

COMMENT

WHAT’S NOT SO “SUPER” ABOUT COMPARATIVE DESCRIPTIONS: THE NEED FOR REFORM IN ATTORNEY ADVERTISING*

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I. INTRODUCTION

In an age of advertisements promising weight loss without diet or exercise,¹ a car loan with zero dollars down for those with a bad credit score,² or finding a perfect mate via Internet astrology,³ misleading advertisements constantly inundate today’s consumers.⁴ Although it may be tempting to credit these types of advertisements to slimy salespersons simply out to make a quick buck, are modern attorney-advertising practices equally blameworthy?

This Comment asserts that certain attorney advertising practices lay outside the realm of protected commercial speech⁵

1. See Lose 18 lbs in 4 Days!, <http://slimin4.com> (last visited Feb. 29, 2008) (promising customers will lose eighteen pounds in four days with “No gimmicks, No exercising, No diet pills, No diet additives, No laxatives, No meal replacements, [and] No diet drinks”).

2. See Consolidated Auto Solutions, <http://www.we-finance-bad-credit.com> (last visited Feb. 29, 2008) (advertising automobile loans designed to help “good people with bad credit”).

3. See Free Astrology Match, <http://www.aboutastro.com/cgi-bin/reg2008.cgi?r=plgw16-us&a=2006-12-12> (last visited Feb. 29, 2008) (advertising a “Free Astrology Match Report” to find your soul mate).

4. See KIM SHEEHAN, *CONTROVERSIES IN CONTEMPORARY ADVERTISING* 178–79 (2004) (describing advertisements, such as for diet pills and state lottery tickets, that frequently make “[b]latantly [e]xcessive [p]romises” and that are “consistently . . . questioned and criticized for their misleading tactics”).

5. Commercial speech means speech that “proposes a commercial transaction.” MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 349 n.55 (3d ed. 2004) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel*, 425 U.S. 748, 762 (1976)). It receives less protection under the First Amendment than other types of speech. *Id.* Courts commonly apply varying degrees of protection to different types of

under the First Amendment⁶ and posits that reform is necessary to avoid misleading the ordinary consumer. In particular, this Comment argues that recent state bans on advertising one's nomination as a "Super Lawyer" or "Best Lawyer in America"⁷ are not unreasonable attacks on First Amendment commercial speech and should be a model for setting necessary boundaries on attorney advertising. Various reasons compel this result: the need to protect the public from misleading advertisements; the need to defend the reputation of the legal profession; and the need to protect small firms and solo practitioners from market exploitation.⁸

Part II sketches a brief history of attorney advertising and explains how advertising restrictions ebbed and flowed in the United States over the last few centuries. Part II also discusses today's varying criteria for determining whether a descriptive statement is permissible commercial speech based on the Model Rules of Professional Conduct, Supreme Court precedent, and state court precedent and state model rules. Part III analyzes the recent controversy surrounding self-laudatory statements in *Super Lawyer* and like magazines. Part IV outlines the need for reform in advertising, given the lack of uniformity among the states in defining a misleading communication. Part V assesses the pros and cons of tighter regulations on comparative designations and argues that restrictions on designations such as "Super Lawyer" and "Best Lawyer in America" are necessary

speech; for example, "political, artistic and cultural speech" garners the highest degree of constitutional protection, whereas "fighting words," such as obscenity or libel, garner the lowest degree of constitutional protection. SHEEHAN, *supra* note 4, at 53. Commercial speech maintains an intermediate level of protection. *Id.* For a thorough discussion on the origin of the commercial speech doctrine, see LOUISE L. HILL, *LAWYER ADVERTISING* 24–32 (1993) (discussing the origin, development, and later demise of commercial speech doctrine in the United States).

6. The First Amendment to the U.S. Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

7. *Super Lawyers* is a magazine purporting to name "outstanding lawyers . . . who have attained a high degree of peer recognition and professional achievement" and "is published as a special supplement in leading newspapers and . . . magazines across the country. Super Lawyers magazine, featuring articles about attorneys named to the Super Lawyers list, is distributed to all attorneys in the state or region . . ." About Super Lawyers, <http://www.superlawyers.com/about> (last visited Feb. 29, 2008). *The Best Lawyers in America* is a book published annually proclaiming itself to be "the oldest and most respected peer-review publication in the legal profession." Best Lawyers, <http://www.bestlawyers.com/aboutus/default.aspx> (last visited Feb. 29, 2008); see also *infra* Part III (discussing the current controversy surrounding the permissibility of attorney advertising in publications such as *Super Lawyers* or *The Best Lawyer in America*).

8. See *infra* Part V.

because of their inherently misleading nature. Part V further contends that such restrictions are ultimately beneficial to both consumers and the legal profession. Part VI concludes.

II. THE HISTORY OF ATTORNEY ADVERTISING

A. *The Colonial Days*

Attorney advertising in the United States developed in response to disfavored English tradition.⁹ During the colonial period in America, young men customarily studied law in England and later returned to the United States to begin their legal career.¹⁰ Attorneys, considered a select and privileged group of individuals, were often insulated from laypersons.¹¹ This elitist position did not sit well with the colonial American virtue of opportunity and freedom for every man.¹² To eradicate the idea that lawyers were untouchable elites, various states, including Indiana, New Hampshire, and Ohio, passed legislation in the early nineteenth century allowing ordinary voters to practice law with minimal study or character qualifications.¹³ Soon, so many people began practicing law that supply quickly exceeded the demand for legal services.¹⁴ By the mid-to-late nineteenth century, regulation became necessary to establish order in the then-booming legal profession.¹⁵

B. *The Nineteenth and Twentieth Centuries*

In the late nineteenth century, attorneys began establishing state bar associations and sought to formulate rules of professional conduct, including appropriate advertising standards.¹⁶ Early bar association rules allowed printed

9. See generally Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 374–88 (1990) (discussing the legal profession as a backdrop for the development of lawyer solicitation from the classical period to the modern day).

10. *Id.* at 378–79.

11. *See id.* at 379.

12. *See id.* (noting the hostility shown toward lawyers during the colonial period).

13. *See id.* at 379–80 & nn.74–75 (explaining states' recognition of the "natural right of every voter" to practice law).

14. *See id.* at 380.

15. *See id.* at 380–81 (explaining that bar associations formed to halt the "rampant commercialism" of the legal industry).

16. *See id.* at 381 (noting that the Alabama State Bar Association created a Code of Ethics for attorneys in 1887, which was subsequently adopted by the American Bar Association (ABA)).

advertising materials but not in-person solicitation of a client.¹⁷ However, prior to the passage of the Model Rules of Professional Conduct (MRPC), the Canons of Professional Conduct, promulgated by the American Bar Association (ABA) and passed in 1969, broadly prohibited advertising and solicitation of attorney services.¹⁸ The Canons severely stifled attorney advertising during the twentieth century¹⁹—that is, until the landmark 1977 Supreme Court decision of *Bates v. State Bar of Arizona*.²⁰

In *Bates*, the Court held that truthful attorney advertising is entitled to First Amendment protection as commercial speech.²¹ The Court justified its decision based on the importance of public access to information and on the assumption that advertising would increase volume and competition, ultimately reducing the price of legal services for the public's benefit.²² However, Justice Blackman was careful to narrow the Court's holding to the advertisement of routine legal services and specifically excluded advertisements "relating to the *quality* of legal services."²³

The *Bates* decision marked a pivotal turning point in American legal history: "the contest shifted from *whether* lawyers

17. See *id.* at 382 (citing the ABA's 1908 Code of Ethics, which disallowed solicitations by "personal communication[]" unless the attorney had a personal relationship with the client). To distinguish advertising from solicitation, compare MODEL RULES OF PROF'L CONDUCT R. 7.3 (2006) (prohibiting direct solicitation by "in-person, live telephone or real-time electronic contact" with prospective clients) with MODEL RULES OF PROF'L CONDUCT R. 7.2 (2006) (permitting "advertising" by "written, recorded or electronic communication"). The distinction between advertising and solicitation still applies today, as adopted in the Model Rules of Professional Conduct in 1983. This Comment pertains to attorney advertising practices, not solicitation.

