

**SUPREME COURT OF NEW JERSEY**

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IN RE OPINION 39 OF THE COMMITTEE : No. 60, 003  
ON ATTORNEY ADVERTISING : E-18/19/20-06  
*[Remainder of caption on*  
*inside page]* :

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**COMMENTS ON REPORT OF SPECIAL MASTER**

SUBMITTED ON BEHALF OF INTERVENOR-PETITIONER  
KEY PROFESSIONAL MEDIA, INC. AND INDIVIDUAL  
PETITIONERS IN CASE NO. E-19-06

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NEW JERSEY MONTHLY, LLC,  
*Petitioner,*

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**E-18-06**

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*Petitioners,*

**E-19-06**

KEY PROFESSIONAL MEDIA, INC.,  
  
*Intervenor-Petitioner,*

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STUART A. HOBERMAN, ESQ.,  
*Petitioner,*  
and

**E-20-06**

WOODWARD-WHITE, INC., publisher of  
"THE BEST LAWYERS IN AMERICA,"  
*Intervenor,*

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LEXIS-NEXIS, a Division of Reed  
Elsevier, Inc., MARTINDALE-HUBBELL,  
*Intervenor,*

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v.

COMMITTEE ON ATTORNEY ADVERTISING,  
*Respondent.*

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**PRELIMINARY STATEMENT**

Intervenor-Petitioner Key Professional Media, Inc. ("KPM") is the publisher of *New Jersey Super Lawyers*® magazine. On June 30, 2008, the Clerk of this Court issued the Report of Special Master Robert A. Fall, J.A.D., Retired (the "Report," cited as "R\_\_."). An accompanying Memorandum stated that parties wishing to comment on the Report must file briefs no later than September 15, 2008. Intervenor-Petitioner KPM and the six individual Petitioners in Case E-19-06<sup>1</sup> submit this Brief in accordance with the Clerk's Memorandum.

The United States Supreme Court and the New Jersey Supreme Court have resoundingly declared that lawyer advertising conveys valuable information to consumers and is deserving of First Amendment protection. In particular, this Court has recognized that current information about a lawyer's reputation is

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<sup>1</sup> For convenience, arguments made on behalf of KPM shall be deemed to incorporate the six individual petitioners as well. Exhibits are abbreviated in the same manner as in the Report (see R Appendix ("Appx") A (exhibit list)). Note, however, that "KPM" exhibits are sometimes referred to as "PK," the designation under which they were premarked. Some of the documents in the record are also bound in the Appendix to KPM's petition for review ("Pa\_"). References to hearing transcripts are as follows:

1T = April 20, 2007	2T = June 12, 2007
3T = October 9, 2007	4T = October 10, 2007
5T = October 11, 2008	6T = January 7, 2008
7T = January 8, 2008	

precisely what consumers want and need. Such information dwarfs in importance the bland generalities typical of web page biographies -- the law school attended years ago, courts of admission, or the lawyer's boast as to his or her own expertise, gingerly phrased in terms of "experience."

The permissive principles announced in these cases require that any third-party accolade reported in a lawyer's advertisement be bona fide. That is, a lawyer cannot report what merely *purports* to be a third-party accolade but is actually a sham, purchased for money. Truthful information, however, may and indeed must be permitted.

The Committee did not introduce a single piece of evidence -- not a witness, not a document, not even a hearsay anecdote -- that any consumer has ever been misled by an advertisement that truthfully discloses a lawyer's selection by *Super Lawyers*® magazine. The hearings before the Special Master probed the nature and validity of *Super Lawyers* attorney ratings and the intricate details of how KPM, an independent publisher, exercises its editorial judgment in assessing the peer recognition and achievement of lawyers. That evidence demonstrated -- and the Special Master found -- that *Super Lawyers* ratings are bona fide and that they are not misleading.

The world of consumer information has changed, particularly as internet access has become ubiquitous. Consumers want and

expect comprehensive information about their purchases, including purchases of legal services. Services to fill that need have proliferated. Attempts by the State to stifle such information are not merely inadvisable and impermissible; they are quixotic and Canuteian.

A lawyer's truthful statement that he or she has been selected by an independent publication, such as *Super Lawyers* magazine, is not the equivalent of a prohibited "comparison" and does not raise "unjustified expectations" in violation of the ethical rules, *RPC* 7.1(a)(3) and *RPC* 7.1(a)(2). And if the regulations were interpreted to prohibit such advertisements, they would run afoul of well-established First Amendment case law. Advertisements reporting bona fide third-party accolades are permitted; Opinion 39 must be vacated.

#### **PROCEDURAL HISTORY**

##### **A. Background to the Report**

The procedural history of this case has been exhaustively summarized by the Special Master. (R17-46) The critical procedural events, for purposes of this Brief, are as follows.

On July 24, 2006, the Committee on Attorney Advertising (the "Committee") issued Opinion 39 (copy at Pa1), which concluded that it was impermissible for attorneys to communicate their selection by *Super Lawyers* magazine or even to participate in *Super Lawyers* surveys. Opinion 39 cited the *RPC* 7.1(a)(3)

ban on comparative advertising and the *RPC* 7.1(a)(2) ban on advertising that creates unjustified expectations. (R18-22) On August 14, 2006, KPM filed in this Court a motion to intervene, which was granted, and a petition for review of Opinion 39. On September 6, 2006, this Court granted KPM's motion to stay the effect of Opinion 39. (R24)<sup>2</sup>

On March 23, 2007, after briefing, this Court granted KPM's petition for review and referred the matter to a Special Master, the Hon. Robert A. Fall, J.A.D. (retired), for development of an evidentiary record. (R25)

Before the Special Master the Committee obtained extensive and intrusive discovery of KPM's editorial process. (R35) Indeed, KPM furnished all of the pertinent data as to each attorney (whether selected or not) "touched" by the *Super Lawyers* selection process. That information, encompassing some 7,447 individual attorneys, was produced in spreadsheet form that permitted the Committee to analyze it readily.<sup>3</sup> (R217; Ex. AG-16 [corrected])

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<sup>2</sup> The State Bar Association also moved for a stay.

<sup>3</sup> The spreadsheet remains subject to a confidentiality order because it would reveal confidential information about attorneys (although names of attorneys and firms were redacted) as well as proprietary business methods of KPM. (R217) The information from the spreadsheet that was pertinent to the Special Master's analysis is revealed in the Report.

Evidentiary hearings occurred in the period October 2007-January 2008. KPM's witnesses testified on October 9, 10 and 11, 2007. (R40) By consent, both sides' expert reports were accepted in evidence without the experts' live testimony. (R45-46) The Committee and KPM also agreed to introduce by stipulation certain additional facts -- primarily the analysis of the data on the KPM spreadsheet. (R218 & Appx P)

On or about April 2, 2008, the parties presented their proposed findings of fact, conclusions of law and written summations. (R46)

**B. The Special Master's Report**

On June 18, 2008, the Special Master issued his Report. On June 30, 2008, this Court released the Report.

As to KPM, the Special Master's key factual findings are as follows:

(a) "[I]t is very clear from this record that [KPM's methodology] 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." (R296)

(b) "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." (R296-97)

(c) "[T]he selection procedures employed by [KPM] are sophisticated, comprehensive and complex." (R212)

(d) The Committee's accusation of bias in favor of large firms is incorrect. The KPM methodology contains sufficient "safeguards" in the form of limits on in-firm voting and separate selection of attorneys by firm tier-size. (R221-23)

(e) "[T]here is no empirical evidence in the record supporting the [Committee's] assertion that there is something flawed in the actual methodology of [KPM] itself that results in or supports a bias against women lawyers in the selection process." (R224)

The Special Master's key legal conclusions or recommendations are as follows:

(f) "In R.M.J., Zauderer, Peel and Ibanez,<sup>4</sup> [the U.S. Supreme 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 thus be unprotected by the First Amendment commercial speech doctrine." (R149)

(g) "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." (R149)

(h) *RPC* 7.1(a)(3) prohibits "comparative" advertising as misleading - a prohibition that is virtually unique. Although an attorney's advertisement of an honor or award might be interpreted as an "implied" comparison, other rules, such as *RPC* 7.4(d), authorize analogous "implied" comparisons. (R296-98)

(i) If *RPC* 7.1(a)(3) is interpreted as an "absolute rule" prohibiting "implied" comparisons, the Court must determine

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<sup>4</sup> The cases to which the Report refers, discussed herein, are: *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985); *Peel v. Attorney Registration & Disciplinary Com'n*, 496 U.S. 91, 105 (1990); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994).

whether such a rule has a "valid constitutional basis" under the First Amendment "balancing test." (R301)(See (f) & (g), above.)

(j) There is, however, "a basis to interpret ... RPC 7.1(a)(3) as not being intended to prohibit implied comparisons on a per se basis." (R301)

(k) The Report "extract[s] from" the rules and decisions of other States twelve "examples" of requirements, such as disclosures or disclaimers, 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)." (R302-03)

### **FACTS**

The Special Master's factual findings as to KPM are unassailable. They are firmly grounded in the record; indeed, the record lends no support to any contrary conclusion.

