BL-8 of the magazine, except in a more abbreviated form than that appearing in the two-volume print edition and the description found online at http://www.bestlawyers.com. For example, the description of the selection process contained on page BL-8 of New York magazine does not state that marketing directors of law firms are permitted to nominate individuals in their own firm.

Mr. Naifeh testified that their agreement with New York magazine calls for American Law Media to review each advertisement for adherence to the usage guidelines of The Best Lawyers in America, and that Best Lawyers would review every proposed advertisement as well. Mr. Naifeh noted, however, that there were a few attorney advertisements that violated those guidelines and should have been caught prior to publication. For example, he referred to the quarter-page advertisement appearing on page BL-16 of New York magazine's Special Advertising Section, stating that the terminology "Congratulations to McKee Nelson's Best Lawyers" does not comply, stating "[w]e ask that they not refer to the individual lawyers as Best Lawyers, and . . .

the language we prefer is 'Lawyers selected for inclusion in Best Lawyers.'"

In focusing on the selection process, Mr. Naifeh stated that only 2.9% of all practicing lawyers are included in The Best Lawyers in America listing, even though no actual quotas or limits are set.[55] As to voting on the nominations, every lawyer listed in The Best Lawyers in America is given the opportunity to vote, with roughly half of them responding with votes. For new specialty categories, Mr. Naifeh explained the process as follows:

> Well, for new categories the process reverts to the process we originally used to develop the book, and that is, if we're adding, say, medical malpractice for the first time, we may get the first three or four names from listed personal injury lawyers. But if three personal injury lawyers mention lawyer A, who is not a listed lawyer, we will go to lawyer A and ask that lawyer for additional nominations and follow that procedure. It's what we've called in our introduction a cascading poll, and we use it for new specialties and more recently for new countries, just as we originally used it for the initial book.

He further testified that the number of votes cast in a particular specialty depends on the size of the jurisdiction and the size of the specialty. He noted that "the process is based on the assumption inferred over time

[55] That is a national percentage; Mr. Naifeh was unable to provide a specific list-inclusion percentage for New Jersey.

that lawyers for the most part are only willing to listen to about 200 names before life requires their participation elsewhere." He stated they generally ask lawyers in a specialty to vote on other lawyers in that specialty or, if there are not enough lawyers listed in that specialty, they try to group together categories of law where lawyers might know each other better than in other specialties.

Mr. Naifeh explained that those employees conducting telephone polling are fully trained in the voting process. He emphasized that telephone pollers make it clear to voters they should not render a vote if they do not know the nominee well enough to express an opinion. After converting the letter grades into numerical equivalents, Mr. Naifeh explained:

> We then go through and sort of determine -- since it's all grading on a curve, the votes are higher in some jurisdictions than others and lower in others -- what the break is. And all the lawyers who get above a certain grade point average are automatically included and all lawyers who get below a certain grade point average are [not] included. There's a middle 20% where somebody in the company -- and it's usually me -- has to go through every single one and look for factors that should be taken into consideration in that particular case.[56]

* * * *

[56] Mr. Naifeh explained that the "middle 20%" means those attorneys whose votes were 10% above the cut-off number and those whose votes were 10% below the cut-off number.

> We throw out all partner votes automatically unless it's in the 20% and we look at the pattern of the partner votes and see if they should be taken seriously for some reason. We also throw out all votes of lawyers who give everybody an A or everybody an F. . . . [I]n that 20% of gray area, we look at the pattern of voters themselves so that if they themselves have a particularly high grade point average we add some weight to their vote. We also look to see if their voting tracks more or less the votes of the other lawyers. So that a lawyer who gives completely eccentric votes, we weight their votes less on the assumption that their voting is more political than the other lawyers.

Mr. Naifeh also outlined several other factors that are examined for attorneys' votes that fall within middle 20% to determine the validity and trustworthiness of the vote total, such as checking whether a lawyer who gave negative votes shows any bias in his or her voting pattern, like a bias against women or minorities. Partner/associate votes may be examined for guidance as long as the voting of that partner/associate reflects a wide range of grades in voting for members of their own firm.

Exhibit AG-37 in evidence is a list of all New Jersey law firms who had attorneys included in The Best Lawyers in America 2007 listing, and the number of attorneys from that firm making that list, as well as the size category of that law firm in terms of how many lawyers are contained within each firm. There are 247 law firms and 735 lawyers on this

list. The law firms are grouped by the following sizes: 1 to 3 lawyers; 4 to 10 lawyers; 11 to 50 lawyers; and more than 50 lawyers.

There were eight law firms with more than 50 lawyers, where between 1 and 9 lawyers of each such firm were included in the 2007 list (3 of which had only 1 or 2 lawyers on the list). There were seventeen law firms of that size, where between 10 and 35 lawyers within the firm were included in the 2007 list. There were six law firms with between 11 and 50 lawyers where between 5 and 8 lawyers of the firm made the list, and fifty-three law firms of that size that had between 1 and 4 lawyers make the list, 29 of which only had 1 attorney make the list.

Of the law firms listed on Exhibit AG-37 having between 4 and 10 lawyers in the firm, nineteen firms had between 2 and 4 lawyers on the list, with sixty of such firms only having 1 lawyer on the list. Of the law firms with between 1 and 3 lawyers, there were 10 firms with 2 lawyers on the list and 58 firms with 1 lawyer on the list.

This information and analysis can be extracted from The Best Lawyers in America 2007 two-volume hard-cover edition, see Exhibit BL-2, a publicly-available document, so there is no basis or reason for Exhibit AG-37 to remain protected under the Confidentiality Consent Order.

These numbers can certainly be interpreted to support any number of conclusions. The Committee has argued that they support the conclusion there is a large-firm bias in the Best Lawyers selection process. To support this conclusion, the Committee points out that 10.6% of the selected attorneys on Exhibit AG-37 practice in settings of a law firm size of between 1 and 3 lawyers, whereas the attorney statistics contained in Exhibit AG-3 (the 2006 State of New Jersey Disciplinary Report) demonstrate that 32.6% of lawyers in New Jersey are solo practitioners, another 10.1% practice in firms of two lawyers, and another 15.9% practice in law firms of three to five attorneys. Additionally, the Committee points out that 51.6% of the list-included attorneys contained on Exhibit AG-37 practice in law firms that have more than 50 lawyers, whereas Exhibit AG-3 demonstrates that only 14.1% of the lawyers in New Jersey practice in firms containing more than 50 attorneys.

When confronted by these statistics, Mr. Naifeh commented that

> if we had a list of the outstanding practitioners in corporate law and commercial litigation, and the various categories that [were] in this publication . . . was in direct proportion to the size of the firms in the publication you just put into evidence [, Exhibit AG-3,] I think there

> would be an enormous amount of skepticism about the quality of the list that we put together.
>
> * * * *
>
> I would be surprised if there was not a substantially different demographic in this list [, Exhibit AG-37,] than in the overall list of all the lawyers practicing in the state. . . . It does not surprise me, given the efforts that these major firms go to, to get the most talented people and the efforts that lawyers practicing in New Jersey who want to do corporate kinds of law go to, to get into the major corporate law firms, I would be surprised if there was not a disproportionate number of lawyers in large firms on the list.

In addition to these comments by Mr. Naifeh, it should be noted that the statistics provided by the Committee do not take into account the percentage relationships of the number of attorneys selected, when compared to the number of lawyers in the represented law firms. For example, ten law firms with between 1 and 3 lawyers had 2 lawyers on the list, a rather large percentage of the lawyers in those firms, and 58 law firms with between 1 and 3 lawyers had had 1 lawyer on the list, also a significant percentage. Additionally, there were nineteen law firms with between 4 and 10 lawyers that had been 2 and 4 lawyers on the list, a very significant percentage of inclusion.

In sum, when looking at the statistics contained on Exhibit AG-37, it is difficult, if not impossible, to draw any conclusions concerning the presence of a large-firm

bias in the selection process because, if for no other reason, the list simply represents a compilation of the subjective judgment and the perception of the attorney voters in forming their opinion as to which attorneys they would consider referring a legal matter in a given specialty if the voters would be unable to handle the matter themselves. Moreover, nominations by members of one's own firm are not counted as votes, and lawyers cannot vote for themselves. It also must be noted that the methodology permits any practicing attorney to nominate himself or herself into the nominating pool.