18. See Hill, *supra* note 9, at 382 (describing the proscription as a "blanket provision").

19. See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS* 1–2 (3d ed. 2000) (noting that during the nineteenth century lawyer advertising was commonplace, but restrictions in place from 1908 until 1976 made it difficult for Americans to find "affordable legal services"). Macklin Fleming analogizes the period before commercial advertising became protected First Amendment speech—when the client had to approach the lawyer for legal services and the lawyer could not advertise directly—to a Spanish *paseo*, during which women would dress up and promenade across the town square in hopes that a male suitor would approach them. MACKLIN FLEMING, *LAWYERS, MONEY, & SUCCESS* 116 (1997). Thus, lawyers joined associations, community events, or clubs in hopes of attracting clients by indirect means. *Id.*

20. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); see also COMM'N ON ADVERTISING, AM. BAR ASS'N, *REPORT ON THE SURVEY ON THE IMAGE OF LAWYERS IN ADVERTISING* 2 (1990) (describing the ever-increasing use of attorney advertising since the *Bates* decision).

21. See *Bates*, 433 U.S. at 383 (concluding that "advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected").

22. See *id.* at 377 ("It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.").

23. *Id.* at 366.

could advertise to *how* lawyers could advertise.”²⁴ The tension between a consumer-driven economy and “impulses of paternalism and protectionism” quickly arose after *Bates*.²⁵ Thirty years after *Bates*, states still grapple with the issue of determining the extent to which attorneys may advertise.²⁶

In another cornerstone commercial-speech case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court created a four-pronged analysis for determining the constitutionality of state regulations on commercial speech.²⁷ First, advertising that is “misleading [or] related to unlawful activity” is subject to complete suppression.²⁸ Second, lawful and nonmisleading communications may be subject to restriction if the state asserts a substantial interest in restricting the speech.²⁹ Third, the regulation must advance the asserted state interest.³⁰ Fourth and finally, the regulation will not stand if the asserted state interest could be accomplished by a less restrictive means.³¹

Over time, the Supreme Court began retreating from its strict standard. For example, in *In re R.M.J.*, an attorney’s advertisement contained phrasing that went beyond the “laundry-list”³² of language approved by the state’s code of professional responsibility.³³ The Court held in the attorney’s favor, determining that commercial speech can be limited only if the advertisement is “misleading” or “inherently misleading.”³⁴ Likewise, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, the Court held that a lawyer’s designation as a certified trial specialist through the National

24. Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 441 (2006) (emphasis added).

25. *Id.*

26. See *infra* Part III (examining how different states have dealt with advertising regulations or, in some cases, have yet to do so); see also HILL, *supra* note 5, at 90–91 (discussing the emergence of state regulations on attorney advertising beginning in the mid-1980s and how states continued to grapple with the issue through the mid-1990s).

27. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); see also SHEEHAN, *supra* note 4, at 54–56 (illustrating the application of the four-part test).

28. See *Cent. Hudson Gas*, 447 U.S. at 564, 566 (stating that misleading commercial speech or advertising unlawful activities would not receive First Amendment protection).

29. *Id.* at 566.

30. *Id.*

31. *Id.* at 564, 566.

32. “Laundry list” refers to an exclusive list of specified information allowed by the bar in attorney advertisements after the *Bates* decision. See FREEDMAN & SMITH, *supra* note 5, at 350.

33. See *In re R.M.J.*, 455 U.S. 191, 196–97 (1982).

34. *Id.* at 206–07.

Board of Trial Advocacy (NBTA) was a permissible advertisement because the statement “was neither actually nor inherently misleading” and the certifying organization was “bona fide.”³⁵ Finally, in the early 1990s, a similar result occurred in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, in which the Supreme Court upheld the use of accounting and financial designations as protected commercial speech.³⁶

The Court’s plurality holding in *Peel* identified three types of misleading advertisements, all potentially subject to regulation by the state: “actually misleading,”³⁷ “inherently misleading,”³⁸ and “potentially misleading.”³⁹ Although the Court did not specifically define these terms in the opinion, Justice Stevens rationalized the decision in part by relying on the fact that the NBTA certification was “true and verifiable.”⁴⁰ The majority held that only actual or inherently misleading advertisements are subject to a complete ban.⁴¹ However, Justices Marshall and Brennan, concurring in the judgment in *Peel*, asserted that even potentially misleading advertisements should be subject to a total ban “to ensure that the public is not misled by such representations.”⁴²

In 1995, the Supreme Court confronted another seminal advertising case, *Florida Bar v. Went for It, Inc.*⁴³ At the time, Florida lawyers were prohibited from contacting accident victims by direct mail solicitation within the first thirty days after the injury.⁴⁴ The district court held the ban unconstitutional, in violation of the

35. See *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 110–11 (1990).

36. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 138–39 (1994) (holding that the inclusion of Certified Public Accountant and Certified Financial Planner credentials in an attorney’s advertisements was protected commercial speech).

37. See *Peel*, 496 U.S. at 106 (rejecting the assertion that the NBTA certification was actually misleading).

38. See *id.* at 110 (noting that a state may not completely ban statements that are bona fide and not inherently misleading); cf. Smolla, *supra* note 24, at 444–45 (criticizing the inherently misleading standard as going beyond the general protections provided against truly false, misleading, or deceptive advertising).

39. See *Peel*, 496 U.S. at 100–01 (considering “whether the *potentially misleading* character of [the] statements creates a state interest sufficiently substantial to justify a categorical ban on their use” (emphasis added)).

40. See *id.* (reasoning that NBTA certification was objectively verifiable by its “predicate requirements for . . . certification,” such as continuing education credits, bar activities, and training hours).

41. *Id.* at 110.

42. *Id.* at 111 (Marshall, J., concurring).

43. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

44. *Id.* at 620–21.

First Amendment,⁴⁵ and the Eleventh Circuit affirmed.⁴⁶ The Supreme Court, in a 5–4 decision, reversed and held that the thirty-day ban was constitutional because it satisfied the *Central Hudson* test⁴⁷ for regulating commercial speech.⁴⁸ Moreover, the Florida Bar proved a “substantial interest” in maintaining the regulation because the thirty-day ban protected Florida citizens from relentless mailings and preserved the dignity of the legal profession.⁴⁹

C. Attorney Advertising in the Twenty-First Century

Today, Supreme Court precedent⁵⁰ and the MPRC guide the regulation of attorney advertising, but individual states and bar associations largely determine the boundaries of permissible advertising practices.⁵¹ As a result, varying standards exist for determining whether a descriptive statement is permissible commercial speech. Particularly problematic are self-laudatory statements in attorney advertising⁵² and determining which standards and regulations are most appropriate to accommodate the modern legal profession and its clientele.