#### **A. Attorney Ratings and *Super Lawyers Magazine***

Peer-reviewed lawyer ratings have been part of the American legal landscape since Martindale-Hubbell introduced them in 1868. (R251) Then, the general public was not thought fit to judge members of the "learned professions," but those days are gone. Twenty-first century consumers will no longer, like customers of the fabled Hobson, meekly accept the choice offered to them. Consumers increasingly rely, in part, on peer reviews and professional surveys to choose heart surgeons, marriage counselors, investment advisors and, of course, lawyers. (R184, 300-01; NJM-6; JP1-23)

Although Martindale-Hubbell stood nearly alone for many decades, the field of lawyer rating publications has expanded to meet that consumer demand for information. (See *id.*) A recent entrant to the market for lawyer ratings is *Super Lawyers* magazine. *Super Lawyers* magazine is published by KPM, which is owned by the Opperman family (R189), the former owners of West Publishing Co., the most highly respected legal publisher in the world. It has published lawyer lists in its home state of Minnesota since 1991, and it has more recently expanded to review lawyers in every state. (R189-90) The first edition of *New Jersey Super Lawyers* appeared in 2005. (R153, 190)

*New Jersey Super Lawyers* magazine includes editorial content, consisting primarily of feature articles of interest to lawyers and lists of highly regarded lawyers in various practice areas. (3T22; see KPM4, 5 & 6) It also contains advertisements, in which lawyers refer, *inter alia*, to their inclusion in the *Super Lawyers* lists. (*Id.*) Those lists, as well as lawyer advertising, have also appeared in substantially similar form as special advertising supplements in *New Jersey Monthly* magazine. (See NJM1, 2 & 4.)

#### **B. Opinion 39**

Into this situation stepped the New Jersey Committee on Attorney Advertising. After receiving an inquiry from an attorney, it reserved decision for approximately eighteen

months, but gathered no evidence, held no hearings, and did not even contact KPM. (R155) It then published Opinion 39, which at one stroke (unless stayed) would have put *Super Lawyers* magazine out of business in this State. The Committee and its attorneys did not hesitate to publish the most extravagant, and negative, assumptions about the *Super Lawyers* selection process, based on no evidence at all. For example:

- a designation such as "Super" or "Best" misleads the public because claims about the quality of legal services are necessarily subjective, not objective;
- the *Super Lawyers* selection process is not based on "objective criteria" that are uniformly applied.
- the sale of advertisements "raises concerns that the designation may be considered to be one issued by an entity that is issuing 'certificates indiscriminately for a price.'" (Committee Response to Petition for Review 31-32)

The Committee banned all ads communicating a lawyer's selection by *Super Lawyers* magazine and, remarkably, even prohibited lawyers from privately expressing their opinions in *Super Lawyers* magazine surveys. Unlike the opinions of every other court or regulatory body that has considered this issue,

Opinion 39 does not appear to consider that the First Amendment might be implicated.

**C. Credible Evidence Supports The Special Master's Finding That *Super Lawyers Magazine* Is A "Comprehensive," "Good Faith" Rating Publication**

The Special Master has found, after discovery and extensive cross-examination, that the KPM methodology for developing the *Super Lawyers* lists is bona fide. (E.g., R296) The evidence establishes that Opinion 39 is wrong and that the Committee's express and implied allegations lack any basis in fact. KPM has exposed its entire, confidential evaluation process to scrutiny. For the convenience of the Committee and the Special Master, KPM even *created* a spreadsheet, containing all of the pertinent information about all of the approximately 7400 candidates. (Names and other identifying information were redacted.) And it produced that spreadsheet in Microsoft Excel format, so that the Committee's counsel could analyze the data or recalculate the scores of any candidate, to satisfy itself that the point system operated as described. (R217; Ex. AG-16[corrected]) That information confirmed in every respect what the public descriptions of the selection process had already demonstrated: that *Super Lawyers* magazine uses an honest, well-designed and sophisticated methodology in order to make judgments about the quality of legal services. (R212, 221-24)

KPM put on its direct case using only public, non-confidential information, through the testimony of two witnesses: its publisher, Bill White (3T; R188-200), and its director of research, Cindy Larson. (4T, 5T; R200-15) Lawyers themselves, they have assembled a large full-time staff of dedicated researchers and computer experts to amass and manage the huge amount of data required to make the ratings accurate and meaningful. The research process involves checking hundreds of print and online sources with respect to many thousands of lawyers. (R208-09)

Four guiding principles, as Mr. White conceived them, govern *Super Lawyers*. The lists are designed to be:

- *inclusive*, in that the profession would be eligible both to participate in the process and to be selected;<sup>5</sup>
- *representative* of the profession, in that a broad range of practice areas and firm sizes would appear on the lists;
- *multi-faceted*, in that the process would depend, not just on balloting, but on research and peer review, as a system of checks and balances; and

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<sup>5</sup> Survey participation is limited to attorneys licensed for more than five years. (R197) Selectees generally possess at least ten years of experience, although this not a rigid rule.

- *prestigious*, in that the final list would include no more than approximately 5% of licensed, resident lawyers. There is no magic about that figure, but it was felt to be more useful than either an "elite" listing of the top few lawyers (who typically are easily identifiable) or a more comprehensive listing of, say, the top half.

(R191-92) In short, the process is designed to do what a sophisticated consumer, given sufficient resources and time, would do to identify a superior lawyer, and to make the results available to the consumer who lacks such resources. (R200; 4T6)

Resulting from this process are the lists of selectees published in *New Jersey Super Lawyers* magazine (and reprinted in substantially similar form in a special supplement to *New Jersey Monthly*). (See, e.g., KPM-4, 5, 6; C-7, 8; NJM-1, 2, 4.)

Based on this evidence, the Special Master found that the *Super Lawyers* selection process is a "sophisticated" (R212), "comprehensive, good-faith and detailed" (R296) tool for measuring peer recognition and professional achievement. It applies a merit-based, legitimate rating system and it does not permit attorneys to influence selection by advertising dollars or other illegitimate means. (R296-97)

#### **D. Selection Is Independent Of Advertising**

KPM, like any publisher, aims to generate revenue and profits. Some publications, such as *Best Lawyers*, may profit partly or primarily from the sale of books. KPM has chosen a model that is advertising-based, the prevalent model in the magazine publishing business. Even venerable Martindale-Hubbell has adopted an advertising model for some aspects of its publishing business. (R185-87)

Reputable magazines have their own ethical code of "separation of church and state" between editorial content and advertising. (R192-94; see R154) (We must, by the way, set aside our parochialism and acknowledge that lawyers are not the only professionals with ethical standards.)

The Special Master accepted the testimony of Mr. White and Ms. Larson, and found as a fact that advertising plays no role in the *Super Lawyers* selection process. (R296-97, 192-94) All attorneys selected by *Super Lawyers* magazine are published in its print publications and listed at [superlawyers.com](http://superlawyers.com) without charge. (KPM-21) No one can pay to be included in the list or to be featured in an editorial story. (R192-94) Advertising is solicited only after the selection cycle, and only from those attorneys already selected. (*Id.*) The research and sales staffs are separate, and members of the sales staff are not permitted to interfere with selection. (R193) The selection process is

performed solely through a point system, which does not contain a category where advertising *could* be considered. Whether an attorney advertises is not even tracked in the selection process. (3T33; 4T97-98)

The Special Master's finding that selection is independent of advertising is not just supported, but compelled, by the documentary evidence as well. Stipulated statistics confirm what was already clear from the testimony. Of the lawyers in the 2007 list, 87% had not bought an ad the previous year, and 75% did not buy an ad in 2007. (R Appx P, Stip. ¶50) Of the 246 lawyers who dropped from the list between 2005 and 2006, 72 (nearly 30%) were advertisers or belonged to firms that were advertisers. (R 193-94)

The Committee never called a witness or introduced a document to support its charge that advertising influences selection. The Committee's related attempt to establish that the selection process favors big firms, because big firms buy advertisements, fell completely flat -- and the Special Master so found. (R221-23) Stipulated statistics demonstrated, moreover, that the smallest firms (1-9 lawyers) purchase 59% of ads, and that the largest firms (75 or more lawyers) purchase only 5%. (Appx P, Stip. ¶52 (Table P)).

**E. The Selection Process Occurs As Described**

The Special Master amply described the *Super Lawyers* selection process. That process is also described in the magazine (KPM-4, KPM-5 at 34, KPM-6 at 23); in the *New Jersey Monthly* special section (R159-60, 165, 173-75); in materials mailed to attorneys (KPM-19, 20, 21; R199-200); and at [www.superlawyers.com](http://www.superlawyers.com) ("selection process"). Those publicly-available descriptions fully describe the process so that a reader can determine that it is bona fide and legitimate.

The phases of the selection process, in short, are:

Step One: Creation of the candidate pool, primarily from balloting and the "star search" process. Lawyers cannot vote for themselves. Votes from, and for, colleagues in their own law firms are capped. In the point counting, out-of-firm votes are weighted more heavily than in-firm nominations. Archived votes from prior years count, but are discounted. (See KPM-10 (sample ballot and instructions); R201-04, 2044 n.45, 215, 219-20; 4T32-35; 5T7-11) Managing partners may nominate attorneys as well. (See *infra*; KPM-11; 4T37) To supplement the nominee pool beyond balloting, the *Super Lawyers* magazine research staff also conduct "Star Search," a review of 50 sources, such as the legal press, online databases, and rosters of bar groups, to identify additional worthy candidates. (R206-07; 3T48; 4T61-62)

Step Two: Independent research, in which lawyers are assigned points in twelve categories: recent verdicts and settlements; transactions; representative clients; experience; honors and awards; special licenses and certifications; position within law firm; bar and or other professional activity; pro bono and community service; scholarly lectures and writings; education and employment background; and other outstanding achievement. (R207-10; 4T42-63)

Step Three: Evaluation by a Blue Ribbon Panel ("BRP") of lawyers who received the highest point scores from Steps One and Two, in the same practice area as the lawyers being evaluated. (R210-11)

Step Four: Quality control. *Super Lawyers* magazine detects and eliminates suspected ballot manipulations such as "back scratching" and "block voting." (R203-04, 211-12) The staff also runs reports to identify factors that may merit additional scrutiny of a selection, such as length of practice and disciplinary problems. (R212-13) The lawyers selected are asked to return a data verification form. (R214; KPM-21)

Step Five: Selection by tier. The scores from the first three steps are weighted and aggregated. Candidates are then tiered according to law firm size in order to produce a representative sample from different sized firms. (R212-13)

Typically, lawyers from large firms must meet a higher point threshold than lawyers from smaller firms. (R223; 4T112-16)

Also introduced in evidence -- but sealed -- were the protocols, checklists and manuals that the research staff uses in compiling the *Super Lawyers* lists. These establish the system by which points are assigned to various characteristics or achievements of the lawyers. (R213) Perhaps most important was the spreadsheet (AG-16 [corrected]), in which KPM furnished the precise basis on which the point total was calculated for each lawyer (names were redacted). (R217) The Committee scoured that database and manipulated it in every conceivable way.