Mr. Naifeh emphasized that the principal control in eliminating "gaming" or abuse of their system "is that we choose the voters." This raised the issue as to whether there was a self-serving bias inherent in the selection process if the voting pool of attorneys consisted of those attorneys already on the list. Mr. Niafeh emphasized, however, that the voting pool contains the best lawyers and he is confident they vote responsibly, further addressing this issue by stating:

> We are eager for lawyers even in the larger categories to make sure that they give lawyers in smaller firms adequate consideration. I know the implication has been made that it's essentially

> an All "boys club," but I think really what it reflects more is that when in the field of, say, commercial litigation, if you ask the top commercial litigators who do they run into, who have they, over a career of twenty or thirty years, run into as litigators in commercial matters as opposed to criminal defense matters which are handled more often in smaller firms, you know, they tend to run into other lawyers from other large firms.
>
> * * * *
>
> I don't think that the methodology that we use creates the conditions for a bias towards lawyers in large firms even in the specialties where the top lawyers tend to congregate in large firms. Meaning, that we don't only go to the large firms and ask them, as our competitors do, to nominate lawyers. I mean, we go to all the lawyers in the field and we urge them -- in a mature list like New Jersey that's been around a long time, the nominations are fewer. But in any process in any state we will get nominations of lawyers in firms of varying sizes.

In sum, the procedures utilized by Woodward-White, Inc. to produce its list of attorneys included within The Best Lawyers in America represents only one survey and rating method of compiling a list of attorneys given recognition by their peers. The Best Lawyers methodology has been clearly detailed and explained and represents a bona fide method of determining quality-of-service opinion. Like other peer-review rating systems, they are largely based on the subjective opinion of the competence of the attorneys who do the rating.

If the Court concludes that New Jersey lawyers may advertise their inclusion in The Best Lawyers in America lists, the description of the methodology contained in any special advertising sections should be more comprehensive than appearing in Exhibit BL-4, and encompass at least all of the information contained in the print edition and on the website, particularly the subjective nature of the data received in the form of the opinions received; should inform the reader that only lawyers privately practicing law are included in the list; and that the majority of new nominations received each year from those already on the list and from law firm marketing directors are for lawyers in their own firms, but that those nominations do not count as votes. Additionally, the empirical data upon which the list is compiled should be disclosed (e.g., the actual number of ballots transmitted and the percentage response rate, which the record reflects is actually quite high).

VII. LEXISNEXIS MARTINDALE-HUBBELL.

LexisNexis, a division of Reed Elsevier, Inc. owns the products and services of Martindale-Hubbell, which is located in New Providence, New Jersey. LexisNexis Martindale-Hubbell publishes a multi-volume hard-cover directory of lawyers in the United States and

Internationally.[57] Contained within that directory are peer-review ratings. LexisNexis Martindale-Hubbell maintains various websites that also contain these listings and peer-review ratings.

The methodology and utilization of the LexisNexis Martindale-Hubbell peer-review rating system is not the subject of review in Opinion 39, which does not conclude or suggest that Martindale-Hubbell's methodology or system fails to conform to the New Jersey Rules of Professional Conduct. LexisNexis Martindale-Hubbell intervened in this matter in order to protect its interests; the Court granted leave to intervene by order entered on March 23, 2007.

The Martindale-Hubbell Law Directory publication evolved from combining the Martindale Directory, first published in 1868 as a guide to reliable law firms, banks and real estate offices, with Hubbell's Legal Directory, a digest of collected law, court calendars and a selective list of lawyers and firms. The first edition of the Martindale-Hubbell Law Directory appeared as a two-volume bound volume set in 1931. The current Law Directory contains listings for more than one million lawyers and firms in the United States, Canada and worldwide. See Exhibit LNMH-2, Sub-Exhibit 1 (containing a printout of a

[57] Volume 7 contains the New Jersey lawyer and law firm listings.

page from http://www.martindale.com outlining the company's history). Its database is available in a multi-volume print edition, on its website at http://www.martindale.com, online through LexisNexis, at http://www.lexis.com, and on a CD-ROM, with a special online version of the Law Directory for consumers at http://www.lawyers.com.

LexisNexis Martindale-Hubbell presented the testimony of Carlton A. Dyce, its Vice President of Peer Review Rating and Client Services. Mr. Dyce provided detailed testimony concerning twenty-eight separate exhibits designed to explain the Martindale-Hubbell peer-review system. See Exhibits LNMH-1, sub-exhibits 1 through 28.

Mr. Dyce testified that LexisNexis Martindale-Hubbell has several products. The multi-volume bound print Law Directory is broken into three sections. The blue-pages section is the practice-profile section, a roster of attorneys listed by geographical area. The white-pages of the Law Directory contain the biographical portion, which is the paid section where firms and lawyers pay a fee for their listings; all the names in the white section can also be found in the blue section, but not the other way around. Therefore, the white section consists of those attorneys who have subscribed to the Law Directory, and the blue section includes all attorneys. The last part is the

yellow section (although now being printed on white paper), which is the "Directory of Experts and Legal Services" portion, a listing of those services ancillary to the practice of law such as private detectives, expert witnesses and legal supplies. Individuals who sell or provide those ancillary services advertise in this last section.

The second product is Martindale.com, the flagship website of LexisNexis Martindale-Hubbell, which is available to consumers without cost. It contains numerous features, including a lawyer-locator service where consumers can search by the name of a lawyer or firm, or for firms or attorneys by practice specialty and geographical area. The amount of information found through such a search will vary, depending upon whether the attorney found is a subscriber or non-subscriber. Martindale-Hubbell peer-review ratings of the attorneys found as a result of the search are also listed, with links to the law firm or attorney website, if the attorney or firm is a subscriber.

The third product is Lawyers.com, which is a paid subscriber website site where listed attorneys pay to be included on the site, but it is available for use by consumers at no cost. In other words, lawyers who do no

subscribe cannot be found on this website. The fourth product containing the Martindale-Hubbell database is the CD-Rom where both subscriber and non-subscriber data is found. The full database is also available on the LexisNexis legal research website.

The last Martindale-Hubbell product is Attorneys.com, which is a website also available to consumers. As with Lawyers.com, only paid subscribing attorneys to the Law Directory are listed on this website but it is more locally oriented. Listed attorneys, in their specialty area of practice, can be located by state and municipality, or by simply engaging in a zip code search.

Mr. Dyce explained that Lawyers.com and Attorneys.com are more geared fro use by consumers, while Martindale.com and LexisNexis.com are more geared for use by attorneys or businesses.

The peer-review rating system used by LexisNexis Martindale Hubbell is described in detail in Sub-Exhibit 12 to Exhibit LNMH-1. The first review to establish a rating for a lawyer usually occurs five years after the attorney's bar admission date, and then is reviewed every five to eight years thereafter. The attorneys asked to perform peer-review ratings——the "reporters"——are not compensated in any way. Although the reporters must be in

the LexisNexis Martindale-Hubbell database, they are randomly selected and need not be subscribers, nor it required that the reporter the reporter have a LexisNexis Martindale-Hubbell peer-review rating prior to becoming a reporter. The reporting pool consists of lawyers in both private practice and from the public sector. The reporting process is fully confidential.

The reporter is sent a "personal and confidential" letter and questionnaire containing the names of approximately 15 to 20 attorneys, requesting that ratings be completed in two categories—legal ability and general ethics standards. See Exhibit LNMH-1, Sub-Exhibit 1. The reporter is advised that the rating should be based only on personal knowledge and otherwise be left blank. The reporter is also informed that to be a valid, a rating must be given in both categories. Ibid. No more than two attorneys in one firm can provide a rating on another attorney outside that firm, and members of the same firm are not permitted to rate each other. The description appearing on the letter is as follows:

LEGAL ABILITY RATING	GENERAL ETHICAL STANDARDS RATING
C - From Good to High	V - Very High
B - From High to Very High	X - Does Not Meet Ethical Criteria
A - From Very High to Preeminent	
NR - Does Not Qualify for Legal Ability Rating	

On the questionnaire form itself there is a place allowing for the reporter to write comments concerning the lawyer. The reporter, upon completing the questionnaire, returns it in a self-addressed postage-paid envelope. The rating may also be done through e-mail. The results are then tabulated and recorded.

There is a second component to the rating system, known as an own-reference request, where attorneys who are being reviewed are sent letters asking that they provide references and are asked not to contact that reference. See Exhibit LNMH-1, Sub-Exhibit 2. A letter is then sent to each reference provided. See Exhibit LNMH-1, Sub-Exhibit 3. Mr. Dyce explained that the minimum number of reporters needed for a valid rating is 15, so the reason they have employed this second method is that there are several specialty practice areas, such as maritime law, where there is not a sufficient pool of reporters in that practice area. This own-reference request allows attorneys to obtain a sufficient number of reporters in such circumstances.

LexisNexis Martindale-Hubbell conducts periodic reviews of attorney ratings which are called "major

projects." See Exhibit AG-39.[58] These random major reviews are done by county and municipality within a range of bar admission dates. For example, in one year, they may review the ratings of all attorneys with bar admission dates between 1977 and 1996 in a particular locale.