As a baseline, Model Rule 7.1 prohibits false or misleading communication about a lawyer’s services.⁵³ A misleading statement means one that could lead a “reasonable person to form an

45. *Id.* at 621 (noting the district court’s reliance on *Bates* to find the prohibition unconstitutional).

46. *Id.* at 622.

47. *See supra* notes 27–31 and accompanying text (describing the Supreme Court’s multi-pronged *Central Hudson* test for determining whether a restriction on commercial speech is permissible).

48. *See Went For It Inc.*, 515 U.S. at 620, 635.

49. *Id.* at 635 (“The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.”).

50. For a more expansive discussion of Supreme Court precedent beyond the scope of this Comment, see FREEDMAN & SMITH, *supra* note 5, at 348–70 (summarizing Supreme Court precedent regarding attorney advertising and solicitation). *See also* HORNSBY, *supra* note 19, at 11–12 (summarizing pertinent First Amendment precedent on commercial advertising by lawyers).

51. *See* SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 17–18 (2004) (describing the sources of law for attorney regulation, including judicial mandates, state codes, and bar associations); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) (allowing states to “impose appropriate restrictions” on attorney advertising).

52. *See infra* Part III.A (describing the recent New Jersey Ethics Opinion 39, involving the permissibility of self-laudatory statements such as “best” and “super” in attorney advertising materials).

53. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2004); *see also* HORNSBY, *supra* note 19, at 18 (calling Model Rule 7.1 a “double-edged sword,” noting its vague standard and lack of concrete guidelines).

unjustified expectation” about results, or one that contains an “unsubstantiated comparison of the lawyer’s services . . . with the services . . . of other[s].”⁵⁴

Because rules of professional conduct vary from state to state, court decisions regarding the use of qualitative or comparative descriptions are wide-ranging. For example, several states completely ban the use of self-laudatory statements in attorney advertising.⁵⁵ Pennsylvania maintains a somewhat similar stance, barring the use of the word “experienced” in an attorney advertisement.⁵⁶ Other states, such as Texas, choose an intermediate approach: qualitative descriptions are permissible so long as the context in which the description is used does not mislead the reader.⁵⁷ Specifically, the Texas Disciplinary Rules of Professional Conduct state in Rule 7.02(a):

A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

. . . .

(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law.⁵⁸

Texas rules also consider communication false or misleading if it “compares the lawyer’s services with other

54. MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2004).

55. See HORNSBY, *supra* note 19, at 18 (noting jurisdictions with a blanket ban on self-laudatory statements: Indiana, Iowa, Ohio, Puerto Rico, and South Dakota); see also Timms R. Fowler & James Leventhal, *Congratulations—You’ve Just “Got Your Wings”—Marketing in Ethical Airspace*, 1 ANN.2005 ATLA-CLE 993 (2005) (noting that in *Mason v. Florida Bar*, 208 F.3d 952, 959 (11th Cir. 2000), the court recognized that “merely self-referential and laudatory statements . . . are prohibited”).

56. *Spencer v. Honorable Justices of the Sup. Ct.*, 579 F. Supp. 880, 887–88 (E.D. Pa. 1984) (holding that listing oneself as “experienced” in an attorney advertisement was inherently misleading and should be “totally banned” because the term was neither objective nor verifiable).

57. Tex. Comm. on Prof’l Ethics, Op. 550, 67 Tex. B.J. 698, 698–99 (2004) (holding that lawyers may use the titles of “Dr.,” “Doctor,” “J.D.,” or “Doctor of Jurisprudence” in social and professional communications, so long as the title is not misleading in the context in which it is used); see also *Rodgers v. Comm’n for Lawyer Discipline*, 151 S.W.3d 602, 611–13 (Tex. App.—Fort Worth 2004, pet. denied) (affirming a Texas trial court’s judgment that an attorney advertising his services under the heading “Accidental Injury Hotline” violated prohibition against the false and misleading advertising).

58. TEX. DISCIPLINARY R. PROF’L CONDUCT 7.02(a)(3), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2007) (TEX. STATE BAR R. art. X, § 9).

lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data."⁵⁹ To protect the consumer interest, the Texas Bar recently amended its advertising rules to require that all firms submit their websites to the Advertising Review Committee for review before posting.⁶⁰

Other states, such as Florida and Virginia, determine the propriety of attorney-advertising practices based on whether they are beneficial to the public interest.⁶¹ Finally, Iowa recently determined the permissibility of an attorney advertisement based on whether the advertisement was intended primarily for use by the legal profession or by consumers.⁶² With such an array of criteria for determining the appropriateness of an attorney advertisement, it should come as no surprise that in today's world of high-speed Internet and widely circulated paper publications, attorney advertising practices are problematic,⁶³ and their effects go beyond the bounds of state lines.

III. THE CONTEMPORARY CONTROVERSY OVER SELF-LAUDATORY STATEMENTS: "SUPER" AND "BEST" LAWYERS

This Part addresses the crux of the modern day attorney advertising dispute regarding qualitative designations. Section A summarizes the substance of New Jersey's Ethics Opinion 39, and Section B explains why the decision is spawning controversy. Finally, Section C explores the position of other states on the permissibility of self-laudatory statements.

59. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02(a)(4).

60. See STATE BAR OF TEXAS, FINAL CHANGES AND COMMENTS TO TDRPC PART VII, R. 7.07, at 23–29, available at http://www.texasbar.com/content/contentgroups/professional_requirements1/advertising_review1/advertising_rules/adrules2005.pdf.

61. Fla. Bar v. Pape, 918 So. 2d 240, 242 (2005) (holding that the use of a pit bull in advertising violated Florida's Rules of Professional Conduct and was unprotected by the First Amendment because of its demeaning nature to the legal profession and its failure to assist the public in making an informed decision); see also Allen, Allen, Allen, & Allen v. Williams, 254 F. Supp. 2d 614, 628–29 (E.D. Va. 2003) (granting injunctive relief in favor of a Virginia firm that was prohibited from listing its attorneys nominated in *The Best Lawyers in America* in its advertising materials because allowing the advertisement was in "the public interest").

62. Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Ethics Op. 05-03 (2005) (holding lawyer advertisements are permissible if the publication in which the advertisement is published is "intended primarily for the use of the legal profession" (citation omitted)).

63. See Fowler & Leventhal, *supra* note 55 (advising lawyers to use "extra care" when advertising via the Internet). For a thorough discussion of ethical issues regarding attorney advertisements and the Internet beyond the scope of this Comment, see generally Melissa Blades & Sarah Vermynen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637 (2004) (discussing the interplay between the Internet and attorney ethics in advertising).