The Special Master found *no* evidence that the point totals, which determine selection, are driven by anything other than the numbers in that database. In short, the system is not one in which advertising or any other extraneous factor influences selection. The matter should end there. Neither the First Amendment nor the ethics rules impose any further requirements as a precondition of truthful speech.

**F. The Special Master's Rejection Of The Committee's Miscellaneous Criticisms Was Firmly Based On The Evidence Of Record.**

Nevertheless, the Committee has sniped at various aspects of the process. The Report explicitly rejects these criticisms as unfounded. As the Special Master implied (R213-14), some of these criticisms are trivial, in that they simply fault policy

choice A for not being B; doubtless they would be asserted with equal fervor if B and A were reversed. None detract from the value of the *Super Lawyers* rating system or the permissibility of an advertisement that reports selection by *Super Lawyers* magazine. We discuss some of them here.

### **1. Balloting is just one of several factors**

A common misconception, and a theme of the Committee's presentation, is that the *Super Lawyers* system is a simple vote, and that the other aspects, such as the Blue Ribbon Panels or research, are mere window dressing. As summarized in the Report, the selection process is a multifactor process that relies only partly on balloting.<sup>6</sup>

For example, of the more than 5000 lawyers in the 2007 candidate pool who had research points, 64% had no current year

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<sup>6</sup> Thus, for example, of all points awarded in 2007, BRP scores accounted for 27%; balloting for 34%; and research for 39%. (R Appx P, Stip ¶40)

The Committee's expert, Dr. Presser, is wrong when he writes that balloting is the gate through which all nominees must pass, and that therefore the remaining processes are not independent. The Committee itself has stipulated that "an attorney ... may come to the attention of *Super Lawyers* through a research protocol that entails reviewing dozens of lists and news sources (sometimes referred to in the record as 'Star Search'); may be nominated by a Blue Ribbon panelist; or may in some other way be brought to the attention of the research director or staff, triggering a research evaluation." (R Appx P, Stip. ¶1) For example, of the 5427 lawyers researched through 2007, nearly 2,000 had never received any current or archived votes. (R Appx P, Stip. ¶48)

ballot points (in-firm or out-of-firm votes) and 37% had neither current votes nor archived ones. (R222 & Appx P, Stip. ¶¶48, 14-25) In short, although it would not be mathematically impossible for a candidate to be selected based on outstanding balloting results alone, the stipulated statistics demonstrate that this does not occur to any significant degree. (R222)

**2. In-firm votes and Managing Partner votes are not unduly weighted.**

The Committee alleged that a lawyer could theoretically be selected based solely or primarily on in-firm votes or managing partner nominations. Of course, if *Super Lawyers* wished to survey *only* colleagues, it could have done so. In any event, the Report correctly found that the system contains adequate safeguards against cronyism. (R219-23, 204 n.45)

For example, every in-firm vote cast must be balanced by an out-firm vote; the number of in-firm votes credited to a single lawyer is capped; and out-firm votes receive more points than in-firm votes. (*Id.*) Thus *Super Lawyers* magazine has reasonably judged that in-firm votes have value, but discounts them to offset any tendency to favor colleagues.<sup>7</sup>

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<sup>7</sup> The Committee's efforts to identify firms on the spreadsheet where lawyers received supposedly high numbers of in-firm votes failed. In almost every case, the attorneys possessed sufficient points for selection even if the in-firm votes were not counted at all. (R Appx P, Stip. ¶¶15-25. And in 2007, 66% of selected lawyers in fact received no in-firm votes. (R Appx P, Stip. ¶14)

The Committee criticized the use of nominations by managing partners, which are weighted with extra points. As Ms. Larson testified, this represents a valid judgment that managing partners, as the "voice of the firm," may be in a position to identify overlooked candidates. (R204-05) As the Special Master found, that is within the range of permissible judgments for KPM to make. (R222-23) In any event, the Special Master found that stipulated statistics demonstrate that the effect of managing partner nominations -- whether regarded as good, bad or indifferent -- is minimal. (R223)<sup>8</sup>

Even considered in the aggregate, in-firm and managing partner votes have a modest impact. For 2007, fully 98% of the attorneys listed would have met the point threshold even if their current in-firm votes *and* managing partner nominations were subtracted. (R223 & Appx P, Stip. ¶13)

**3. The Special Master properly found that there was no "big-firm bias" and rejected the proportional-representation issues raised by the Committee.**

Another of the Committee's themes was that the *Super Lawyers* lists do not proportionally represent every size of law firm, including solo practitioners, in the state. The short

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<sup>8</sup> For 2007, 90 managing partner nominations were received, accounting for just 0.4% of the total points awarded. (R223; Appx P, Stip. ¶6) Approximately 94% of the selected attorneys who had managing partner points would have met the point threshold without them. (R 223; Appx P, Stip. ¶10)

answer, of course, is that nothing requires them to do so. Proportional representation is not a prerequisite of First Amendment expression.

The Special Master found, moreover, that this criticism depends on an unproven assumption: that top lawyers are (or that the top 5% of lawyers selected by *Super Lawyers* magazine ought to be) distributed evenly among every size of firm. The Committee introduced no such evidence. Thus the Special Master, finding a "substantial disconnect," properly discounted the "expert" opinion of Dr. Presser, which rested on that very unproven, indeed unexamined, assumption. (R221-22)

In any event, the real point -- again, as found by the Special Master -- is that there is no bias in the selection process. If, for example, lawyers disproportionately cast ballots for large-firm lawyers, *Super Lawyers* magazine could not arbitrarily overrule them based on some proportionality hunch. And the testimony amply established that safeguards -- the limit on in-firm votes, the limit on the number of lawyers from a single firm, and so on -- counteract any perceived big-firm advantage. (R221-23, 204 n.45; see also *supra*.)

In addition, the Special Master, citing stipulated statistics, found factually that the tier system

provides a check and balance assuring that the list contains significant number of lawyers from all firm sizes. [R Appx P, Stip.] 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).

(R223) Thus the distribution of selectees across the four tiers results in a choice of firm sizes and, presumably, price ranges. (5T160; 4T90)<sup>9</sup>

The Special Master, after exhaustively reviewing the record, rejected the Committee's criticism that the lists underrepresent female attorneys. (R224) Nothing in the selection methodology would discourage votes for female candidates, nor does *Super Lawyers* magazine's exhaustive research tend to exclude female candidates. The representation of women on the lists may reflect nothing more than regrettable conditions in the profession; it is in the same range, for example, as the percentage of women partners in the larger New Jersey firms. (R Appx P, Stip. ¶46) And, of course, "[t]o the extent there are biases in those who vote, it would seem no methodology could adequately correct same." (R224) *Super Lawyers* magazine cannot arbitrarily set aside the results of balloting or research, but it does take affirmative steps to recognize women attorneys. Each year a list of the "Top 50 Female New Jersey *Super Lawyers*"

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<sup>9</sup> Indeed, these safeguards might actually *disadvantage* some lawyers from big firms, who would need more points to ensure selection. With no sense of irony, the Committee criticizes *Super Lawyers* for this as well.

is prominently displayed, enabling readers to identify and, if so inclined, hire, the top female point getters. (R224)

**4. The Special Master properly rejected the Committee expert's challenge to the scientific or statistical validity of the *Super Lawyers* selection methodology**

Finally, the Special Master's rejection of the Committee's challenge to the scientific or statistical validity of the *Super Lawyers* selection process was firmly based on the evidence of record. KPM introduced written testimony from Global Strategy Group ("GSG"), experts in market research, to demonstrate that the Committee was incorrect in its assumption that the quality of legal services is so inherently subjective that it cannot be rated meaningfully. Social scientists routinely use objective criteria as proxies for the measurement of subjective qualities.

The GSG report (KPM-22, summarized at R269-73) establishes that the *Super Lawyers* process "is as scientific and objective as any such model of a complex system could be" and that its "protocol provides consumers with an objective measure of lawyers' reputations ... [and] follows the best practices of the social sciences [with] the outcome ... driven by a number of different factors, including the most representative survey sample possible, multiple measurements of different observers and cross-checking of data for inconsistencies and bias." (KPM-22 ¶7)

The Special Master's Report implicitly rejects the conclusions of the Committee's expert, Dr. Presser (summarized at R274-76), that the methodology is invalid. And the Report explicitly rejects Dr. Presser's central contention that the methodology is undermined by the lack of proportional representation in the lists. (R222) (For KPM's detailed rebuttal of Dr. Presser's expert report, see R Appx Q.)