In terms of actually computing the ratings, LexisNexis Martindale-Hubbell has a complicated system that requires, for example, for an "AV" rating that a certain percentage of reporters must have rated that attorney with such an AV rating.[59] It should be also noted that an attorney cannot be given a "C" rating unless he or she has been admitted for a minimum of three years; cannot receive a "B" rating unless practicing between four and nine years; and cannot receive an "A" rating unless admitted to the bar for ten or more years. Additionally, if five reporters have provided an "X" rating under the General Ethical Standards section, an attorney will not receive a rating. LexisNexis Martindale-Hubbell has several rating analysts who review any comments received from the reporters or reporting anomalies to

[58] Exhibit AG-39 is a document prepared by LexisNexis Martindale-Hubbell in reply to the Committee's request for documentation concerning the "major projects" completed in New Jersey between 2005 and 2007. This information is proprietary and protected under the Confidentiality Consent Order, see Exhibit C-2, and should remain so protected because of the random nature of their peer-review rating system, as public disclosure of same could alert attorneys in a given geographic area of the next target of that random review and thereby potentially compromise or taint the results.

[59] As with Key Professional Media, Inc. and Woodward-White, Inc., counsel for the Committee and LexisNexis Martindale-Hubbell have entered into a Confidentiality Consent Order, see Exhibit C-3, designed to protect proprietary information. Here, the specific percentages and formulae utilized fall within that category of information so protected. The methodology is fully understandable without disclosure of this proprietary information.

determine whether additional review reporting should be undertaken.

Once the ratings have been determined, letters are sent to the rated lawyers informing them of the results. See Exhibit LNMH-1, Sub-Exhibit 5 (for a "AV" rating), Sub-Exhibit 6 (for a "BV" rating) and Sub-Exhibit 7 (for a "CV" rating). Attorneys may request that their ratings not be listed or disclosed. Sub-Exhibits 8, 9 and 10 in Exhibit LNMH-1 are samples of letters sent to attorneys where a review of that attorney's rating has resulted in no change, a reduction in rating or the dropping of an attorney's rating.

At the time of this hearing, there were 12,289 New Jersey lawyers with LexisNexis Martindale-Hubbell peer review ratings, of which 4,990 are rated "AV," 6,620 are rated "BV," and 619 are rated "CV." In 2006, approximately 10,000 New Jersey lawyers participated in new peer-review ratings of 258 New Jersey attorneys and 111 own-reference requests; there were also a number of no-change reviews. Additionally, between 2005 and the present there were 35 ratings either dropped or removed. Mr. Dyce stated that approximately 60% to 70% of the reporters mailed questionnaires do not respond, but there is an 80% response rate on questionnaires that are emailed.

Mr. Dyce testified that because the LexisNexis Martindale-Hubble peer-review rating system is performed in a total random manner, it is not biased or prejudiced in favor or against large firms, small firms, women or minorities. Mr. Dyce elaborated, as follows:

> If I were to point to one thing that would create a fair process, that would be it. We're randomly rating and we're randomly selecting the reporters."

Lexis-Nexis Martindale-Hubbell also has specific guidelines concerning the use by an attorney of the rating received, which guidelines are provided to the attorneys and are contained in the materials disseminated to the public on their websites. See Exhibit LNMH-2. When an attorney chooses to list his or her rating in an advertisement, the certification mark reference must be used, e.g. "AV®," and contain the following approved rating explanation:

> Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the confidential opinions of members of the Bar and the Judiciary.[60] Martindale-Hubbell Ratings fall into two categories - legal ability and general ethical standards.

[60] Since in New Jersey Judges are not ethically permitted to provide ratings, the "and the Judiciary" language could not be contained in the explanation with respect to the ratings of New Jersey lawyers.

These guidelines also specifically prohibit use of the peer review ratings in yellow page advertisements; newspaper advertisements; outdoor advertisements (e.g., billboards, buses, benches); political pieces or advertisements or campaign promotions; radio and television commercials; or in letters to the editor or similar articles or opinion pieces that are public commentary to reflect the personal opinions of the rate attorney or firm. Ibid.

The balance of the exhibits in LNMH-1 provide information principally concerning the websites maintained by LexisNexis Martindale-Hubbell, is self-explanatory and has been already discussed in some detail.

LexisNexis Martindale-Hubbell also provided testimony from Louis F. Duffy. Mr. Duffy commenced his employment with Martindale-Hubbell on November 26, 1956, serving as a field representative for twelve years, becoming the Assistant National Sales Manager in 1969. In 1976 he was made Vice President of Sales and shortly thereafter assumed the position of Senior Vice President of Sales and Marketing. Following the acquisition of Martindale-Hubbell by Reed Elsevier, Inc., Mr. Duffy opened the first International office for the company in London, England. He noted that today there are 8,000 law firm listings in

the Martindale-Hubbell Law Directory in 180 countries around the world. Mr. Duffy retired in January 1998, but has remained with the company in the role of International Consultant, Senior Vice President Emeritus.

Mr. Duffy explained that the primary purpose of the Law Directory is that it provides a vehicle for lawyers to contact competent, ethical lawyers at a distant point when there is such a need. He emphasized that there is no payment required of attorneys or law firms to participate in the peer-review rating process either as a reporter or as a person being rated.

Mr. Duffy testified in some detail concerning the structure and use of the print version of the Martindale-Hubbell Law Directory. The New Jersey portion is contained in Volume 7 of a fifteen-volume set. Several pages were extracted from Volume 7. See Exhibit LNMH-3, Sub-Exhibit 2. There are two pages contained therein that contain relevant notices to the reader, and a capsule description of the services offered by LexisNexis Martindale Hubbell. Page iii provides:

IMPORTANT NOTICES

> Martindale-Hubbell® has used its best efforts in collecting and preparing material for inclusion in the **Martindale-Hubbell Law Directory** but cannot warrant that the information herein is complete

> or accurate, and does not assume, and hereby disclaims, any liability to any person for any loss or damage caused by errors or omissions in the **Martindale-Hubbell Law Directory** whether such errors or omissions result from negligence, accident or other cause.
>
> Lawyers providing information regarding themselves and their law firms for inclusion in the **Martindale-Hubbell Law Directory** are responsible for both the accuracy of the information submitted and compliance with local laws and bar regulations.
>
> Some lawyers and law firms are omitted from the **Martindale-Hubbell Law Directory** by request while others are omitted because adequate information is not available.
>
> The Martindale-Hubbell Peer Review Ratings contained in this Directory are intended primarily for the use of lawyers and law firms in the practice of their profession. They may not be used in any advertisement or for commercial, political or other purpose. Peer Review Ratings may be referenced in printed lawyer-to-lawyer communications (such as law firm brochures), professional announcements, and legal directories targeted to lawyers and law firms. For more information on requirements for acknowledgments, please see Guidelines for Using Your Martindale-Hubbell Peer Review Rating on page XV, or visit www.martindale.com/ratings.
>
> Omission of individual lawyer Peer Review Ratings should not be construed as unfavorable since Martindale-Hubbell does not undertake to develop ratings for every lawyer. In addition, certain lawyers have requested their Peer Review Ratings not be published while in other instances, definitive information has yet to be developed.

Page IV of Exhibit LNMH-3, Sub-Exhibit 2 provides the following history and synopsis of Martindale-Hubbell's

products to best illustrate the breadth of its undertakings in the areas of attorney rating, marketing and advertising:

FOREWORD

We are pleased to present the 2007 edition of **Martindale-Hubbell® Law Directory**, the world's leading guide to the legal profession since 1868.

What began as a two-volume register of recommended lawyers has evolved into a global network of over one million legal practitioners, firms, alliances, and services. Today, Martindale-Hubbell's 15 volumes offer uniquely authoritative practice profiles and professional biographies of virtually every lawyer and law firm in the United States, along with extensive coverage of the international legal community in over 165 countries —— from Albania to Zimbabwe.

The classic print edition represents but a single component of the Martindale-Hubbell Legal Network, a multimedia legal research and networking tool. Spanning the full array of fast-access digital formats, the **Law Directory** is also available via the *Martindale-Hubbell Law Locator* at *martindale.com*® and *lawyers.com*, on CD-ROM, and online through LexisNexis®

To help the lawyers and firms represented in our database unlock new opportunities for practice development, our growing network of strategic alliance partners within the legal, business, and consumer spheres offers prominent access to *martindale.com* and its consumer-facing counterpart, *lawyers.com*. Our Internet partners range from professional sites such as CNN.com and law.com to high-traffic consumer destinations including Google, Yahoo!, SuperPages and MSN, which reach over 85% of Internet users. Together, these alliance partners attract over 100 million unique visitors each month, delivering a vast universe of potential clients.