A. *Ethics Opinion 39*

In New Jersey, controversy brews over Ethics Opinion 39, a sweeping decision that imposed a prophylactic ban on all *Super Lawyer* designations in attorney advertisements.⁶⁴ The decision resulted from a disgruntled attorney who reported his dissatisfaction with his “Super Lawyer” nomination, which was to be published in a special advertising insert in *New Jersey Monthly* magazine.⁶⁵ The Ethics Committee sided in the lawyer’s favor, reasoning that this type of advertising was “likely to create an unjustified expectation about results” and was “comparative in nature.”⁶⁶ The opinion harshly criticized *New Jersey Monthly*’s methodology, determining that the *Super Lawyer* selection process was too vague and the data unverifiable.⁶⁷ The Ethics Committee based its opinion on the fact that the publication intends the magazine for mass consumption, whereas other surveys, such as Martindale–Hubbell, publish survey results primarily for use by the legal profession.⁶⁸ After significant backlash from the New Jersey Bar Association on behalf of its member attorneys,⁶⁹ the Supreme Court of New Jersey

64. N.J. Sup. Ct. Advisory Comm. on Attorney Adver., Ethics Op. 39 (2006) [hereinafter Ethics Op. 39] (prohibiting the use of superlative designations, such as “Super Lawyer,” in attorney advertisements because such designations violate New Jersey’s rules of Professional Conduct, Rule 7.1).

65. See Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising at 1–2, In re Opinion 39 of the Comm. on Attorney Adver., 919 A.2d 845 (N.J. 2007) (No. 60,003) (explaining that Lloyd Levenson, Esq., nominated as a “Super Lawyer” for 2005, initiated a complaint with the Committee on Attorney Advertising questioning the propriety of *Super Lawyers* magazine); see also Katherine E. Stout, *New Jersey Ethics Opinion Could Impact Lawyer Advertising*, 8 LAW. J. 5 (2006) (discussing Opinion 39).

66. Ethics Op. 39, *supra* note 64, at 1.

67. *Id.* at 1–2 & n.1. *Contra* Posting of Bill White to Super Lawyer Facts, <http://www.superlawyersfacts.com/2006/week37/index.html#entry-12832805> (Sept. 15, 2006) (rejecting the idea that the methodology is unsound in selecting a “Super Lawyer”). A *Super Lawyer* representative asserted, “The facts are that our selection process is more quantitative, rigorous and comprehensive than any of the other directories.” *Id.* (emphasis omitted); see also Linda Eads, *Inadmissible Kryptonite For Super Lawyer*, TEX. LAW., Oct. 2, 2006, at 3 (explaining the balloting and *Super Lawyer* selection methodology). President Chuck Thell of Key Professional Media, the company that created the ranking system for Super Lawyer, asserts that “no one pays to be listed as a Super Lawyer.” *Id.*

68. Ethics Op. 39, *supra* note 64, at 3.

69. Letter Brief for N.J. State Bar Assoc. at 8, In re Opinion 39 of the Comm. on Attorney Adver., 919 A.2d 845 (N.J. 2007) (No. 60,003) (raising concerns of the steep financial impact Opinion 39 has on lawyers, especially small firms and solo practitioners, who will have to reprint color brochures, modify websites, remake commercials, etc., to exclude the “Super Lawyer” designation from their advertising materials). See generally William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 305 (2005) (noting that lawyer advertising is a billion-dollar industry).

succumbed to the pressure and granted a stay of enforcement of the opinion.⁷⁰ At the time of this writing, the New Jersey Supreme Court has made no final determination on the issue, creating leeway for vigorous debate.

B. *The Current Debate*

Some attorneys agree with the ban on self-laudatory statements in advertising, complaining that the magazine wrongfully promotes attorneys in the profession by implying that a “Super Lawyer” is superior to an ordinary lawyer and creates a disadvantage to those not listed in the magazine.⁷¹ Others take a more cynical view of the publication, claiming that the real purpose of the survey is not to assist the public in making an informed decision in selecting qualified counsel, but rather to make money from a multi-million dollar industry.⁷² Given the temporary stay on Opinion 39, the future of self-laudatory statements in New Jersey is uncertain; however, other states have confronted similar issues, each grappling with the problem in its own way.

C. *Different States, Different Stances*

Because each state adopts its own model rules of professional conduct,⁷³ it naturally follows that states have varying standards for attorney advertising. For example, in Tennessee, an Ethics Committee recently held that lawyers may list their nomination as a “Super Lawyer” or “Best Lawyer in America” in advertising materials, provided the selection process is not arbitrary and lawyers do not pay the publication in order to receive the designation.⁷⁴ Taking a somewhat different approach, in Pennsylvania, a Philadelphia Bar Association

70. See *In re Opinion 39*, 919 A.2d at 845.

71. Karen Donovan, *Some Lawyers Ranked “Super” Are Not the Least Bit Flattered*, N.Y. TIMES, Sept. 15, 2006, at C6 (noting that most complaints regarding the *Super Lawyers* publication come from lawyers, not the general public).

72. Henry Gottlieb, *‘Super Lawyers’ Edict Stayed by N.J. Supreme Court*, LAW.COM, Aug. 23, 2006, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1156248910932> (noting that *Super Lawyers* generates \$1.3 million annually in New Jersey alone); About Super Lawyers, *supra* note 7 (boasting that *Super Lawyers* is published in all 50 states and “reaches more than 13 million readers”); see also Sean Carter, *Whose Who’s? How to Get Listed Among the Best (at Paying to Get Listed)*, 5 A.B.A. J. E-REPORT 5 (2006) (making a tongue-in-cheek comparison of *Super Lawyers* to *Who’s Who Among American High School Students*).

73. See *supra* Part II.C (discussing modern-day regulation of attorney advertising).

74. *Practice Tips*, DICTA, Nov. 2006, at 1, 4 (discussing Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Advisory Ethics Op. 2006-A-841 (2006) (not for publication)).

Ethics Opinion held that lawyers may include the “Super Lawyer” designation in advertisements so long as it “contains sufficiently detailed information” concerning the process, criteria, and context of the designation.⁷⁵

Other states, such as Texas, have yet to tackle this issue directly, but some scholars predict that it will soon come to a head.⁷⁶ However, Kathy Kelly, chairperson of the Texas Bar Advertising Review Committee, states: “None of what’s going on in [New Jersey] has any direct impact on us [Texans].”⁷⁷ At this point, only time will tell. Yet, one thing is certain—courts shy away from allowing self-laudatory statements in the name of professionalism and in an effort to avoid misleading the public at large.⁷⁸

However, reform will likely be an uphill battle, as competition among firms is fierce⁷⁹ and lawyers are plentiful, leaving consumers with the upper hand. If lawyers and firms must distinguish themselves in the marketplace to attract clientele,⁸⁰ one may argue that consumers deserve the most forthcoming information possible to make an informed decision.⁸¹ Certainly, a designation of “Super Lawyer” or “Best Lawyer in

75. Phila. Bar Assoc., Ethics Op. 2004-10 (2004).

76. Professor Linda Eads of Southern Methodist University claims the ads in *Texas Monthly* are “close to the line, if not over it.” Eads, *supra* note 67, at 3.