The Committee's other expert, Dr. Dhar, made the trivial observation that the words "Super" and "Best" may imply a comparison. Dr. Dhar did no research, however, to establish that a single consumer was or could be misled. Nor did he demonstrate that a lawyer's truthful report of the fact of selection by a third-party organization constitutes an unethical "comparison" or promise of results. The Special Master, while admitting the Dhar report in evidence, noted that it "does not take an expert" to assess such issues. (R286) (For KPM's rebuttal of Dr. Dhar's expert report, see R Appx Q.)

The Special Master agreed with the conclusions of the GSG report, as he was entitled to do. He found that the *Super Lawyers* selection process was within the range of acceptable methodologies. (R286)

In short, the Special Master's central factual findings must be accepted. The evidence is not merely persuasive, but thoroughly lopsided in favor of *Super Lawyers* magazine. Not a

single piece of evidence surfaced to support the Committee's suggestion that this accolade is "bogus" or purchased for a price; indeed, the evidence demonstrates that the very opposite is the case. The rating process is bona fide; it is conducted according to an established methodology that is applied in a uniform manner; the methodology as disclosed to the public matches the methodology as revealed by testimony and documentary evidence; the methodology is scientifically and statistically valid; and the honor bestowed is legitimate.

#### **LEGAL ARGUMENT**

When the law is applied to the facts found by the Special Master, this Court must conclude that there is nothing unethical about an attorney's advertisement that truthfully discloses that attorney's selection by *Super Lawyers* magazine.

Opinion 39 must be vacated for three reasons. First, lawyers who truthfully advertise that they have been listed in *New Jersey Super Lawyers* do not run afoul of the New Jersey Rules of Professional Conduct ("RPC") 7.1(a). Because *Super Lawyers* is a bona fide rating system, and because its selection protocol is helpful to consumers seeking legal counsel and lawyers making referrals, attorney advertisements that refer to a *New Jersey Super Lawyers* listing do not create "unjustified" expectations in consumers or improperly "compare" lawyers' services. Second, if the relevant RPC provisions were

interpreted in the way the Committee proposes - i.e., to forbid truthful advertising of a lawyer's *Super Lawyers* listing - they would run afoul of First Amendment case law restricting state regulation of lawyer advertising. Relatedly, such an interpretation would burden the First Amendment right of *Super Lawyers* magazine to freely determine its own editorial content. Third, this Court should not adopt the remedies the Committee prescribed in Opinion 39 or the twelve examples of potential amendments to the Rules, such as disclosure requirements (see Report pages 302-03). The First Amendment case law dictates that once it is determined that a rating is bona fide -- as it was here -- the proper scope of regulation is exhausted.

**I. LAWYER RATINGS IN NEW JERSEY SUPER LAWYERS MAGAZINE PROVIDE VALUABLE INFORMATION TO CONSUMERS, AND ARE NOT MISLEADING UNDER NEW JERSEY ETHICS RULES**

This Court and the U.S. Supreme Court have recognized that attorney advertising is valuable to consumers. Even setting aside the First Amendment issues (see Point II, *infra*), this Court should not strain to read the ethical rules in a manner that would deny the public needed information.

**A. Lawyer Rating Publications Are Useful To Consumers And To Lawyers Making Referrals**

More than thirty years ago, the United States Supreme Court concluded that "advertising by attorneys ... may offer great benefits." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376

(1977). Studies had shown that "the middle 70% of our population is not being reached or served adequately by the legal profession," and that "[a]mong the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer." *Id.* "Advertising," the Court reasoned, "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." *Id.* at 376-77 (citations, internal quotation marks, and footnotes omitted). Indeed, "the state, as part of its duty to regulate attorneys, has an interest in ensuring and encouraging the flow of helpful, relevant information about attorneys." *Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000).

This Court, too, has acknowledged the benefits of attorney advertising: "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. ... [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." *In re Petition of Felmeister & Isaacs*, 104 N.J. 515, 523 (1986). The Court also recognized

that such advertising is "one of the best ways to foster price competition." *Id.* at 524.

*Felmeister* concluded that "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 that 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.*

To be helpful, lawyer advertising must be informative. "[A]n advertising diet limited to such spartan fare" as "the attorney's name, address, and telephone number, office hours, and the like ... would provide scant nourishment" to consumers hungering for real information to help them select a lawyer. *Bates*, 433 U.S. at 36-67. "Attorney advertising restricted to a factual recitation ... of the need for legal services, the qualifications of the attorney, and the prices offered might fail to achieve" the objective of informing the public. *Felmeister*, 104 N.J. at 524.

Perhaps "the most important information a consumer would need" relates to a lawyer's "reputation: how he is regarded by

his peers, how other attorneys whom the client already knows assess his ability, ... etc." *Id.* at 527. That is precisely the information provided by lawyer-rating publications, such as *Super Lawyers* magazine (including *New Jersey Super Lawyers*), Martindale-Hubbell, and *Best Lawyers in America*. *Super Lawyers* magazine, as the Special Master found, "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." (R296)

Of course "[a]dvertising does not provide a complete foundation on which to select an attorney." It does not follow, however, that it is better "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." *Bates*, 433 U.S. at 374. The U.S. Supreme Court has admonished the States that they are not to "restrict the information that flows to consumers." *Id.* States must eschew paternalistic rules enacted on the assumption "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." *Id.* at 374-75. And they must further "reject the paternalistic assumption that the recipients of [lawyer advertising] are no more discriminating

than the audience for children's television." See *Peel v. Attorney Registration & Disciplinary Com'n*, 496 U.S. 91, 105 (1990). Opinion 39 appears to reflect this rejected mindset.

In fact, American consumers are accustomed to and quite adept at assessing ratings. They use them in relation to some of their most important life decisions. Ratings are not just a part of choosing a DVD player or a car. They help guide consumers in the choice of colleges, heart surgeons, cancer centers, supported living communities, and mutual funds. (R184, 300-01; NJM-6; JP1-23) There is no reason to believe that the same consumers who use ratings to make important decisions in these often foreign and intimidating areas would be misled by similar ratings when it comes to choosing lawyers and law firms. More to the point, the Committee produced no such evidence.

Lawyer rating publications are especially valuable to average consumers, who cannot afford to hire the most famous lawyers but nevertheless need some reliable signal to assure themselves that the lawyer they choose is reputable. There is nothing misleading or untoward about advertising these ratings, so long as the rating entity is bona fide, i.e., that it is independent of the lawyers themselves, does not award ratings on the basis of financial contributions, and provides some explanation for the criteria and process by which the rating is

made. See *Peel*, 496 U.S. at 102, 109. As the Special Master has found, *Super Lawyers* magazine easily meets these criteria.

In addition, the *Super Lawyers* listings are a useful tool for lawyers. A lawyer may be called upon, for example, to make a recommendation or referral outside of his or her practice area or geographical location. *Super Lawyers* magazine can be of assistance in guiding the referring lawyer's client to a superior attorney.

To be sure, some assessments are more subjective than others. But the inherently subjective nature of peer reviews neither diminishes the value of the credential to consumers nor renders the resulting review misleading. Consumers only benefit when they have multiple credible sources at their disposal and can be trusted to assess how much weight to give them and make decisions regarding retention of counsel accordingly.

**B. A Lawyer's Advertisement Of Selection By Super Lawyers Does Not Impermissibly Compare Lawyers' Services Or Create Unjustified Expectations In Consumers In Violation Of RPC 7.1(a)(3) & (2).**

In Opinion 39, the Committee cited two provisions of the *RPC* that it asserted would be violated by lawyers truthfully advertising their selection for *New Jersey Super Lawyers*:

- *RPC* 7.1(a)(3), which states that a communication is misleading if it "compares the lawyer's services with other lawyers' services."

- *RPC* 7.1(a)(2), which states that a communication is misleading if it "is likely to create an unjustified expectation about the results the lawyer can achieve."

The plain language of the rule forbidding lawyers to compare their services with other lawyers' services (*RPC* 7.1(a)(3)) is violated only when the advertising lawyers themselves explicitly make such a comparison. Lawyers do not violate that rule when they truthfully communicate the fact of their selection by *New Jersey Super Lawyers*. The Committee has argued that such advertisements violate this rule because they "inferentially" compare the attorneys' services to others'. (Brief in Opposition to Petition for Review at 15-16) The Special Master, without taking a position, noted the possibility that "a distinction could be made between 'direct' or 'explicit' comparative advertising ... and 'implied' comparative advertising," but noted that these terms do not appear in the Rule itself. (R296)

Respectfully, the Rule, which does not ban "implied" comparisons, should not be interpreted to do so. The Committee's position is incorrect for two reasons: (1) most if not all advertising can be viewed as inferentially speaking to the advertiser's "quality" or implicitly comparing the advertiser to peers; and (2) any arguable implied comparison is made, not by the advertising lawyer, but by *New Jersey Super Lawyers*.