To ensure the most up-to-date information on

lawyers and law firms is made available in our directories, we recently launched the *Client Service Center*. This online updating tool allows law firms to securely make changes to their Martindale-Hubbell listing whenever they have new information to share, including staff changes, new practice areas, updated contact information and recent awards.

We are also continuing to enhance and expand our Web marketing tools, designed to help law firms grow their practices via the Internet. *Custom Web Sites* and *Search Placement Pro* maximize a firm's Internet presence through sophisticated graphics, creative content, and improved ranking in the results of major search engines. City, county, state and nationwide *Sponsorships* on *lawyers.com* are also available in specific practice areas to increase visibility and drive targeted prospects to a firm's credentials.

Another initiative, *The Advantage Program*, is a unique portfolio of client development opportunities that includes speaking engagements at well-respected conferences; publication in *Counsel to Counsel* magazine and in *Legal Articles* on *martindale.com*; the opportunity to co-host a Counsel to Counsel forum; and expanded practice area and industry *Group Profiles* and *Diversity Profiles* on our proprietary Web sites.

In addition, we continuously improve our *Experts & Services* application, which provides extensive information on experts, consultants, investigators, court reporters, and many other legal-service providers —— free of charge —— from links at the *martindale.com* home page and at *martindale.com/ resources*. We've implemented an online alliance with the Round Table Group, Inc., a renowned expert services firm, to further expand the tools available to lawyers, and made significant investments in online marketing campaigns with the major search engines to increase value to our legal service advertisers. These and other marketing activities have driven record-setting levels of searches to *martindale.com*.

> While technological advances will no doubt further enhance the practice of law and our own offering of services, nothing will change Martindale-Hubbell's fundamental partnership with the legal profession: a commitment too enhance the visibility and working efficiency of every firm and every individual attorney.

It is clear from the testimony and documentary evidence that the LexisNexis Martindale-Hubbell attorney ratings are widely disseminated to consumers, as well as other attorneys, law firms and corporate counsel, through a wide variety of mediums.

Mr. Duffy also testified in some detail concerning a separate publication of LexisNexis Martindale-Hubbell known as the Bar Register of Preeminent Lawyers. See Exhibit LNMH-3, Sub-Exhibit 3 (containing portions of the 2007 edition). He explained that this publication contains a listing of those lawyers who have achieved an "AV" rating by Martindale-Hubbell. The lawyers appearing in the Bar Register pay to have their names listed. The "Foreword" on page V of this Exhibit explains this publication as follows:

> We are pleased to present the 91st edition of the **Martindale-Hubbell® Bar Register of Preeminent Lawyers™**, the definitive guide to America's leading lawyers and law firms.
>
> Only the most distinguished law practices appear in the **Bar Register ——** those that have achieved

> the prestigious "AV®" rating, the top ranking in the **Martindale-Hubbell® Law Directory**. The "A" signifies the highest level of legal ability, while the "V" denotes "very high" adherence to the "Professional Code of Responsibility," in conduct, ethics, reliability and diligence. This rating is the result of a structured peer review and is based upon the confidential opinions of practicing attorneys and members of the judiciary.
>
> The **Bar Register** is an invaluable resource for identifying the most highly regarded law firms in a particular geographic location or area of expertise. The 2007 edition contains concise listings and full contact data for more than 8,900 solo practitioners and law firms in the United States and Canada. It covers lawyers and firms excelling in 77 practice areas, from Administrative Law to Workers' Compensation. This year's edition features new practice areas for Guardianship and Conservatorship and Libel, Slander and Defamation.
>
> Potential clients can easily determine a firm's status even when conducting research outside of the **Bar Register**. Firms included in the **Bar Register** receive a special notation in their professional listing in the **Martindale-Hubbell Law Directory**, where applicable, and their profiles on *martindale.com*® also feature a **Bar Register** icon. In addition, *martindale.com* users can search for firms by **Bar Register** practice area.

Mr. Duffy explained that the primary purpose of the Bar Register is "to assist lawyers in private practice, general counsel, assistant general counsel, in the selection of outside counsel." The Bar Register is sent to all subscribers listed in the Law Directory and there is a complimentary distribution to general counsel of all major corporations in the United States. On further questioning,

Mr. Duffy stated that not all lawyers listed in the Bar Register have an "AV" rating because firms can pay to be listed therein when at least one lawyer has such a rating, while other members of that firm may not.

During the cross-examination of Mr. Dyce and Mr. Duffy, several questions were asked that required additional investigation by those witnesses before responses could be provided. By letter dated February 19, 2008, counsel for LexisNexis Martindale-Hubbell provided the following relevant information:

- In 2007, Martindale-Hubbell received 4,051 responses to Questionnaires in New Jersey; of those, 2,228 responses were from print Questionnaires and 1,823 were received from electronic Questionnaires.

- In 2007, Martindale-Hubbell received 118 requests for own-reference evaluations in New Jersey; in 2006, 111 own-reference requests were received in New Jersey.

- The eligibility requirement for a law firm to be included in the Bar Register of Preeminent Lawyers is that at least one attorney in the firm must be "AV" rated.

Additional information was supplied in that February 19, 2008 letter concerning the frequency of random special project attorney ratings being conducted in the various counties in New Jersey, and a revised Exhibit AG-39 was provided. As discussed above, that information is

proprietary in nature because to release same could reveal where the ratings would occur in the future, thus undercutting the random nature of those special project and potentially compromise the evaluation process. Moreover, that information is not necessary to arrive at an understanding of the peer-review rating methodology utilized by LexisNexis Martindale-Hubbell. That methodology is straightforward, transparent and represents a bona fide method of determining the subjective quality-of-service opinion of lawyers' peers.

VIII. EXPERT REPORTS.

As discussed in Part II of this Report, early-on in these proceedings the issue was presented as to whether expert opinion would become part of this record. That request was first made by the petitioners and intervenors, and objected to by the Committee. When permission was granted to offer expert opinions in the area of marketing, the Committee retained experts in anticipation of the presentation of expert testimony by at least some of the petitioners and intervenors. New Jersey Monthly, LLC and LexisNexis Martindale-Hubbell supported the introduction of expert testimony but elected not to retain their own experts. During the course of their respective evidentiary presentations, Key professional Media, Inc. and Woodward-

White, Inc. announced they would not be presenting any expert testimony during their case-in-chief, reserving their respective rights to do so in the event the Committee was permitted to produce expert testimony.

Ultimately, all parties agreed to the submission into evidence of several expert reports without formal proof with the stipulation that the authors of those reports would essentially testify consistent with their content. They also agreed to submit written arguments concerning the issue of what weight, if any, should be accorded the information and opinions set forth in those reports.

Key Professional Media, Inc. placed into the record the December 12, 2006 certification of Max Blackston, Britt Power, and Nick Gourevitch of Global Strategy Group (GSP). See Exhibit KMP-22. This certification was originally submitted to the Court in the Reply Appendix of petitioners Jon-Henry Barr, Esq., et al., and Key Professional Media, Inc. filed on December 18, 2006. See Pra-342 through Pra-359.

GSG is a market research and consulting firm. The qualifications, credentials and experience of Messrs. Blackston, Power and Gourevitch are detailed in the certification. They have extensive backgrounds in the market research industry, including public opinion polling

and research methodologies. GSG was retained to provide an assessment of the methodology utilized in compiling the Super Lawyers lists. The certification states that

> GSG prepared for the writing of this document by reviewing all aspects of the *Super Lawyers* protocol, interviewing supervisors and analysts from the *Super lawyers* research team and by receiving a full-feature presentation of the *Super Lawyers* database and data entry system.

Based on this review, GSG concluded that

> the *Super Lawyers* protocol provides consumers with an objective measure of lawyers' reputations. While an individual evaluation of a lawyer's reputation is subjective, it is incorrect to assume that a lawyer's reputation cannot be measured in an objective way. Just as any social scientist would, *Super Lawyers* measures reputation by aggregating subjective evaluations (e.g. the peer evaluations of lawyers and third-party organizations) in a systematic and unbiased manner. Their protocol follows the best practices of the social sciences and the outcome is driven by a number of different factors, including the most representative survey sample possible, multiple measurements by different observers and cross-checking of data for inconsistencies and bias. Finally, like any accepted social science model, the *Super Lawyers* protocol is validated further by the similarity of its ratings to its respected peers - 70% of those on the New Jersey 2006 *Super Lawyers* list are also on the Martindale-Hubbell AV rated list.
>
> [Id. at ¶7.]