77. *Id.*

78. See HARRY J. HAYNSWORTH, EXPANDING YOUR LAW PRACTICE: THE ETHICAL RISKS 17 (1984) (“Self-laudatory statements about a lawyer or a law firm . . . are universally condemned. . . . [S]tatements about the quality of legal services . . . have almost always been held to be impermissible.” (emphasis omitted)); Jason B. Lutz, *Attorney Advertising and Disciplinary Action: Some Do’s and Don’ts of Advertising*, 25 J. LEGAL PROF. 183, 185–86 (2001) (discussing attorney qualifications in advertisements—such as “experienced,” “highly qualified” or “competent”—that courts may consider misleading); cf. FREEDMAN & SMITH, *supra* note 5, at 348 (“[P]rofessionalism’ is frequently a euphemism for public image”); Eugene Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 696 (2006) (“[T]here is no agreed meaning for ‘professionalism.’”).

79. “[T]he rigors of competition are eroding gentlemanly inhibitions against public bragging and tooting one’s own horn.” FLEMING, *supra* note 19, at 120; see also *id.* at 83–84 (noting that the recent explosive growth and mobility of large law firms with multiple offices partially accounts for the “oversupply” of firms and the disproportionate lack of demand).

80. See *id.* at 119 (discussing brand-name development and business promotion techniques undertaken by large firms, such as hiring public relations specialists and marketing experts in order to attract new clients). Fleming predicts that the future of large law firm marketing will focus on two main areas: increasing institutional advertising and requiring lawyers to expand their involvement in “relevant business and legal circles” to attract specific clients. *Id.* at 120.

81. “[T]he public should not face a greater potential of being even further misled by an unwarranted disciplinary action than by the advertising in question, should the opinion [39] be overturned.” Letter Brief for N.J. State Bar Assoc., *supra* note 69, at 9.

America” would seem persuasive to an average consumer, unsure of whom to hire among a slew of similar listings in the *Yellow Pages*.

On the other hand, are these types of publications really informing the public of anything useful at all?⁸² This is especially vital given that only a small percentage of attorneys participate in the *Super Lawyers* survey to begin with, something readers may or may not be aware of when “shopping” for a lawyer based on these types of publications.⁸³

Essentially, the issue is whether superlative designations provide consumers with relevant information or misleading information. Until or unless the Supreme Court steps in to clarify this issue,⁸⁴ or the ABA moves to amend the Model Rules of Professional Conduct,⁸⁵ each state must decide this controversial issue for itself. Persuasive reasons exist for states to follow New Jersey’s lead and protect unwitting consumers with a bright-line rule banning misleading statements from attorney advertisements.⁸⁶

IV. THE NEED FOR CLARITY

According to professor Louise Hill, contemporary lawyers and clients must consider five major problems in attorney advertising: (1) “what is false or misleading”; (2) “what is advertising and what is marketing”; (3) “state regulation of multi-state or national activities”; (4) “client contact by lawyers leaving law firms”; and (5) “criteria for impermissible solicitation [that is] subjective and inappropriate.”⁸⁷ This Part discusses Hill’s first three issues.

82. See Ethics Op. 39, *supra* note 64, at 2 n.1 (criticizing the *Super Lawyer* methodology as an “arbitrary selection” method, lacking empirical results, and using vague selection criteria).

83. For example, of the 30,000 attorneys balloted for the *Super Lawyer* nomination survey in New Jersey, only 4.8% completed the ballot and responded. Donovan, *supra* note 71.

84. See Stout, *supra* note 65, at 5 (quoting Professor John Taylor of West Virginia University College of Law, who warns that “because the Supreme Court offers little guidance in this area, ‘predictions are hazardous’”); see also Smolla, *supra* note 24, at 443 (asserting that “in many respects, constitutional doctrine governing lawyer advertising is more striking for what remains opaque than for what is clear”).

85. See *supra* notes 53–54 and accompanying text (describing the current model rules pertaining to attorney advertising).

86. See *infra* Part V (discussing why tighter restrictions on self-laudatory statements are necessary).

87. HILL, *supra* note 5, at 133–50.

A. *What is Misleading*

One challenge proponents of a ban on “misleading” comparative designations face is that there seems to be no uniform definition of a misleading communication in the context of attorney advertising.⁸⁸ States vary greatly in their definition of what constitutes a false or misleading communication.⁸⁹ In fact, some states do not define the term at all in their rules of professional conduct, while others, such as Hawaii and Missouri, enumerate a list of proscribed communications.⁹⁰ Such lack of uniformity among the states leads to the problem of evaluating advertisements on a jurisdiction-by-jurisdiction basis.⁹¹ This system is inefficient, especially given that advertisements and publications such as *Super Lawyers* are available for worldwide viewing, unlimited by jurisdictional boundaries, through the Internet.⁹²

B. *Marketing vs. Advertising*

According to Hill, a grey area exists in the legal industry between prohibited advertising techniques under the Model Rules and what some firms suggest is simply “marketing” of their legal services.⁹³ Hill also raises the question of whether to label handouts as “Advertising Material” if the sponsoring lawyer or firm claims the handout is merely included inside a packet of educational seminar materials and not otherwise distributed separately.⁹⁴

Interestingly, in a recent ABA publication, William Hornsby defines “advertising” as an element of “marketing.”⁹⁵ Clearly, the interpretation of what is advertising versus marketing is

88. *Id.* at 133.

89. *See id.* at 133–34 (noting that while some states have adopted MRPC 7.1(a), others have attempted to define misleading communications more explicitly).

90. *See id.* at 134–35 (explaining that Hawaii and Missouri’s model rules prohibit advertisements that omit material facts, are likely to create an unjustified expectation regarding results, or compare a lawyer’s services with that of another).

91. *Id.* at 135.

92. *See id.* at 137–38 (raising the concern of what rules should apply to multistate advertising when an attorney promotes legal services in advertising mediums with national distribution).

93. *Id.* at 136–37 (according to Hill, examples of “marketing” include sponsoring a seminar in the community and notifying participants by mail with brochures about a firm’s legal practice).

94. *Id.* at 136.

95. HORNSBY, *supra* note 19, at 2 (“Concepts of law firm marketing are not uniformly defined. However, . . . the elements of legal services marketing are broken down into 1. advertising, 2. solicitation, 3. public relations and promotions, and 4. marketing through new technologies.”).

uncertain at this time. Currently, the MRPC Rule 7.2 explicitly uses the term “advertising” without reference to attorney marketing.⁹⁶ With no clear line between marketing brochures or seminar sponsorships and regulated advertising activities under Model Rule 7.2, lawyers and firms have broad leeway, opening the door to abusive practices. For this reason, states should consider amending their model codes to better delineate the distinction between marketing and advertising.

C. Varying Jurisdictional Standards

Another major challenge is how to take the “subjectivity out of a false and misleading standard.”⁹⁷ As with any subjective criterion, misleading advertising in the eyes of one fact-finder may be perfectly legitimate in the eyes of another. Consequently, not only does the paradigm for what is misleading vary from jurisdiction to jurisdiction, but it may also fluctuate “from fact finder to fact finder” within that jurisdiction.⁹⁸ With such a high potential for differing outcomes, attorneys and consumers alike lack clear guidance on what type of advertising is acceptable and what is not.⁹⁹ The fact that magazines such as *Super Lawyers* publish in almost all fifty states¹⁰⁰ warrants a more consistent definition of “misleading” communication. One way to solve this problem is to amend the Model Rules and state codes so they prohibit the use of misleading, self-laudatory statements, including “super” and “best” lawyer.¹⁰¹

V. TIGHTER RESTRICTIONS ON SELF-LAUDATORY STATEMENTS ARE NECESSARY

This Part analyzes why strengthening attorney advertising regulations on comparative or qualitative designations would be beneficial to the legal profession and consumers. It also considers some of the major problems that lawyers, firms, and clients confront today, given the varying standards on ethical advertising.¹⁰²

96. MODEL RULES OF PROF'L CONDUCT R. 7.2 (2004).

97. HILL, *supra* note 5, at 136.

98. *Id.*

99. *See id.* (lamenting the problems faced by lawyers seeking to advertise, resulting from the various jurisdictional standards and the “varying interpretations of many factual scenarios” even if the proper standard is known).