As for the first reason, the idea of an "implied" comparison simply goes too far; it would lead to the absurd result that nearly all lawyer advertising is prohibited by RPC 7.1(a)(3). For example, lawyers' advertisements frequently specify the law schools they attended, the number of trials they have won, or awards they have received. Such advertisements, by the Committee's logic, would be prohibited because they impliedly compare the advertising lawyers to colleagues who attended law schools considered less prestigious, have tried fewer cases, or have not won the same awards. Under the Committee's extreme view, virtually any favorable information about a lawyer is suspect. (See R297) It is hard to imagine what lawyers could legitimately advertise about themselves and their professional accomplishments—beyond bland facts such as their contact information—that would not potentially run afoul of the Committee's outsized reading of RPC 7.1(a)(3).<sup>10</sup>

Indeed, as the Special Master points out, the Committee's *per se* interpretation of RPC 7.1(a)(3) would bring it into conflict with another disciplinary rule. (R297-98) RPC 7.4(d) permits an attorney to advertise certification as a specialist

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<sup>10</sup> The Committee also opined that advertising selection by *Super Lawyers* is "self-aggrandizing." (Op. 39 at 2) A *Super Lawyers* designation is awarded by a third party, not self-bestowed by the lawyer. If by "self-aggrandizing," the Committee merely meant "immodest," perhaps no advertisement could survive its scrutiny.

if such certification has been granted by the Supreme Court or the ABA; by the Committee's logic, that would impliedly compare the attorney to others who do not possess such a certification. Moreover, *RPC* 7.4(d) authorizes communication of such a certification granted by an organization *not* approved by the Supreme Court or the ABA, so long as "the absence or denial of such approval shall be clearly identified in each such communication by the lawyer." *Id.* It is "arguably inconsistent" for Opinion 39 to ban advertisements of legitimate, bona fide lawyer ratings, while *RPC* 7.4(d) would seemingly authorize advertisements of certifications by organizations denied approval, or even certifications purchased for a price. (R297)

As for the second reason, lawyers truthfully representing that they have been selected for *New Jersey Super Lawyers* are not "compar[ing]" themselves with their peers. Rather, they are truthfully reporting an accolade issued *by a third party*. The existence of such an accolade is an objective and verifiable statement of fact by the advertising lawyer. As discussed below, the State has the authority to determine whether the accolade is bona fide. That is, the cited Supreme Court cases would permit a ban on a lawyer reporting something that merely *purports* to be a third-party accolade but is actually a sham, purchased for money. The State cannot bar a legitimate accolade, however, simply because it disapproves of or disagrees

with any favorable conclusion that a consumer might draw from it.<sup>11</sup>

The other Rule cited by Opinion 39, RPC 7.1(a)(2), is violated when a lawyer's advertisement creates an "unjustified" expectation in the reader about "the results the lawyer can achieve." Advertising a listing or rating does not create an "unjustified" expectation of "results." Consumers are well aware that a positive rating or a mark of approval from a private third party—for a doctor, a college, or a lawyer—is not

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<sup>11</sup> Opinion 39's gratuitous endorsement of the bona fides of Martindale-Hubbell's selection methodology further undermines any "implied comparison" rationale. Op. 39 at 3. As the Special Master points out, Martindale-Hubbell rates lawyers with letter grades A, B, C, a rating that "certainly implies comparison" under the Committee's extreme view of the Rule. (R298) A translates into "highest level of professional achievement"; B into "excellent"; and C into "above-average." Beyond that, Martindale also affixes the moniker "Preeminent" to certain law firms, which is, perhaps, even more superlative than "Super" or "Best." LNMH-3 Sub-3.

The Committee found Martindale's ratings permissible because they are supposedly "directed toward other attorneys" and have "minimal recognition to the public." The Committee was seemingly unaware of the facts; as the Special Master found, "the LexisNexis Martindale-Hubbell attorney rating are widely disseminated to consumers." (R265) Martindale runs two consumer-oriented websites, [lawyers.com](http://lawyers.com) and [attorneys.com](http://attorneys.com), featuring selected lawyers and it also links to Google and Yahoo searches. (R299) This is not a criticism of Martindale, but simply evidence of the lack of foundation for the Committee's position. As the U.S. Supreme Court has observed, where, as here, "a means of pursuing [a state's] objective ... [is] woefully underinclusive ... [it] render[s] belief in that purpose a challenge to the credulous." *Republican Party v. White*, 536 U.S. 765, 780 (2002).

a promise of results, but rather is one piece of information about a lawyer's ability that may go into making an informed selection. The Committee presented no evidence that consumers who were exposed to lawyer advertising that included mention of the lawyer's listing in *New Jersey Super Lawyers* would harbor "unjustified" expectations about the results that lawyer would achieve. Nor is there any reason to believe that consumers of legal services would be confused by such an advertisement; they are not confused by references to *New York Magazine's* Best Cardiology Departments (which do not guarantee cures) or *U.S. News & World Report's* Best Colleges (which do not guarantee erudition). (See R300-01)

Indeed, when the rating publication is independent, and the selection process is legitimate, then any inference of superiority -- *should the consumer care to draw it* -- is a reasonable one.<sup>12</sup> Consumers understand, correctly, that the particular lawyer met the publication's criteria to be listed. They would not, however, fall prey to any "unjustified" expectation that the lawyer was promising a "result." Any

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<sup>12</sup> The readers of *New Jersey Super Lawyers* are typically lawyers, and the readers of *New Jersey Monthly* magazine, where the same listings are published in a special supplement, are typically adults of above-average education and means. (R151-52) Such readers, in particular, should be able to draw reasonable conclusions from the fact of a particular lawyer's listing, and his or her advertisement thereof.

reasonable consumer understands that a lawyer who is selected for inclusion in *New Jersey Super Lawyers* cannot guarantee a winning jury verdict in a single bound. Consumers understand that these ratings are no more guarantees of success or superiority than the other information typically contained in a lawyer advertisement: for example, a position on the law review, a degree from a prestigious law school, or experience in twenty jury trials. A bona fide rating does not entail a promise of results, but rather a reasonable inference of quality. It is up to the reader to decide how much to rely upon it.

This Court should reject the Committee's overexpansive interpretation and hold that advertisements stating a lawyer's selection by *Super Lawyers* do not violate the Rules of Professional Conduct.

## **II. OPINION 39'S INTERPRETATION OF THE ETHICAL RULES VIOLATES THE FIRST AMENDMENT RIGHTS OF LAWYERS TO ADVERTISE BONA FIDE THIRD PARTY ACCOLADES**

KPM's reasonable reading of Rules 7.1(a)(2) & (a)(3) is faithful both to the language and the policy of the Rules, but there is another compelling reason to adopt it: the doctrine of constitutional avoidance. The First Amendment strictly limits the power of states to regulate lawyer advertising. The Committee's broad reading of *RPC* 7.1(a)(2) and (a)(3) would bring those rules into direct conflict with lawyers' First Amendment rights by interfering with their ability to truthfully

advertise their qualifications and experience, and would likely require the rules to be struck as unconstitutional. It is incumbent on courts and agencies to read laws in a way that avoids entanglement in these constitutional thickets. *Right to Choose v. Byrne*, 91 N.J. 287, 311 (1982); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of [a statute] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *American Trucking Ass'ns v. State*, 164 N.J. 183, 184-85 (2000).

What prudence and sound interpretation discourage, the First Amendment prohibits. The State may not ban attorney advertisements of third-party accolades that are bona fide.

**A. The First Amendment Limits States' Abilities To Regulate Lawyers' Advertisements Of Third-Party Credentials Or Accolades.**

Although lawyer advertising is constitutionally protected, states may regulate it to some extent. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142

(1994). States have leeway to restrict or prohibit "inherently misleading" advertising. *Peel*, 496 *U.S.* at 100.

"[B]ut ... States may not place an absolute prohibition on ... *potentially* misleading information ... if the information also may be presented in a way that is not deceptive." *Id.* at 100 (emphasis added). "Even if we assume that [certain types of lawyer advertising] may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 109. A state's "rote invocation of the words 'potentially misleading,'" does not relieve its burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 512 *U.S.* at 146 (citations and internal quotations omitted). "[A] concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Peel*, 496 *U.S.* at 111.

The burden of justifying any regulation falls on the State. That "burden is not slight; the free flow of information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. Mere

speculation or conjecture will not suffice; rather the State must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 143 (internal citations and quotations omitted).

In particular, the U.S. Supreme Court and other courts have repeatedly held that states may not restrict lawyers from advertising their professional accolades and credentials. Thus, for example, the Supreme Court has invalidated state-bar rules that have prohibited lawyers from advertising: certification by the National Board of Trial Advocacy, a nongovernmental entity that attests to lawyers' having met a particular set of criteria relating to litigation experience, see *Peel*, 496 U.S. at 94-96; qualification as a Certified Financial Planner (CFP) by a private organization, see *Ibanez*, 512 U.S. at 138; and even the "relatively uninformative" fact of "[a]dmi[ssion] to practice before the Supreme Court of the United States," *In re R.M.J.*, 455 U.S. 191, 205-06 (1982).

Even though consumers might not understand the precise nature of these qualifications or know precisely who issues them, the Court has repeatedly concluded that such information is helpful to consumers in their selection of counsel. See *Peel*, 496 U.S. at 109; *R.M.J.*, 455 U.S. at 203. In each case, the Court held that "'disclosure of ... truthful, relevant information is more likely to make a positive contribution to

decision-making than is concealment of such information.'" *Ibanez*, 512 U.S. at 142 (quoting *Peel*, 496 U.S. at 108).

A third-party rating is no mere "comparison" or assertion of superiority by the lawyer. "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.'" *Mason*, 208 F.3d at 957 (quoting *Peel*, 496 U.S. at 101). Even though consumers may not be familiar with the standards the issuing entity used to award the accolade, "[u]nfamiliarity is not synonymous with misinformation" and readers may still "find it useful and not misleading." *Id.* That is particularly true when consumers have the ability to verify the credential and the standards underpinning it. See *Ibanez*, 512 U.S. at 145 n.9. Even consumers who do not bother to inform themselves of the precise standards used to award an accolade are not necessarily misled when exposed to advertising of that accolade, provided that it is in fact bona fide. See *Peel*, 496 U.S. at 102-03. Indeed, as the Supreme Court has recognized, because the strength of a publication awarding accolades is measured by its quality, such publications have a strong incentive to devise programs of the

highest caliber in order to effectively compete against one another. See *id.* at 102.