The GSG report outlined the three characteristics required for a modeling process that follows accepted

social-science standards——a hypothesis, data, and testing——and concluded that the Super Lawyers methodology contained and successfully satisfied each characteristic. In commenting on the low response rate of the balloting, the GSG report stated:

> For New Jersey in 2006, *Super Lawyers* received by-mail ballots from 4.8% of lawyers in the state. While this response rate may seem low, it is typical for by-mail surveys to experience similarly low response rates, especially among busy professionals such as lawyers. The *Super Lawyers* ballot process was executed in a systematic, consistent, and unbiased way to ensure that every lawyer was given the same chance to respond and give their input. As a result, the balloting process provides a meaningful assessment of a lawyer's reputation, especially when combined with all of the additional measures built into the *Super Lawyers* protocol. As mentioned earlier, the nominees are drawn from a number of other sources including third-party organizations who conduct similar research to include lawyer subpopulations that might be underrepresented by the balloting process. In the end, 21% of the lawyers in New Jersey were considered and researched by the *Super Lawyers* team.
>
> [Id. at ¶18.]

The GSG report also concluded that the *Super lawyers* protocol contains sufficient checks and balances to identify and prevent ballot manipulation, as well as measures to avoid bias in the nomination process by lawyers

being permitted to nominate members of their own firm. More specifically,

> - Ballots are only considered as valid if they have at least as many out-firm nominations as in-firm nominations. This - together with the maximum number of total votes allowed on each ballot (14) - limits the ability of large firms to unfairly pack the nominee pool with members of their own firm.
>
> - The protocol caps the number of in-firm nominations at a number under ten (10). For example, if one lawyer at a large firm received 100 nominations from within his own firm, over 90% of those ballots would have no impact on the lawyer's score.
>
> - When evaluating nominees (phase 2), the protocol systematically treats in-firm nominations as less "valuable" in its scoring system.
>
> - The final selection takes into consideration the size of the firm that nominees belong to and ensures balanced representation of all firm sizes.
>
> [Id. at ¶20.]

The GSG report found that the evaluation stage of the *Super Lawyers* process consists of "an exhaustive and very systemic screening of the nominee pool by trained researchers[,]" where points are allocated to nominees based on a set of 12 different objective criteria of professional achievement together with the peer recognition balloting. Id. at ¶21. The report concludes that

consistency and objectivity are achieved by this process, important components for survey research in the area of social sciences. Thus, the GSG report concludes that the combination of the balloting process and the evaluation process resulted in a nominee pool representing approximately 20% of New Jersey's lawyers. Id. at ¶25.

The GSG report also found that the Blue Ribbon Panel evaluations, by practice area, was an important component of the *Super Lawyers* methodology because the top practitioners in each specialty area "uniquely have the specialized knowledge to be able to evaluate the candidates thoroughly[,]" and "is the standard way of selecting the winners of honors and awards in most fields of humanities and sciences." Id. at ¶26.

The GSG report was particularly complimentary of the final selection process, where the number of lawyers selected for the list is based on their weighted cumulative scores from the general balloting, research evaluation and Blue Ribbon Panel balloting and is equal to no more than 5% of the active resident bar. The report concludes that the cumulative score is thus based on both objective achievements and the subjective opinions of peers, weighted in such a way that no single factor or group of similar factors is solely responsible for a lawyer's selection.

the report also emphasized that selecting nominees by firm size is an additional check to eliminate a large-firm bias in the balloting and selection process.

In response, the Committee presented the report of Dr. Stanley Presser, a professor of Sociology at the University of Maryland, with more than 30 years experience as a survey methodologist. See Exhibit AG-41 (listing his qualifications on pages 4 through 8). Professor Presser identified three fundamental flaws based on his review of the Super Lawyers methodology, stating:

> These are [1] the encouragement of in-firm nominations in the reputation surveys, [2] lack of independence between the construction of the achievement measures and the construction of the reputation measures, and [3] differential selection of lawyers by firm size.
>
> [Id. at 1-2.]

Professor Presser explained that lawyers have an incentive to misreport the qualities of their partners; thus, permitting in-firm votes results in a bias in favor of large firms by directly giving large-firm attorneys more opportunities to gain points from the reputation surveys, and by indirectly giving large-firm attorneys a greater opportunity to accumulate points for achievement. Id. at 2. He stated "[t]his is because the reputation points

assignments and the achievement points assignment were not conducted independently[,]" noting that the lawyers who were researched, and therefore had the opportunity to received achievement points, were mainly those who had received points from the reputation surveys. Ibid.

Professor stated the appropriate methodology would have been not to permit in-firm voting, and to allow all attorneys to receive points for achievements, concluding as follows:

> Instead, the Super Lawyers list was created by making separate selections within categories defined by firm size (thereby using different point cut-offs for lawyers in different size firms). This was apparently done to offset the point system's bias against lawyers in smaller firms. But if the rationale for making the final selection within size categories was to ensure that attorneys from each category were represented on the final list in proportion to their representation in the population, the procedure failed. Whereas about two-thirds of New Jersey lawyers practice in firms of 10 or less, this is true for only about one-third of the Super Lawyers. If the rationale for making the final selection within size categories was not to ensure that attorneys from each category were represented in proportion to their representation in the population, then the use of different point cut-offs for lawyers in different size firms was arbitrary (as was the decision to delete from the final list some lawyers in firms that had many members above the cut-off score).
>
> [Id. at 2-3 (footnote omitted).]

Woodward-White, Inc. submitted the July 10, 2007 report of Edward M. Mazze, Ph.D., professor of Business Administration at the University of Rhode Island. See Exhibit BL-5. Professor Mazze's extensive experience and qualifications in the areas of marketing and advertising are set forth in his report. Id. at 2-3. He defined the scope of his report, as follows:

> This report is submitted pursuant to my retention in the above-referenced matter on behalf of *The Best Lawyers in America*, a biographical directory published by Woodward/White, Inc. I have been asked to review Opinion 39 of the Committee on Attorney Advertising appointed by the Supreme Court of New Jersey ("Opinion 39") and provide an opinion regarding the use of the term "best lawyers" in advertisements by attorneys. I will also provide an opinion about whether the inclusion of this recognition in an attorney's advertisement is considered false or misleading and whether the designation, by itself, compares a lawyer's services with other lawyer's services creating a misleading expectation about the results a lawyer can achieve for a particular client.
>
> [Id. at 2.]

Professor Mazze first explained that the use of a peer-review nomination and selection process is generally accepted as an essential component of evaluating professionals, since feedback from colleagues "is a value-added process since professionals who are widely known for

excellence in their own work are best suited to evaluate the work of their colleagues." Id. at 6. After reviewing the methodology and criteria in detail in his report, Professor Mazze concluded:

> It is my opinion based on independent research including a review of the materials listed earlier in this report[61] that the methodology used by *The Best Lawyers in America* for the nomination and selection of lawyers for inclusion in the directory is peer-review driven, selective and transparent and described in detail in the directory and on its web site. The methodology is simple to understand. The voting pool is available for inspection. The names included in the directory come from nomination using a peer review survey within each specialty and each jurisdiction. The directory is well respected and widely accepted in the legal profession as a reputable source of information for users of legal services. The criterion for inclusion in the directory appears in the directory and on the directory's web page.
>
> [Id. at 8.]

In concluding that use of the terminology "Best Lawyer" is not misleading when used in attorney advertising to identify a lawyer whose name appears in The Best Lawyers in America, Professor Mazze stated that such a listing is only one fact, among others, which a consumer may or may not consider in making the selection of an attorney. Id. at 10. He elaborated, as follows:

[61] The list of materials reviewed by Professor Mazze is contained on pages 3 and 4 of the report.

A listing in the directory is not a predictor of future results or a statement of comparison to the work of other attorneys. The listing, by itself, creates no expectation about results. The attorney was selected by his/her peers for inclusion in the directory.

The listing does not suggest any greater degree of professional qualifications. The methodology used in developing the listing appears in the publication and on the publisher's web site. The listing is an additional piece of information that the reader can consider in selecting an attorney. The listing would be misleading if the designation were available to any attorney who paid a fee without regard to the attorney's qualifications.

When using the listing in an advertisement, "Best Lawyers" should be in italics or some other typeface along with a reference to the web site where the reader can read the standards for inclusion in the directory.

An advertisement that included the designation should say the following: "Included in *The Best Lawyers in America*, a publication of Woodward/White, Inc." or "Listed in *The Best Lawyers in America*, a publication of Woodward/ White, Inc." The identification of the web site can appear under the listing so that the reader can obtain information about the process and criteria on how the designation was obtained.

It is my opinion based on a review of the materials listed in my report and my experience and education in advertising and marketing that the use of the designation "Best Lawyer" is not misleading or a misrepresentation of facts if the individual is listed in the directory. It is also my opinion that the title "Best Lawyer" in itself does not claim the lawyer to be superior to other lawyers in education, experience or success. The listing does not violate the Rules of Professional Conduct of Attorneys or some other law.

[Id. at 10-11.]