100. *See* About Super Lawyers, *supra* note 7 (“Super Lawyers magazine is published in all 50 states and reaches more than 13 million readers.”).

101. *See infra* Part V.A (asserting that self-laudatory statements mislead the public by comparing one lawyer's services to that of another).

102. *See supra* Part III.C (explaining that different states adopt varying rules of professional conduct, including rules pertaining to attorney advertising).

A. Protecting the Public From False or Misleading Advertising

States should consider following the lead of New Jersey's Ethics Committee and ban the use of self-laudatory statements in attorney advertising because such a ban helps protect the public from false or misleading advertising. First, the use of the words "super" or "best" in an attorney advertisement is facially misleading because it is an "unsubstantiated comparison" of one lawyer's services to that of another, violating MRPC 7.1.¹⁰³ To state that one is "super" automatically implies that an attorney without the "super" designation is merely ordinary or of a lesser quality.¹⁰⁴ Second, *Super Lawyers* self-proclaims that the magazine is "a resource to assist attorneys and *sophisticated* consumers in the search for legal counsel."¹⁰⁵ Yet, it appears few safeguards are in place to ensure that only "sophisticated" consumers are reading the magazine—especially considering that the publication boasts an annual readership of 13 million.¹⁰⁶ Third, attorney rating publications that manipulate inherently subjective opinion surveys into purportedly "scientific and objective" data can be misleading to the public.¹⁰⁷ Even if one were to assume nominations are entirely based on objective facts, "[m]erely because something is a fact does not make it readily verifiable. A statement, even if true, could be misleading."¹⁰⁸

103. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2004); *see also supra* notes 53–54 and accompanying text (explaining that MRPC 7.1 prohibits false or misleading communications).

104. *See* Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising, *supra* note 65, at 20 ("[T]he relevant consideration is what the advertisement is likely to connote to a consumer; in this case, it is reasonable to believe that a consumer will infer that a 'super' lawyer has been so designated because he or she has skills and acumen exceeding that of his or her peers, and . . . will be able to achieve results that exceed the results that might be obtained by a mere ordinary lawyer."). *But see* Smolla, *supra* note 24, at 460 (positing that "prohibitions on self-laudatory statements are in fundamental conflict with the whole point of advertising").

105. Super Lawyers Selection Process, http://www.superlawyers.com/about/selection_process.html (last visited Feb. 29, 2008) (emphasis added).

106. About Super Lawyers, *supra* note 7.

107. *Compare* Reply Brief of Intervenor New Jersey Monthly, LLC to Brief of Respondent Committee on Attorney Advertising at 2, *In re* Opinion 39 of the Comm. on Attorney Adver., 919 A.2d 845 (N.J. 2007) (No. 60,003) (asserting that "the results of the polling data were closely scrutinized and crosschecked"), *with* Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising, *supra* note 65, at 21 (noting the court's difficulty in supporting objective data based on subjective determinations).

108. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 121–22 (1990) (O'Connor, J., dissenting).

B. Protecting the Reputation of the Legal Profession

Another reason qualitative descriptions should be disallowed is to protect the reputation and integrity of the legal profession. Interestingly, attorneys file most of the complaints for advertising violations,¹⁰⁹ which may suggest that attorneys do care about the impact advertisements have on the public perception of the profession. In fact, many attorneys believe advertising is to blame for the corrosion of the public image of lawyers.¹¹⁰

Studies suggest that indecorous advertising practices decrease the public's trust in both the legal profession and the justice system itself.¹¹¹ Research also shows that both lawyers and consumers prefer advertising that is "in good taste" and "dignified."¹¹² The public already perceives lawyers as "greedy, dishonest and otherwise unprincipled."¹¹³ This unsavory image will remain unchanged as long as misleading advertisements boasting self-laudatory accolades remain permissible.¹¹⁴

Some scholars go so far as to assert that advertising not only greatly influences the public's perception of the legal profession, but is a tool to *educate* the public about the legal profession.¹¹⁵

109. Christopher R. Lavoie, Note, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 425 (1997).

110. See J. GORDON HYLTON, PROFESSIONAL VALUES AND INDIVIDUAL AUTONOMY 169 (1998) (citing a poll by *California Lawyer* magazine in which 86% of the survey respondents believe "advertising adversely affect[s] the public image of the bar").

111. See Vanderveer Custis, *The Place of Ethics in the Field of Advertising*, in THE ETHICAL PROBLEMS OF MODERN ADVERTISING 3, 15 (Henry Assael et al. eds., 1978) (1931) (stating that false advertising "reduces public confidence in advertising and so makes it less effective"); ABA Center for Professional Responsibility, ABA Aspirational Goals for Lawyer Advertising: Preamble, <http://www.abanet.org/cpr/professionalism/abaaspirationalgoals.html> (last visited Feb. 29, 2008) ("[E]mpirical evidence suggests that undignified advertising . . . detract[s] from the public's confidence in the legal profession . . ."); see also Lavoie, *supra* note 109, at 433 ("The public . . . prefers dignified and tastefully presented lawyer advertisements over tacky, greedy, or unrealistic ones.").

112. See COMM'N ON ADVERTISING, *supra* note 20, at 55 (describing the conclusions of a national survey on attorney advertising). According to the survey results, an indicator of a dignified advertisement is information that is "useful to legal consumers beyond merely promoting the advertising lawyer or firm." *Id.*

113. Gaetke, *supra* note 78, at 696.

114. But see Smolla, *supra* note 24, at 445 (asserting that the "management of good taste" should be assigned to "the forces of the marketplace, not the forces of government").

115. *Roundtable: Lawyers, Marketing and Advertising*, 37 APR ARIZ. ATT'Y 26, 28 (2001) (quoting attorney and author Martin Solomon: "[W]e would have been much better off as a profession had the Bar taken a more active role in fashioning where advertising would be going, based upon its role as an *educator* of the profession") (emphasis added); see also Custis, *supra* note 111, at 13 ("Rightly used, [advertising] may have a high educational value as to wants and the means of their satisfaction."); ABA Center for Professional Responsibility, *supra* note 111 ("[A]dvertising can help people to better understand the legal services available to them and how to obtain those services.").