**B. States Retain The Limited Power To Determine Whether Accolades Are "Bogus" And Can Prohibit Only Advertisements Of Those That Are Not Issued On A Bona Fide Basis.**

The First Amendment does not, of course, leave states powerless to address a scenario in which "some unscrupulous attorneys" might advertise "bogus" credentials. *Peel*, 496 U.S. at 109. Indeed, the U.S. Supreme Court has suggested that "bar associations and official disciplinary committees" may "distinguish[] between certifying boards that are bona fide and those that are bogus." *Id.* The Court's "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

Indeed, the U.S. Supreme Court has set forth the standard by which a state should conduct this inquiry in the context of entities awarding accolades to lawyers. States may restrict lawyers from advertising credentials "issued by an organization that ... made no inquiry into [their] fitness, or by one that

issued certificates indiscriminately for a price." *Peel*, 496 U.S. at 102; see *id.* at 110.

The analysis in *Mason, supra*, is particularly instructive. There, Florida attempted to prohibit a lawyer from stating in an advertisement that he was "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." *Mason*, 208 F.3d at 954. The Florida Bar did not even object to the lawyer's disclosing his AV rating in and of itself; rather, it challenged his additional, truthful characterization of that rating as the "highest" that Martindale-Hubbell offers. Florida insisted that he include in his Yellow Pages ad a "full explanation as to the meaning of the AV rating and how the publication chooses the participating attorneys," and a disclaimer that "the ratings and participation are based exclusively on ... opinions expressed by ... confidential sources and that these publications do not undertake to rate all Florida attorneys." *Id.* (internal quotation marks omitted).

Florida asserted "an interest in encouraging attorney rating services to use objective criteria," suggesting that peer reviews like Martindale's are less valuable than so-called "objective" criteria about a lawyer—number of trials litigated, years of experience, and the like. *Id.* at 956. But the court found that interest flimsy: "The Florida Bar offers no reason for its preference for objective criteria over subjective

criteria, and the existing case law contributes little additional guidance on the matter. Because we fail to see the value in the distinction between objective and subjective criteria in the specific context before us, we must reject the Bar's ... asserted 'substantial' interest." *Id.*

The Florida Bar offered no proof that any consumer was misled by the lawyer's use of the phrase "AV Rated, The Highest Rating." Rather, a Bar official testified that "simple common sense" supported the ban. *Id.* at 957. The court found that argument unpersuasive because "the Supreme Court has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm." *Id.*

The *Mason* court also rejected any argument that the public's unfamiliarity with Martindale's selection process or ranking system rendered the advertisement misleading. It held that a lawyer's advertisement of a bona fide third party rating is not equivalent to the lawyer's own "unverifiable" opinion of his or own abilities, or a promise of results. Rather, the lawyer's statement that he or she received a favorable rating is a factual statement that a consumer might wish to consider. *Mason*, 208 F.3d at 957.

Finally, the court saw no need to require disclaimers when readers have access to verify a credential. Even if "the general public is unfamiliar with the ratings system, this fact

alone does not justify imposition of a disclaimer requirement on [a] truthful advertisement," especially "given the glaring omissions in the record of identifiable harm." *Id.* at 957-58.

The minimum standard for a bona fide lawyer accolade is relatively modest. The state's role, as circumscribed by the First Amendment, is to determine whether the entity in question is "indiscriminately" issuing accolades to lawyers—whether to realize a dubious profit or through a sheer lack of standards. Once the state has satisfied itself that an organization makes bona fide investigations into lawyers' capabilities and issues its accolades only to those lawyers who meet its standards, its investigation should be at an end.

**C. Because The Selection Methodology For *New Jersey Super Lawyers* Has Been Proven Bona Fide, The First Amendment Prohibits The State From Restricting Lawyers' Advertisements That Recite Their Selection By *Super Lawyers* Magazine.**

- 1. The Special Master's well-supported findings that that the selection methodology is bona fide require that the ban on advertising a *Super Lawyers* designation be struck down on First Amendment grounds.**

Although *Super Lawyers* magazine of course aims much higher, it easily meets the threshold for First Amendment protection: it is bona fide. The Special Master has so found. For example:

"[I]t is very clear from this record that [KPM's methodology] is a comprehensive, good-faith and detailed attempts 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." (R296)

"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." (R296-97)

The Report explicitly rejects the unfounded criticisms that the Committee -- with virtually no factual record before it -- leveled at *Super Lawyers* magazine. Documentary evidence and the uncontradicted testimony of *Super Lawyers* magazine's publisher and research director demonstrated that:

- Selection is independent of any advertising purchased by a lawyer or law firm. The selection methodology is impartially applied.
- The selection process validly uses objective indicators to measure subjective characteristics.
- The selection process is not arbitrary. The methodology is rigorous and merit-based. New Jersey lawyers who satisfy certain threshold conditions are eligible for listing, and the criteria are consistently applied, verified and validated to those considered for inclusion. The selection protocol

provides consumers with an objective measure of lawyers' reputation.

- The selection methodology is easy for consumers to locate. It appears prominently in the magazine, in the *New Jersey Monthly* special advertising section, and at [www.superlawyers.com](http://www.superlawyers.com). These accurate summaries of the selection process are sufficient to inform the reader of the nature of the process and to establish that it is bona fide, is consistently applied, and is not influenced by advertising or other financial considerations.

(See Facts, *supra*; see also R199-200, 212, 221-24, 296-97.)

The Committee's criticisms (e.g., that selection relies too much on balloting, that in-firm and managing partner votes bias the results, that it is biased toward large firms, that it is impossible to measure subjective qualities such as lawyer performance) bear only a weak relationship to the bona fides of *Super Lawyers* magazine. In any event, the Report carefully discusses and explicitly rejects them. Those findings of the Special Master are well-grounded in the record.<sup>13</sup>

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<sup>13</sup> The State also carps at the size of the candidate pool, the particular number of points assigned to various factors, and other details. As the Report states, such policy decisions are beyond the proper concern of regulation. (See R208, 212-14) There is a range of acceptable methodologies that are bona fide and not misleading.

*Super Lawyers* magazine thus falls comfortably within the bounds of First Amendment protection established by the case law discussed at Points II.A & B, *supra*. Selection by *Super Lawyers* is "bona fide" and not "bogus." *Peel*, 496 U.S. at 109. The State has utterly failed to discharge its burden of proving that a *Super Lawyers* designation is misleading. *See, e.g., Zauderer*, 471 U.S. at 646. The *Super Lawyers* process is a careful and conscientious one; *a fortiori*, KPM does not fail to make "inquiry into [attorneys'] fitness, or ... issue[] certificates indiscriminately for a price." *Peel*, 496 U.S. at 102.

As in *Mason*, *supra*, regulation cannot be justified by the state's preference for "objective" over "subjective" criteria; that preference fails to constitute an interest so substantial as to justify restriction of speech. 208 F.3d at 956. As in *Mason*, the Committee here failed to introduce any proof that any consumer was misled by a *Super Lawyers* ranking; and this Court, like *Mason*, should reject any attempt to resort to so-called "common sense," in the absence of proof of a "concrete, non-speculative harm." *Id.* at 957. Like *Mason* (and the Special Master, R149) this Court should reject the notion that the public's preexisting unfamiliarity with a selection process renders an advertisement misleading. And, like *Mason*, it should find that a lawyer's advertisement of a bona fide third party rating is not equivalent to the lawyer's own "unverifiable"

opinion of his or own abilities or a promise of results, but rather a factual statement that a consumer might wish to consider. *Id.* at 957.

**2. Decisions of courts and regulatory authorities of other states, as well as the Federal Trade Commission as amicus, support KPM's position.**

Several courts and bar associations have undertaken evaluations of the selection methodologies of *Super Lawyers* magazine, *Best Lawyers in America*, and Martindale-Hubbell. All of these have concluded that these methodologies are bona fide. In *Mason, supra*, the Eleventh Circuit overturned a Florida Bar rule that had been used to forbid a lawyer from advertising his Martindale-Hubbell "AV" ranking. 208 F.3d at 957. And a Virginia federal court invalidated a similar state rule that had been used to prohibit advertisement of a listing in *Best Lawyers in America*. *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614 (E.D. Va. 2003).

Many state bar ethics authorities have also approved lawyers' advertising their selection by *Best Lawyers in America* and *Super Lawyers* magazine. In the margin are relevant citations from Arizona, Connecticut, Delaware, Florida, Iowa, Michigan, North Carolina, Pennsylvania, Tennessee and Virginia.<sup>14</sup>

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<sup>14</sup> See Ariz. State Bar Comm. Rules Prof'l Conduct, Op. 05-03 (July 2005) (*Best Lawyers in America*), available at <http://www.myazbar.org/ethics>; Conn. Statewide Grievance Comm., Adv. Op. 07-01008-A (Nov. 16, 2007) (*Super*

Rules and decisions of the various state regulatory authorities are further surveyed and summarized at R87-142.

Opinion 39 -- whether or not it was intended that way -- is anti-consumer. It is a step back to the days of "Lawyer Knows Best." That is not just the opinion of KPM. It is the opinion of *amicus curiae* the Federal Trade Commission ("FTC"), the federal agency with the mandate to look out for the welfare of consumers.