Professor Mazze also concluded that the use in attorney advertising of citation inclusion in The Best Lawyers in America is not a form of comparative advertising because it does not reference the attorney's competition nor does it discredit or disparage other attorneys or law firms, and does not claim or imply superiority with respect to that attorney's services. Id. at 11-12.

In response, the Committee produced a second report of Dr. Presser, evaluating the methodology used to identify lawyers for inclusion in The Best Lawyers in America. See Exhibit AG-40. Professor Presser first noted that the Best Lawyers list, like any reputational survey, is affected by the decision about whose judgments are considered in preparing the list. Id. at 2.

After reviewing the methodology utilized in compiling the list, Professor Presser found it is skewed disproportionately toward large law firms, with over half of the New Jersey list consisting of attorneys from firms of 50 or more lawyers. Ibid. He also concluded that the procedures utilized also produced a gender bias, with a disproportionate number of men identified as Best Lawyers, with only approximately 8% of those on the New Jersey list

being women. Id. at 3. He reached that conclusion based on the fact that, although nominations to the list can be accepted from any source, they consist almost entirely of lawyers on the previous year's list and those lawyers nominated by lawyers on that prior list or from marketing directors of large firms. Id. at 2. Professor Presser expressed concern that the first edition's list was complied by the authors, Harvard Law School graduates, consulting their classmates who joined large firms as a starting point, thus resulting in a large-firm bias that was carried forward into subsequent editions. Ibid. Professor Presser explained his conclusions, as follows:

> Such biases are not inevitable in a reputational survey. A random sample of lawyers could be drawn and the respondents asked to nominate the individuals they consider the best in their practice areas. With a randomly drawn sample, there would be no bias against lawyers of any type, whether solo practitioners, women, or minority group members. With appropriate safeguards to prevent self-interest from influencing the results (e.g., ensuring that lawyers did not nominate members of their own firms), this would accurately convey the judgments of the New Jersey legal community about the best lawyers in the State. By contrast, the bias in the procedures used to compile the Best Lawyers list means that the list does *not* accurately represent the judgments of the New Jersey legal community.
>
> [Id. at 3 (footnote omitted).]

Finally, the Committee submitted into evidence the expert report of Professor Ravi Dhar of the Yale School of Management, Yale University. See Exhibit AG-42. Professor Dhar has an extensive background and experience in consumer behavior and consumer psychology, and in the areas of marketing and advertising. Id. at 3-4 and 13-22. In explaining his charge in preparing the report, Professor Dhar stated, in pertinent part:

> I was asked to provide an expert opinion on the exact nature of actual or implied representation with respect to the advertisements that appear either in the stand alone "Super Lawyers" magazine or as advertising inserts such as in the *New Jersey Monthly* magazine as well as individual advertisements that may be placed by attorneys mentioning the "Super Lawyer" or "Best Lawyer" designation in their communication and attorney advertising materials. Specifically, I assessed the nature of inferences drawn by average consumers who are prospective purchasers of legal services based on the designation "Best" or "Super" that appear in the attorney's advertising. I also assessed the likelihood that the use of the designation "Best" or "Super" is likely to be inferred as being relative to other lawyers in terms of the quality of the attorney's services even in the absence of explicit comparisons to other attorneys.
>
> [Id. at ¶7.]

In his report, Professor Dhar explained that consumers have access to an immense amount of information in our

society, and that consumer research suggests that the consumer choice process in product selection often focuses attention on information selectively, such as information that is prominent or salient. Id. at ¶11. This, he noted "increases the likelihood that prospective customers rely disproportionately on these designations in choosing among different attorneys. This is especially the case when a consumer is looking at several advertisements and only one of them has the 'Best Lawyer' or a 'Super Lawyer' designation." Ibid.

Professor Dhar went on to opine that the likelihood of making an inference from designations in advertising is determined by product category, with there being a greater susceptibility to making inferences when the consumer is less familiar with a product category and has limited prior-purchase experience in that category. Id. at ¶12. He concluded that designations such as "Super Lawyers" or "Best Lawyers" are more likely to result in forming favorable inferences about the service quality of an attorney and greater weight in evaluating the attorney or law firm. Id. at ¶¶12-13.

Addressing the comparative advertising issue, Professor Dhar also concluded that use of the terms "Best" and "Super" in describing a lawyer will naturally refer to

an inference concerning the quality of professional services in relations to lawyers who do not have such designations. Id. at ¶15 (see also ¶16). Professor Dhar explained that "[r]esearch in cognitive psychology suggests that the positive feelings are elicited spontaneously upon exposure to certain stimulus such as 'best' or 'super' and the positive feelings generated by these words translate to favorable perceptions to the attorney's service." Ibid. He then states, "[i]n my opinion, this context around the usage of the word reinforces the expectations about obtaining better outcomes when an attorney with those designations is hired." Ibid.

In specifically considering the effect on consumers of the New Jersey Super Lawyers Special Advertising Sections appearing in New Jersey Monthly, Professor Dhar stated:

> While all the pages of the "New Jersey Super Lawyers" that appear[] in the New Jersey Monthly are labeled as a "special advertising section", the section itself has profiles that look like articles as well as individual advertisements. The popularity of this type of advertising in recent years is based on its higher credibility. The term advertorial is used to refer to such sections as they are often alleged to blur the difference between commercial and editorial content. Consumer research suggests that even if at the time of reading, a customer aware that the article is an advertisement, this information may not be salient on a later date when the customer is making a choice among attorneys. A reader of

> the Super Lawyer magazine may also assume that the profiled lawyers are not actually advertising but rather profiled because of their prominence and performance in providing legal services.
>
> [Id. at ¶17.]

Professor Dhar thus concludes that use of the designations "Best Lawyers" or Super Lawyers" in attorney advertisements implicitly compares the attorney's services with that of other attorneys, and that these designations, as currently used, conveys to consumers an expectation of a better quality of legal services available in relation to similar legal services from attorneys not carrying those designations. Id. at ¶19.

As noted in Part II, all counsel were permitted an opportunity to submit position papers concerning these expert reports, and they are contained in Appendix Q.

Scientific, technical, or other specialized knowledge is admissible through expert opinion if it will assist the trier of fact in understanding the evidence or if it will assist in determining a fact in issue. N.J.R.E. 702. To be admissible, the evidence must concern subject matter that is beyond the ken of the factfinder; the field testified to must be at a state that the expert's opinion is sufficiently reliable; and the witness must have sufficient expertise in that area in order to offer such

testimony. Creanga v. Jardal, 185 N.J. 345, 355 (2005). Moreover, to be admissible and considered, the expert cannot express a "net opinion," one that is based on bare conclusions untethered to facts. Id. at 349. Essentially, the expert opinion must be based on facts or data perceived by or made available to the expert at or before the hearing, id. at 360, and requires the expert "to give the why and wherefore of his expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996).

Here, the expert reports submitted do not express net opinions because they are rendered by experts in the field of marketing, polling and advertising based on an analysis of specific peer-review rating methodologies. However, these expert opinions are not of particular assistance in focusing on the issues in this matter. Specifically, those issues center on whether attorney advertising of one's inclusion in the New Jersey Super Lawyers or The Best Lawyers in America lists violates: (1) RPC 7.1(a)(3) prohibiting comparative advertising and, if so, should the Rule be amended to permit same and, if so, under what conditions; and (2) whether such advertising violates RPC 7.1(a)(2) because it is likely to create an unjustified expectation about the results the lawyer can achieve.

It does not take an expert to determine whether the use of superlatives in such advertising implies comparison and is thereby potentially misleading, nor does it take an expert to determine whether the use of superlatives may create potentially in the consumer an unjustified expectation about the results the lawyer can achieve. These determinations are within the ken of the factfinder given the breadth of this record; expert opinion was not needed to reach these conclusions.

The record also provides a sufficient basis for the factfinder to conclude that in devising a peer-based rating survey of professionals there are any number of methodologies and formulae that can be employed in arriving at a listing that rates and ranks attorneys in a quality-of-service manner. As has been demonstrated by this record, and certainly highlighted by the expert reports, all of the methodologies reviewed in this Report are different, and all can be subjected to a certain amount of criticism, and some can certainly be modified to achieve certain perceived improvements in result.

Each methodology is unique and some have stood the test of professional recognition over time. The focal questions remain: (1) does a lawyer's advertising of his or her inclusion in these lists constitute a violation of RPC

7.1(a)(2) or RPC 7.1(a)(3); (2) do these rules constitute a permissible manner in the regulation of commercial speech in achieving the State's interest to protect consumers from misleading or deceptive information; and (3) should these rules be interpreted, or modified, in a manner that would permit attorney advertising of inclusion in such lists and, if so, under what conditions.