Viewed as an instrument for educating the public, the standard for attorney advertisements should be high, and toleration for misleading advertisements should be low.¹¹⁶

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court recognized that lawyers and physicians may be subject to a higher standard in commercial advertising than other professionals given the “historical and functional” characteristics of their professions.¹¹⁷ The Court noted that attorneys “do not dispense standardized products; they render professional *services* . . . with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.”¹¹⁸ This statement suggests that, even before the landmark *Bates* decision,¹¹⁹ the Supreme Court held lawyers to a more rigorous standard than that of regular commercial advertisers.¹²⁰

Because “[i]mage, not information, is the touchstone of much of our commercial discourse,”¹²¹ it makes sense that to enhance the reputation of the legal profession, attorneys must take affirmative steps to improve the public perception of the legal industry. A means of accomplishing this goal is banning misleading self-laudatory statements in attorney advertisements. To be clear, the prescription is not a blanket prohibition on advertising, but rather a straightforward restraint on self-laudatory statements in attorney advertisements.

C. *Protecting Small Firms and Solo Practitioners From Market Exploitation*

“Commercial speech represents commercial power.”¹²² Supposing this is true, the inverse is that lack of commercial speech represents lack of commercial power. Applying this paradigm to attorney rating publications, those lawyers who can

116. According to the ABA, “lawyer advertising should exemplify the inherent dignity and professionalism of the legal community.” ABA Center for Professional Responsibility, *supra* note 111.

117. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 773 n.25 (1976).

118. *Id.*

119. *See supra* notes 23–29 (discussing the seminal attorney advertising Supreme Court decision, *Bates v. Arizona*).

120. *See* Michael Hegarty, Note, *Constitutional Law—First Amendment Commercial Speech—Attorney Solicitation—In re Von Wiegen*, 34 U. KAN. L. REV. 191, 213–14 & n.129 (1985) (observing the Supreme Court’s traditional expectations of the legal profession (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 773 n.25)).

121. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 736 (1993).

122. *Id.* at 722.

afford to advertise their nomination naturally garner the most commercial power. Although attorneys nominated for recognition as a “Super” lawyer do not pay to be listed,¹²³ those lawyers (or firms) who do pay for a “supplemental” advertisement within the magazine are typically listed in red and bold, whereas attorneys not paying for extra advertising are named in plain black, ordinary typeface.¹²⁴ Furthermore, while all attorneys receiving the nomination are encouraged to advertise their services in the publications, the cost of placing an advertisement is not cheap, ranging from approximately \$1,400 for a minimal “standard-profile” ad,¹²⁵ to \$23,000 for a “platinum-profile” two-page ad.¹²⁶ Large to mid-size firms are more likely to be able to afford an advertisement in the publication, whereas small firms and solo practitioners often have smaller advertising budgets.

These discrepancies are important to recognize, not to demonize the print media’s practice, but to gain awareness of the substantial difference in how attorneys are listed in *Super Lawyers* based on whether they purchase a supplemental advertisement or not. If all lawyers selected as a “Super Lawyer” are equally deserving of the designation, it is unreasonable to list some lawyers in red and bold and others in plain typeface. This sends the wrong message to readers—namely that lawyers named in red or bold are in fact more “Super” or distinguished than those lawyers listed in plain type.

D. Consistency with Supreme Court Precedent and the First Amendment

The *Bates* Court, cognizant of the subjective nature of comparative statements, was careful not to extend its holding to qualitative descriptions.¹²⁷ In fact, the Court has repeatedly declined to extend First Amendment commercial speech freedoms

123. Advertising Opportunities, <http://www.superlawyers.com/about/advertising.html> (last visited Feb. 29, 2008) (explaining that “[t]hose attorneys chosen to the Super Lawyers list have several unique marketing opportunities available”).

124. See Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising, *supra* note 65, at 6 (explaining the differentiation of the appearance of the attorney nomination listings based on whether the lawyer elects to purchase a supplemental advertisement in the magazine).

125. See *id.* (detailing the costs for advertising in *New Jersey Super Lawyers* magazine and *New Jersey Monthly Super Lawyers* advertising inserts).

126. *Id.*

127. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977) (opining that “claims as to the quality of services . . . may be so likely to be misleading as to warrant restriction”); see also *supra* notes 21–23 and accompanying text (discussing the *Bates* decision in detail).

to qualitative descriptions in attorney advertising.¹²⁸ This core principle should not wane simply in the name of commercialism.

1. *The Four-Part Central Hudson Test Is Satisfied.* Recent state bans on attorney advertising such as a “Super Lawyer” or “Best Lawyer in America” satisfy the four-part *Central Hudson* test and, for this reason, are justified regulations of qualitative descriptions in attorney advertising.¹²⁹ As to the first prong, the use of comparative designations is misleading to the public because the self-laudatory designations are not objective facts intended to inform the public of one’s practice area or certifications; rather, the accolades are based on subjective opinion.¹³⁰ Second, all states that produce publications such as *Super Lawyer* or *Best Lawyer in America* have a substantial interest in regulating self-laudatory speech to protect unwary consumers from erroneously relying on the publications as their main source for selecting legal counsel.

Third, banning the use of comparative designations will further states’ interests because the legal profession is a largely self-policed profession,¹³¹ meaning that states must rely on professional rules of conduct to ensure that the integrity of the legal profession is upheld. In fact, one scholar goes so far as to say that “lawyers have ensured their self-regulation at the public’s expense.”¹³² By incorporating the ban on self-laudatory statements into states’ rules of professional conduct, states can be more vigilant in protecting the public and safeguarding the integrity of the legal profession from erosion by commercialism.¹³³

Lastly, encouraging other states to follow New Jersey’s proposed ban on “Super” and “Best” designations in attorney advertisements is not excessively restrictive because it does not preclude lawyers and firms from utilizing other forms of permissible advertising. If states were to implement a ban on the use of “Super” or “Best” lawyer nominations in advertisements,

128. See *supra* notes 24–26 and accompanying text.

129. See *supra* notes 27–31 (describing the *Central Hudson* four-pronged test).

130. See *supra* Part V.A (explaining why the “Super” and “Best” designations blatantly mislead the public).

131. See Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 419 (2005).

132. Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can’t Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 299 (1992).

133. See Hornsby, *supra* note 69, at 256 (commenting that policies governing attorney advertising often “foster economic interests at the expense of broader access to legal services, and have little to do with dignity”).

lawyers would still be able to freely advertise their services in print, television, radio, or Internet mediums. Furthermore, the ban would not impede the ability of potential clients to gather information regarding attorneys via other sources, such as state bar associations, referral services, attorney directories, and public complaints for malpractice.¹³⁴ The critical issue is not whether lawyers may advertise their services, but the means by which they do so and the ethical boundaries of the privilege of commercial speech.¹³⁵

In other words, the ability to advertise and the flow of advertising to the public would not change. Rather, only the extent of the permissible content of the advertisement would change. The restriction would be sufficiently narrow to satisfy states' interests in avoiding misleading communications to the public. As wisely noted by the Supreme Court, "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."¹³⁶

Even if one were to concede that a ban on comparative descriptions in attorney advertisements is not narrowly tailored, courts should still find the regulation permissible because commercial speech garners a lower level of protection than other types of noncommercial speech under the First Amendment.¹³⁷ As the Court articulated in *Went For It, Inc.*, "the 'least restrictive means' test has *no role* in the commercial speech context."¹³⁸ Applying this tenet, as long as a state's rule barring self-laudatory statements in attorney advertisements is "reasonably well tailored" to the objectives of protecting the public from misleading information and preserving the dignity of the legal profession, the prohibition should be able to withstand judicial scrutiny.