The FTC possesses enormous expertise as to deceptive or misleading advertising practices and the extent to which particular forms of advertising do, or do not, tend to promote the benefits of competition. The FTC's *amicus* brief establishes persuasively that "the restrictions in RPC 7.1(a)(2) & (3), both

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*Lawyers*) ([www.jud.ct.gov/sgc/Adv\\_opinions/Adv\\_07-01008.pdf](http://www.jud.ct.gov/sgc/Adv_opinions/Adv_07-01008.pdf)); Delaware State Bar Ass'n Comm. Prof. Ethics, Op. 2008-2 (Feb. 29, 2008) (*Super Lawyers and Best Lawyers*) ([www.dsba.org/AssocPubs/PDFs/2008-2.pdf](http://www.dsba.org/AssocPubs/PDFs/2008-2.pdf)); Letter, Ruth A. Smith, Ass't Ethics Counsel, Florida Bar to William C. White, Publisher (Apr. 20, 2006) (*Super Lawyers*) (reproduced in KPM Appendix to Petition to the N.J. Sup. Ct. at PA-000196); Iowa State Bar Ass'n Cmte. on Ethics & Practice Guidelines, Ethics Op. 07-09 (Oct. 30, 2007) (*Super Lawyers*), available at <http://www.iowabar.org/ethics.nsf>; State Bar of Mich. Ethics Comm., Ethics Op. RI-341 (June 8, 2007) (*Super Lawyers*) ([www.michbar.org/opinions/ethics/numbered\\_opinions/ri-341.htm](http://www.michbar.org/opinions/ethics/numbered_opinions/ri-341.htm)); N.C. State Bar, 2007 Formal Op. 14 (Jan. 25, 2008) ([www.ncbar.com/ethics](http://www.ncbar.com/ethics)); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Resp., Informal Op. 2005-125 (Sept. 2, 2005) (*Super Lawyers*) (unpublished); Tenn. Bd. Prof'l Resp., Advisory Ethics Op. 2006-A-841 (Sept. 21, 2006) (*Super Lawyers*) (copy available at [superlawyersfacts.com/tennesseepinion.pdf](http://superlawyersfacts.com/tennesseepinion.pdf)); Va. State Bar, Legal Adv. Op. A-0114 (*Best Lawyers*) ([www.vsb.org/committees/standing/advertising/all14.html](http://www.vsb.org/committees/standing/advertising/all14.html)), approved by Order (Va. Aug. 26, 2005).

as expressed in the rule and as applied in Opinion 39, are not in the interest of New Jersey consumers because they prevent consumers from receiving truthful information and are likely to reduce competition among attorneys without providing any countervailing benefits." (FTC *Amicus* Br. at 6) The Report summarizes the FTC brief in more detail at R287-91.

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In short, it cannot be seriously maintained that the *Super Lawyers* designation is not bona fide. Once it is determined that the *New Jersey Super Lawyers* selection methodology is not "bogus," the State's regulatory function should be at an end. Opinion 39 should be vacated.

**III. ASSUMING ARGUENDO THAT SOME REGULATION IS PERMISSIBLE, THE REMEDIES PROPOSED, INCLUDING BROAD DISCLOSURES, ARE UNWARRANTED BECAUSE THEY EXCEED THE BOUNDS OF THE FIRST AMENDMENT AND THE JURISDICTION OF THE COMMITTEE**

**A. *New Jersey Super Lawyers* Should Not Be Required To Include Further Disclosures Or Disclaimers.**

Based on sound considerations of policy and the First Amendment, *RPC* 7.1 should not be interpreted in the manner proposed by the Committee, as established above. Nevertheless, the Special Master's Report suggests that the Court might consider amending the Rules to add certain requirements, including certain disclosures or disclaimers, and lists twelve examples gleaned from other states' decisions and regulations. (R216, 302-03) As noted above, *Super Lawyers* amply discloses

its process, and meets the tests of the First Amendment and the current rules. Additional regulations, under the circumstances, would be unwise and would violate the First Amendment.

**1. No disclosure requirement is justified because the Committee failed to make the showing of concrete harm required by the First Amendment.**

Disclosure and other requirements, while certainly preferable to an outright ban, have their own First Amendment pitfalls. Lacking sufficient justification, the State may not burden free speech any more than it may ban it. The U.S. Supreme Court has held that rules mandating disclaimers can be "unduly burdensome disclosure requirements [that] offend the First Amendment." *Ibanez*, 512 U.S. at 146 (quoting *Zauderer*, 471 U.S. at 651). A regulation must "directly and materially" advance the goal of preventing deception of consumers. *Ibanez*, 512 U.S. at 142. To justify a disclosure or disclaimer requirement, the State must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 146 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).<sup>15</sup> Thus any requirement of

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<sup>15</sup> *Zauderer's* permissive approval of a disclosure requirement (that advertisements explain the distinction between "fees" and "costs") must be applied with care in light of subsequent case law. *Edenfield, supra*, has strengthened and clarified the third of the four factors announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (see discussion at R57), by requiring a tight connection between a proposed regulation and the perceived harm wrought by commercial

disclosures "must be supported by a showing of some identifiable harm," *i.e.*, actual confusion or deception of consumers, that a disclaimer will directly alleviate. *Mason*, 208 F.3d at 958.

In *Ibanez*, the state had argued that consumers' unfamiliarity with the criteria used to accredit Certified Financial Planners justified its requirement of a disclaimer "set[ting] out the recognizing agency's requirements for recognition, including, but not limited to, educatio[n], experience and testing." *Id.* (internal quotation omitted). That proffered interest did not pass the First Amendment test.

Here, consumers have easy access to *New Jersey Super Lawyers'* selection methodology in each of its publications and on its website. (*E.g.*, KPM-6 at 23, R173-75, [www.superlawyers.com](http://www.superlawyers.com).) Consumers need not know every detail of the selection process, or all relevant statistics, in order to assess what a listing means. At most they need to know that the basic process is bona fide. To mandate any further disclosures would impose an impermissible burden.

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speech. The *Zauderer* approach was further undermined by *United States v. United Foods Inc.*, 533 U.S. 405 (2005) (striking down as "compelled speech" a requirement that mushroom growers subsidize advertisements). *United Foods'* enhancement of commercial speech protection is potentially transformative; at least one commentator has found unpersuasive its statement that *Zauderer* remains unaffected. See Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood*, 40 *Valparaiso U. L. Rev.* 555 (2006).

Extensive hearings produced not a scrap of evidence that a single consumer has been harmed or misled by an advertisement that recites a lawyer's selection by *Super Lawyers* magazine. This Court should, like *Mason*, reject any requirement of further disclaimers when readers have the means to verify a credential and there is no showing -- none -- of harm. Under the First Amendment, the State may regulate untruthful speech; it cannot require that every truthful statement be accompanied by *proof* of its truth as a condition of publication.

Even if "the general public is unfamiliar with the ratings system, this fact alone does not justify imposition of a disclaimer requirement on [a] truthful advertisement," especially "given the glaring omissions in the record of identifiable harm." *Mason*, 208 F.3d at 957-58. Thus, even more so than in *Ibanez*, "[g]iven ... the failure of the [Committee] to point to any harm that is potentially real, not purely hypothetical," any suggestion of the need for further disclosures or disclaimers "is unjustified." *Id.*

**2. The particular disclosures and other measures suggested in the Report should not be adopted.**

As established above, the State should not regulate at all in the absence of any evidence of misleading or false statements. In the alternative, however, KPM offers the following comments on the twelve regulatory examples at R302-03.

First, disclosure requirements easily become unduly burdensome and violate the First Amendment. (See *supra*.) Any disclosure regime must be unduly burdensome, e.g., if it (a) obscures the advertised message with excessive disclosures, (b) unduly multiplies the cost of advertisements, or (c) requires disclosure of proprietary information.

For example, the State simply cannot practically require that every advertisement mentioning an accolade -- or multiple accolades from multiple sources -- include large swaths of fine print about each rating publication. Many such ads are short banners, classified ads or 1/8 page yellow pages listings. Closely related is the question of format. Advertisements, which are bought by the line or by size, cannot contain pages of descriptive data except at prohibitive cost. Indeed, copious disclosure requirements may constitute a *de facto* ban.<sup>16</sup> Under whatever regime, a reference to the website should suffice.

Second, elaborate disclosure requirements are simply disproportionate to any legitimate need. The regulations already require that advertised ratings not be misleading in fact. What is proposed here is that *proof* of truth accompany each ad, a very different proposition. Cigarettes kill;

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<sup>16</sup> "The detail required in the disclaimer currently described by the Board effectively rules out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Ibanez*, 512 U.S. at 146-47.

nevertheless, a one-sentence package warning is considered adequate to alert the consumer. Regulators of attorney advertising must keep a sense of perspective.

Third, there are approximately 700 attorney rating services, and that number is growing. Their diverse methodologies cannot be captured by one-size-fits-all regulations.

Finally, as to the specific examples (R302-03):

*No. 1 (advertised representation must be true).*

*No. 2 (advertisement should state year of listing and specialty).*

*No. 9 (credential of individual should not be attributed to other lawyers in the firm).*

*Super Lawyers* magazine voluntarily complies with these requirements. They add little, however, to the overall requirement that advertisements not be misleading.

*No. 3 (Advertisement must disclose methodology, including "empirical data" such as response rate for peer-review methodology).*

As established above, *Super Lawyers* magazine does disclose its methodology in considerable detail. Further requirements that "empirical data" be published cross the line to micro-management, and also intrude into the magazine's editorial processes (see Point IV, *infra*). Moreover, singling out publications that use balloting is unavoidably discriminatory. Some models purposely consult a limited number of attorneys (see

R231-32 (*Best*)); others, such as *Super Lawyers* magazine, use balloting as part of a multi-factor process; some may not poll at all; others may avoid the issue entirely by compiling opinions received over the internet without formal solicitation. Requiring one numerical datum -- the response rate of lawyers -- would distort comparisons among these processes. More rigorous models would potentially be placed in an inferior position to those that have no such "empirical data" to report. Such a rule, moreover, would be highly unfair to *Super Lawyers* magazine. Since Opinion 39 (although stayed) banned attorneys from responding to surveys, the response rate has dropped significantly. (See 5T168)<sup>17</sup>

*No. 4 (Rating must consider lawyer's qualifications).*

*Super Lawyers* magazine's ratings obviously do this. This example, however, seemingly purports to regulate the practices of rating publications, as opposed to attorney advertisements. In any event, if a magazine article identified lawyers who surf or smoke cigars, a lawyer presumably could mention it, provided that it was not misleadingly presented as an endorsement of legal expertise.