Those questions can only be answered, not through application of expert opinion, but rather based on application of the constitutional principles discussed in Part II of this Report, and the balancing of the legitimate State interest of regulating attorney advertising in a manner that protects consumers from false, misleading or deceptive, as balanced with adherence to those constitutional principles.

IX. AMICUS CURIAE BRIEFS.

There have been two amicus curiae briefs filed in this matter. The United States Federal Trade Commission (FTC) filed a brief supporting the arguments of petitioners and intervenors seeking to vacate Opinion 39. The Supreme Court Board on Attorney Certification (Board) has filed a brief expressing concern that the manner of attorney advertising through use of the superlatives "Super Lawyers" and "The Best Lawyers in America" may have a deleterious

effect on the New Jersey Attorney Certification Program set forth in R. 1:39.

The FTC is an agency of the United States with primary responsibility for enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, and for stopping deceptive and misleading advertising practices. See 15 U.S.C.A. § 45. The FTC encourages competition in the licensed professions, including the legal profession, and has routinely sought leave to intervene in matters concerning the regulation of attorney advertising. In its brief, the FTC more specifically outlines its concerns with respect to attorney advertising as follows:

> Decisions regarding attorney advertising raise important policy concerns, such as preventing statements that would mislead lay people and potentially undermine public trust in lawyers and the legal system. While deceptive advertising by lawyers should be prohibited, Courts and other state policy makers should be careful not to restrict unnecessarily the dissemination of truthful and non-misleading advertising that may help consumers make more informed choices. Overly broad restrictions of truthful and non-deceptive information are likely to harm consumers of legal services by denying them useful information and impeding competition among attorneys. Accordingly, consumers are better off when policy makers address concerns about potentially deceptive advertising with narrowly tailored restrictions.

In its brief, the FTC argues that RPC 7.1(a)(2) and RPC 7.1(a)(3), and now Opinion 39 unnecessarily restrict truthful and non-misleading advertising and thus harms consumers. The FTC notes that there are a wide variety of lawyer-rating systems employed in the United States, including but certainly not limited to Super Lawyers and The Best Lawyers in America, each with its own unique review and rating methodology that are available for consumer review in print and on websites. The FTC maintains that the merit, quality and validity of those systems is best determined in the marketplace. The FTC recommends that the Court vacate Opinion 39, and adopt a policy that exists in an overwhelming number of states by revising these Rules to permit comparative attorney advertising as long as it is not false and misleading. In the event the Court determines that advertising one's inclusion in a Super Lawyers of The Best Lawyers in America list is potentially misleading, the FTC urges that the Court adopt a less-restrictive remedy than a per se prohibition, such as requiring disclosures or disclaimers.

The FTC further argues that implementation of Opinion 39 would reduce the amount of information available to New Jersey consumers seeking legal representation, and would be

likely to reduce competition among attorneys to the detriment of consumers, noting that

> FTC policy states that truthful and non-deceptive comparative advertising "is a source of important information to consumers[,] assists them in making rational purchase decisions[,] encourages product improvement and innovation, and can lead to lower prices in the marketplace." 16 C.F.R. § 14.15(c). When the state prohibits the free flow of commercial information, the incentive to compete will be weakened, and consumer welfare will be reduced.
>
> [Footnote omitted.]

The FTC urges that if concerns about deceptive advertising remain, they are better addressed by requiring more information in the form of disclosures, rather than through restrictions on the flow of truthful information to consumers, asserting:

> Almost all states permit truthful, non-deceptive comparative attorney advertising, and many have adopted narrow disclosure requirements to address concerns that consumers may be misled. Every state prohibits false and misleading advertising but, with the exception of New Jersey, Alabama and Oregon, every state either expressly allows comparative advertising that may be substantiated or evaluates comparative advertising on a case-by-case basis to determine if it is misleading or deceptive.
>
> [Footnote omitted.]

The FTC urges that any concerns that certain comparative claims could mislead consumers about the results lawyers can achieve be addressed by a narrower rule than one banning all comparative titles.

In its amicus curiae brief, the Board of Attorney Certification expressed concern that attorneys may have no incentive to proceed through the rigorous and time-consuming specialist certification process if they can, instead, rely upon being able to advertise their inclusion in the Super Lawyers or The Best Lawyers in America lists. The Board specifically asserts that

> if this form of advertising were to flourish in New Jersey, it may lead to fewer and fewer attorneys choosing the more difficult process of applying for attorney certification, preferring instead to find one's name in publication . . . under the heading of *Best Lawyers in America* or *Super Lawyers*. That would not serve the public's interest as the certification program was created to assist the legal consumer in selecting an attorney with a demonstrated level of expertise. All of this is for the protection of the public.

The Board expressed the additional concern as to whether members of the public would be able to understand the difference between a "certified attorney" and a "best lawyer" or "super lawyer" without further information or language explaining that inclusion in a peer-review rating survey does not mean those attorneys have been tested by an

approved authority. The Board contends that the use of superlatives such as "best" or "super" in attorney advertising has the potential to mislead the consumer about the attorney's abilities and chances of success.

The arguments of the Board focused on the importance of the attorney certification, stating:

> It was designed to effectuate a number of desirable goals, including assisting the public in selecting a capable and qualified attorney to handle a matter in a certification practice area, advancing the quality of representation and lawyering in those practice areas, encouraging continuing legal education in a currently non-mandatory legal education state, and improving the delivery of legal services to the public. As noted, these laudable goals have been accomplished through a reliable and comprehensive screening process[.] . . .
>
> The certification requirements serve to assure the public that board certified attorneys have the requisite experience, skill, knowledge, preparation, education, and ethical standards to hold themselves out as qualified in their particular area(s} of specialty. . . .

Because there are no similar requirements for inclusion in the Super Lawyers or The Best Lawyers in America lists, the Board maintains that superlative terms like "specialist," "best, and "super" have the potential to mislead the public in violation of RPC 7.1(a)(1) and (3).

The Board requests that if the Court were to permit attorneys to advertise their inclusion in the Super Lawyers or The Best Lawyers in America lists, then it should require a disclaimer similar to that required in RPC 7.4(d) when denoting specialty certifications other than those approved by the Court or the American Bar Association. Specifically, the Board recommends the following language be utilized:

> The "Super Lawyer" and "Best Lawyer" designations are not recognized attorney certifications by the Supreme Court of New Jersey or an authority approved by the American Bar Association, and they are the result of peer recognition only. The lawyer so designated [is/is not] an attorney certified by the Supreme Court of New Jersey or an ABA approved certifying authority.

X. CONCLUSION.

The legal profession is a competitive industry. As of October 26, 2006, there were approximately 79,640 attorneys licensed to practice law in New Jersey, with almost 55% of those admitted since 1991. Of the 79,640 admitted attorneys, 32,775 are engaged in the private practice of New Jersey law. See Exhibit AG-3 at 103. New Jersey is among the fastest growing lawyer populations in the country, with one lawyer for every 109 citizens in our State, which has a total population of 8,724,560. Id. at

50. It is estimated that by the year 2010, the total population of admitted lawyers in New Jersey will reach 90,000. Ibid.

Competition for clients in the legal profession thereby has given rise to a wide array of advertising and marketing strategies designed to develop clientele. Marketing entrepreneurs seeking to profit by obtaining a share of this growing attorney-advertising market have developed a menu of available advertising techniques to be applied through use of virtually all available media including, but not limited to, magazines, newspapers, direct mailings, television, radio, telephone book yellow pages and, more recently, on Internet websites. All of these techniques, of course, are designed to target consumers and business entities who may be seeking legal counsel.

Although all states require that attorney advertising be truthful and that it not be deceptive or misleading, the views of each state as to what constitutes deceptive or misleading lawyer advertising differ. The various approaches by states that have directly confronted the issues before this Court concerning attorney advertising of one's inclusion in a Super Lawyers or The Best Lawyers in America listing have been included in this Report in an

effort to demonstrate how those states have balanced the rights and benefits of commercial speech with the obligation to protect consumers from false and misleading attorney advertising. Those states have an underlying attorney-advertising regulatory scheme that differs from that in New Jersey; they generally prohibit comparative attorney advertising, but only if it cannot be verified, while New Jersey prohibits comparative attorney advertising per se.

Those states who have addressed the same issues in this matter have permitted comparative and quality-of-services advertising by lawyers, usually construing such advertising to be an implied comparison with the services of lawyers not contained on the listings, but finding there is either a subjective or objective basis for that comparison that can be verified by a disclosure and analysis of the underlying peer-review rating methodology, often imposing the additional requirement of a disclaimer designed to place these peer-review attorney rating lists in proper perspective for the consumer.