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<sup>17</sup> In deference to the Special Master's Report, however, KPM has discontinued disclosure of the total number of ballot solicitations, to avoid any potential misinterpretation.

No. 5 (*rating cannot have been issued for a price, and evaluation must precede solicitation of advertising*).

*Super Lawyers* magazine has proven, and the Special Master has found, that evaluation is independent of advertising. To the extent that such a rule prohibits a lawyer from advertising a bogus rating, its goal is permissible. Here again, however, the micro-management problem arises. KPM happens to have an annual cycle. The evaluation process for a particular year closes, and then advertisements for that particular year are solicited; the process then begins again for the following year. Although advertising and selection are wholly independent, a rigid rule that selection must "precede" advertising solicitation might inadvertently bar any publication with an annual cycle. Other services may have a different cycle, or no cycle, and such a rule may have uncertain application to them.

No. 6 (*superlative language, such as "Super" or "Best" refers to selection, and is not a description of the attorney*).

No. 8 (*rating methodology must contain usage guidelines that are adhered to in advertisements*).

*Super Lawyers* magazine has voluntarily promulgated guidelines for the use of its name. Thus, for example, "Smith was selected for the *Super Lawyers*® list" is correct, but "Smith is a Super Lawyer" is not. (R58; 3T46-48, 60; KPM-16, 17) Such a specific regulation, which depends on the name of an

individual publication, is ill-advised. As phrased, it suggests direct regulation of the magazine (which may even be held responsible for enforcement), as opposed to the attorney advertisers. That exceeds the Committee's jurisdiction.

*No. 7 (statement that a list names "best" or "top 5%" of lawyers is prohibited as misleading).*

Any consumer would understand that a reference to the "best" or "top" lawyers is *in relation to that rating publication's process*. If *Super Lawyers* magazine refers to the "top 5%," it obviously means the top point getters in the *Super Lawyers* evaluation process. Absent any showing that anyone has been misled, such a regulation is unwarranted and impermissible.

*No. 10 (methodology "open to all members of the Bar").*

This, too, purports to regulate the magazine directly, as if it were a utility or a public accommodation. As phrased, it might prohibit a rating of "top patent attorneys," "top Mercer County attorneys" or "top women attorneys." It might outlaw minimum age or experience requirements for balloting or rating. Any such prohibition would be unwise and unwarranted.

*No. 11 (methodology must have standards for inclusion that are "clear and consistently applied.")*

The Special Master has found that *Super Lawyers* magazine meets and surpasses this standard. Nevertheless, such a regulation is objectionable. It appears to be addressed

directly to rating publications, as opposed to attorney advertisements. It exceeds the First Amendment limit that a rating need only be *bona fide*. And it sets a standard that might stifle innovation or discriminate among acceptable rating models.<sup>18</sup>

12. *Disclaimer that private rating is not recognized by Supreme Court or ABA.*

Existing rules are adequate to deal with any advertisements that pass off private ratings as something else. Absent a specific showing that consumers have been misled, such a regulation is impermissible. See *Peel*, 496 U.S. at 102-03, 105-06 (no evidence that any consumer had mistakenly assumed that a private certification was government-issued); *Ibanez*, 512 U.S. at 146 (because no evidence of confusion, striking down requirement of disclaimer that CFP certification not government-issued). In any event, any required disclosure should not be unduly prolix; should not, in effect, require self-disparagement; and should not additionally demand that the attorney state whether he or she is certified in a specialty.<sup>19</sup>

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<sup>18</sup> *Best Lawyers*, for example, started as a cascading system of referrals by Harvard Law School graduates. Today, ballots are solicited from lawyers currently listed. (R242) The process no doubt produces valid lists of competent attorneys, but it could not claim to be open to all.

<sup>19</sup> The language suggested by the Board of Attorney Certification runs afoul of these principles. (R293) Recently,

**B. The Remedies Imposed By Opinion 39 Far Exceed The Committee's Mandate.**

Opinion 39 forbade New Jersey lawyers (1) to take out "advertisements describing [themselves] as '*Super Lawyers* ,' '*Best Lawyers in America*,' or similar comparative titles;" (2) to take out "advertisements, even those advertisements that do not repeat the moniker of '*Super Lawyer*,' appearing in the '*Super Lawyer*' magazine insert;" and (3) to "participat[e] in [the *New Jersey Super Lawyers*] survey." Op. 39 at 2-3.

Even if the Committee had been correct that the ads in question did not comply with *RPC* 7.1 -- which it was not -- only the first of these prohibitions would have been permissible. The Committee has the authority to regulate misleading lawyer advertising. It has no authority to dictate in what publication a lawyer may advertise. It has no authority to order lawyers to refrain from participating in a survey commissioned by a private party. It hardly requires stating that a State prohibition on lawyers' expressing their opinions of other lawyers runs seriously afoul of the First Amendment. The Committee has not even attempted seriously to defend these aspects of Opinion 39.

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KPM voluntarily began including a shorter disclaimer in its magazines.

**IV. IN ADDITION, OPINION 39 AND THE PROPOSED RESTRICTIONS MUST BE REJECTED BECAUSE THEY PURPORT TO BURDEN OR DICTATE THE EDITORIAL CONTENT OF *SUPER LAWYERS* MAGAZINE, IN VIOLATION OF THE FIRST AMENDMENT.**

*New Jersey Super Lawyers*, it bears repeating, is a magazine. Its lists, developed after extensive research, are editorial content, not advertising. (R192-93) The editorial content of a magazine is not commercial speech; it constitutes expression deserving of the highest First Amendment protection. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) ("[W]e reaffirm unequivocally the protection afforded to [publishers'] editorial judgment ...." (internal quotation marks omitted)). It cannot be restricted except for the weightiest of reasons, not remotely present here. Here, a magazine's freedom to publish has been conditioned, albeit indirectly, upon the State's satisfaction with its message. And, based on the content of the magazine, the State has forbidden citizens to purchase the advertisements that are its source of revenue.

True, lawyer advertising is the proper (and sole) subject of the Committee's jurisdiction. (R6) Nevertheless, this Court cannot close its eyes to the First Amendment collateral damage wrought by the Opinion 39 advertising ban. With a stroke of the pen, and without due process or an opportunity to be heard, the Committee put a magazine out of business in New Jersey based upon its content (or would have, absent this Court's stay).

The magazine had no choice but to incur the cost of defending its reputation against baseless accusations and insinuations, and to submit its entire editorial process to unwarranted scrutiny. The hearings produced no substantiation of the insulting suggestion that the *Super Lawyers* selection process is anything but bona fide. The Committee was reduced to grousing about the details of the editorial process.

The Committee's stance metamorphosed the hearings into an evaluation, not of attorney advertisements, but of *Super Lawyers* magazine itself. And the remedies proposed by the Committee (as well as the twelve examples cited above) would shift the focus of the case from lawyer advertising to regulation of the methods and content of *New Jersey Super Lawyers* magazine.

The decisions of the publisher of *New Jersey Super Lawyers* to feature certain lawyers as superior are quintessential editorial judgments. The Committee has no authority to infringe those editorial judgments, whether directly or indirectly. As then-Judge Alito wrote, an advertising ban impermissibly infringes the *magazine's*, not just the advertisers', First Amendment rights:

[I]f government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment.... ... Section 4-498 imposes "a financial disincentive" on certain speech by *The Pitt News* (alcoholic beverage ads [in a student newspaper]) because would-be advertisers cannot pay the paper to

run such ads, and consequently ... must be analyzed as a content-based restriction of speech.

*Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004)(citing *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991)(striking down "Son of Sam" law depriving criminal authors of proceeds of books relating to their crimes)); see also *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (striking down tax on gross receipts from newspaper advertising); *State v. Lashinsky*, 81 N.J. 1, 13 (1979) (newsgathering process is protected). A ban on lawyers' advertising in a particular publication, or providing information to its publisher, unconstitutionally regulates the publication itself.

Just as a state may not prohibit advertisers from advertising in the *New York Times* out of an objection to its content or reportorial methods, it cannot prohibit advertisers from advertising in *New Jersey Super Lawyers*, just because it disagrees with that publication's message or methods. And just as the state may not prohibit colleges from participating in *U.S. News & World Report's* annual survey, it cannot prohibit New Jersey lawyers from responding to the *New Jersey Super Lawyers* surveys. Nor can a State leave a newspaper nominally free to publish, but strangle its message by prohibiting citizens --

even attorneys -- from supporting it financially or communicating its content to others.

For this reason, too, Opinion 39 and other proposed restrictions on *Super Lawyers* magazines are unconstitutional. This Court should give protected publications wide berth, and should refrain from adopting regulations or interpretations of regulations that impinge on editorial decisions.

#### CONCLUSION

The findings of the Special Master further confirm that Opinion 39, which bans, *inter alia*, New Jersey lawyers' advertising their selection by *New Jersey Super Lawyers* is impermissible. The ban is not dictated by the Rules of Professional Conduct, and to the extent that the Rules might be read in that manner, they would be unconstitutional.

Dated: Newark, New Jersey  
September 15, 2008

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