The petitioners and intervenors have argued that advertising of one's inclusion in the Super Lawyers or The Best Lawyers in America lists does not constitute "comparative or quality-of-service advertising" that fits

within the regulatory scheme or intent of RPC 7.1(a)(3). However, at a minimum, such advertising certainly constitutes an implied comparison as to the quality-of-service provided by those lawyers who are not included in the listings. Perhaps a distinction could be made between "direct" or "explicit" comparative advertising, which should be prohibited whether or not the comparison could be verified, and "implied" comparative advertising, which could be permitted if the basis for same can be verified through adequate and accurate disclosure of the basis for same, coupled with appropriate disclaimers. The problem, of course, is that RPC 7.1(a)(3) makes no such distinction.

The record in this matter contains an exhaustive review of the methodologies utilized by Key Professional Media, Inc., Woodward-White, Inc., and LexisNexis Martindale-Hubbell in compiling their lists of attorneys. Although each methodology can be criticized, and perhaps improved, it is very clear from this record that each is a comprehensive, good-faith and detailed attempt to produce a list of lawyers that have attained high peer recognition, meet ethical standards, and have demonstrated some degree of achievement in their field. It is absolutely clear from this record that these entities do not permit a lawyer to buy one's way onto the list, nor is there any requirement

for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists.

Interestingly enough, RPC 7.4(d) already permits, in effect, a form of implied comparative advertising, since an attorney may advertise his or her certification as a specialist or being certified in a field of practice if that "certification has been granted by the Supreme Court, or by an organization that has been approved by the American Bar Association." And, "[i]f the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer." (Emphasis added). The implied comparison permitted there is that those lawyers not listing such a certification or specialty in their advertisements are not so certified or specialized. Note also that RPC 7.4(d) injects the concept of a disclaimer. It seems arguably inconsistent to permit attorney advertising showcasing certifications issued by organizations that have not been approved, or even denied approval, as long as a disclaimer accompanies same, without

requiring any inquiry into the basis for those types of certifications, while at the same time prohibiting, per se, advertising of one's inclusion in a peer-review attorney rating list that uses superlatives. Indeed, RPC 7.4(d) seemingly would permit advertising of such certification by an organization that has no standards for inclusion other than payment of a listing fee, although arguably the provisions of RPC 7.2(c) (stating that a lawyer shall not give anything of value to a person for recommending the lawyer's services other than the cost of advertising or a referral fee) might prohibit same.

Likewise, the advertising of an "AV" rating from LexisNexis Martindale-Hubbell, whether presented as "the highest rating given," or not, certainly implies comparison. Indeed, LexisNexis Martindale-Hubbell, which publishes a well-respected and long-tenured law directory, has tapped the market of consumers seeking legal counsel on the Internet through use of its various websites, particularly Lawyers.com and Attorneys.com, where Martindale-Hubbell peer-rated attorneys can subscribe to those websites for a fee, with the search engines of those websites directing consumers to listings and ratings for those subscribing attorneys.

The record establishes that LexisNexis Martindale-Hubbell also partners with various recognized Internet search engines such as "Google" and "Yahoo!" to obtain search-listing priority. It is not hard to imagine that consumers searching the Internet for an attorney would start their search with the keywords "lawyers" or "attorney," typing same into the required search dialog box. Try it. Using the word "lawyers" on the "Google" search engine produced 110,000,000 results, with Lawyers.com the second-listed site; using the word "attorneys" produced 107,000,000 results with Attorneys.com the fifth-listed site. See Appendix R. Similar results are obtained using "Yahoo!" Ibid. That is the result of "partnering," and is a market-controlled attorney advertising device. The Lawyers.com website proudly states that its website and Martindale.com are the "#1 destination to find attorneys according to comScore Media Metrix custom experts," with eight million pages on their websites being viewed each month. See Appendix R at A-301. As the record also reflects, these websites contain disclaimers fully informing consumers that they are not an attorney referral services; that the attorney listings are paid advertisements; and that the website listing does not constitute an endorsement of those attorneys.

Reason and logic inform us that an important consideration for a consumer searching for legal counsel is information relating to lawyer quality and competence. See Felmeister, supra, 104 N.J. at 525-26. In 1986, the Court declared that the public would be well served by more information about the legal system and attorneys to assist consumers in the selection of an attorney to enforce and exercise their legal rights, and speculated that attorney advertising was perhaps the best way to meet those needs. Id. at 524. The record supports the conclusion that since some time after Felmeister decision, the consumer market has been flooded with a seemingly endless flow of information concerning lawyers, the legal system, as well as marketing companies and websites providing readily-available evaluations and ratings of lawyers. Consumers are regularly bombarded with such information, and it is available at their fingertips with the click of a mouse. See, e.g., Exhibit JP-1 through JP-23 (illustrating several of the hundreds of available sources of such information).

The unavoidable reality is that lawyers advertise through a wide range of commercial media, and that consumers in large numbers peruse those advertisements when searching for an attorney, whether it be through an Internet search, by reading a special advertising section

in a magazine, or leafing through the yellow pages. It is evident that the Twenty-First Century consumer is more sophisticated than ever and actively seeks information prior to making purchase choices, including the selection of legal representation.

In New Jersey, RPC 7.1(a)(3) specifically defines comparative advertising as being, per se, misleading or deceptive. Whether the Court finds a valid constitutional basis for such an absolute rule in the context of this record, is a policy decision to be arrived at through application of the balancing test so often cited in this Report.

There is a basis to interpret that RPC 7.1(a)(3) as not being intended to prohibit implied comparisons on a per se basis. Certainly, implied comparisons can be at least potentially misleading, particularly when superlatives such as "super," "best" or even "highest rated" are contained in attorney advertisements. The advertising opinions of other states that have confronted these issues, discussed in Part III of this Report, do provide some guidance in terms of methods for eliminating potentially misleading statements through use of certain standards and disclaimers or explanatory language in attorney advertisements listing inclusion in such lists. Collectively, the following

regulatory components have been extracted from those decisions to provides some guidance to the Court should it elect to modify or interpret the New Jersey Rules of Professional Conduct in a manner that would permit attorney advertising of one's inclusion in these subject lists:

1. The advertised representation must be true;

2. The advertisement must state the year of inclusion in the listing as well as the specialty for which the lawyer was listed;

3. The basis for the implied comparison must be verifiable by accurate and adequate disclosure in the advertisement of the rating or certifying methodology utilized for compiling the listing or inclusion that provides a basis upon which a consumer can reasonably determine how much value to place in the listing or certification; as a minimum, the specific empirical data regarding the selection process should be included (e.g., in a peer-review methodology, the number of ballots sent and the percentage of ballots returned; see Appendix K and pp. 120-21, infra.);

4. The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion;

5. The rating or certification cannot have been issued for a price or fee, nor can it have been conditioned on the purchase of a product, and the evaluation process must be completed prior to the solicitation of any advertising, such as for a special advertising supplement in a magazine or other publication;

6. Where superlatives are contained in the title of the list itself, such as here, the advertising must state and emphasize only one's ***inclusion*** in the Super Lawyers or The Best Lawyers in America list, and ***must not*** describe the attorney as being a "Super Lawyer" or the "Best Lawyer;"

7. Likewise, claims that the list contains "the best" lawyers or, e.g., "the top 5% of attorneys in the state," or similar phrases are misleading, are usually factually inaccurate and should be prohibited;

8. The peer-review or certification methodology must contain proper usage guidelines that embody these requirements and must be adhered to in the advertisement;

9. The advertising must be done in a manner that does not impute the credentials bestowed upon individual attorneys to the entire firm;

10. The peer-review or certification methodology must be open to all members of the Bar;

11. The peer-review rating methodology must contain standards for inclusion in the lists that are clear and consistently applied; and

12. The advertisement must include a disclaimer making it clear that inclusion of a lawyer in a Super Lawyers or The Best Lawyers in America list, or the rating of an attorney by any other organization based on a peer-review ranking is not a designation or recognized certification by the Supreme Court of New Jersey or the American Bar Association.

These are but a few examples of regulatory requirements and potential disclaimer or explanatory language that would be designed to mitigate any potentially

misleading information based on inherently comparative attorney advertising, RPC 7.1(a)(3), or advertising that could potentially create an unjustified expectation about the results a lawyer can achieve, RPC 7.1(a)(2). How the right of commercial free speech protected by the First Amendment is balanced with the State's interest in protecting the public from the dissemination of deceptive or misleading information in attorney advertising, and whether the use of disclaimers, qualifying or explanatory language can sufficiently alleviate the potential for such misleading information in the circumstances presented is ultimately a policy decision that can only be made by the Court. The experience of other states, the record developed, and the content of this Report hopefully provide the Court with an appropriate basis for such a decision.

Respectfully Submitted,

Dated: June 18, 2008

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Robert A. Fall, J.A.D., retired