134. See Morton, *supra* note 132, at 295 (listing various means by which consumers can gather information about an attorney).

135. See Smolla, *supra* note 24, at 441 (noting that following the *Bates* decision, the dilemma was not *whether* lawyers may advertise, but *how* they advertise).

136. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, 425 U.S. 748, 771–72 n.24 (1976). *Sine qua non* means "[a]n indispensable condition or thing; something on which something else necessarily depends." BLACK'S LAW DICTIONARY 1418 (8th ed. 2004).

137. See Fla. Bar v. Went for It, Inc., 515 U.S. 618, 634–35 (1995) ("[P]ure commercial advertising . . . reserve[s] a lesser degree of protection under the First Amendment.").

138. *Id.* at 632 (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)) (emphasis added). Instead of the least restrictive means test, commercial speech receives an intermediate level of constitutional scrutiny, requiring that the means used to accomplish an end be not a perfect fit, but merely a reasonable one. *Id.*

2. *A Peer Review Is Not “Just Like” a Certification.* Banning comparative designations in attorney advertisements is consistent with the Supreme Court’s holding in *Peel* because a peer review is not “just like” a certification.¹³⁹ In *Peel*, the Court upheld a lawyer’s freedom to advertise his status as certified by the NBTA because it was an objectively verifiable fact, akin to listing where a lawyer attended school or facts about the lawyer’s training and bar activities.¹⁴⁰ To assert that a largely peer-based survey can be treated “just like” a certification obliterates the Court’s distinction between “statements of opinion or quality and statements of objective facts that may support an inference of quality.”¹⁴¹ It is irrational to extend the holding in *Peel* to include self-laudatory statements because such statements are exactly the types of qualitative statements the Court considers unprotected commercial speech.¹⁴²

3. *Restrictions on Self-Laudatory Statements Are Consistent With the Court’s Policy Concerns.* From a policy standpoint, the Court validates commercial speech based on “the value to consumers of the information such speech provides.”¹⁴³ If information such as comparative designations and self-laudatory statements in the advertisement misleads consumers, the value of that information declines and the policy justification for commercial speech loses viability.

One commentator suggests the Supreme Court frequently ignores policy concerns, including “degradation of the legal profession and protection of accident victims and mourning families from imposition,” when analyzing attorney advertising issues.¹⁴⁴ Another commentator believes that “there has yet to be a serious national debate about the desirability or undesirability,

139. Reply of Intervenor Best Lawyers and Petitioner Stuart Hoberman, Esq. to the Brief in Opposition to Petitions for Review of Opinion 39 on Behalf of Respondent Committee on Attorney Advertising at 5, In re Opinion 39 of the Comm. on Attorney Adver., 919 A.2d 845 (N.J. 2007) (No. 60,003) (asserting that a “peer review selection [is] just like an award or a certification” and should be considered “simply a fact” (quoting *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 101 (1990))).

140. *Peel*, 496 U.S. at 101.

141. *Id.*

142. *See id.* (distinguishing qualitative claims from statements of underlying fact); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (noting that statements relating to the quality of services may be deceptive or misleading).

143. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 651 (1985).

144. Hegarty, *supra* note 120, at 191; *cf.* Smolla, *supra* note 24, at 457–60 (discussing the policy behind attorney advertising restrictions and suggesting that “[n]ot all courts . . . have boarded the bandwagon” of such policy interests).

as a policy matter, of the restriction of attorney advertising.”¹⁴⁵ A close analysis of the Court’s decision in *Went For It, Inc.*, however, overrides these viewpoints. The policy of preserving the dignity of the legal profession was one of the main reasons Justice O’Connor argued to uphold the regulation of commercial speech.¹⁴⁶ Although harshly criticized by the dissent,¹⁴⁷ the majority’s policy stance makes sense.¹⁴⁸ Because the Court “afford[s] lawyers a great deal of leeway to devise innovative ways to attract new business”—such as television, radio, newspapers, and magazine advertisements¹⁴⁹—it is appropriate that the duty to preserve the reputation of the legal profession rests partially in the hands of the judiciary.

The Supreme Court in *Went For It, Inc.* prohibited attorney advertising mailings sent within the first thirty days of an accident because the mailings invaded the privacy of Florida citizens.¹⁵⁰ Similar to the Court’s policy rationale in *Went For It, Inc.*, the New Jersey Ethics Opinion implicitly claims responsibility for maintaining the integrity of the profession by disallowing the use of comparative designations. This result is correct based on the Court’s policy concerns raised in *Went For It, Inc.* and should be followed today when states consider the regulation of self-laudatory statements.

4. *A Call for Discourse.* Policy concerns regarding attorney advertising do not rest in the hands of the courts alone. State bar associations should also do their part by assuring that states’ rules of professional conduct mirror underlying policy goals, such as improving the reputation of the legal profession and protecting consumers from misleading advertisements.¹⁵¹

145. Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 702 (1997).

146. Fla. Bar v. *Went for It, Inc.*, 515 U.S. 618, 635 (1995) (recognizing “preventing the erosion of confidence in the profession” as one of two substantial interests advanced by the state).

147. See *id.* at 639 (Kennedy, J., dissenting) (arguing that the justification for protecting the legal profession is “circular”); see also Jodi Vanderwater, Note, *Florida Bar v. Went For It, Inc.: Restricting Attorney Advertising to Preserve the Image of the Legal Profession*, 27 LOY. U. CHI. L.J. 765, 793–94 (1996) (discussing the dissent’s argument that the policy concern of public image is not a substantial state interest).

148. See Vanderwater, *supra* note 147, at 766 (noting that the Supreme Court’s decision in *Went For It, Inc.* is substantiated by the state’s asserted interest of preserving the reputation of the legal profession).

149. *Went for It, Inc.*, 515 U.S. at 633 (majority opinion).

150. See *id.* at 635; see also HYLTON, *supra* note 110, at 211 (noting that “[m]any courts . . . have interpreted *Went For It* as justifying restrictions on attorney advertising”).

151. See Smolla, *supra* note 24, at 469 (arguing that bar associations “possess a vital and compelling responsibility to regulate the practice of law[,]” including “protecting the

Although courts have considered the various issues presented in this discussion, consumers largely have not. For this reason, a public debate on the underlying policy concerns of misleading communications in attorney advertising would be useful. Public discussion of this issue would raise awareness for both the consumers who rely on advertisements and the lawyers who create them. A public debate would also increase awareness about the positive benefits of truthful advertising, such as improving the public image of the legal profession, allowing consumers access to legal services, and creating healthy competition among attorneys in the free market.¹⁵² Pushing these issues to the forefront of state bar associations for public discourse is crucial to raising awareness of the public policy benefits of truthful advertising and the dangers of misleading consumers.

E. Eliminating “Grey” Ethical Areas

Another reason for banning the use of comparative designations in attorney advertisements is to alleviate the onerous task of case-by-case review of advertisements.¹⁵³ Setting a bright-line standard would streamline advertising policies and practices and avoid the need for states to expend resources on policing individual advertisements.¹⁵⁴ Furthermore, establishing a clear distinction between superlatives and fact-based credentials will force lawyers and firms to hold themselves socially accountable for their advertisements.¹⁵⁵

VI. CONCLUSION

From the colonial days to the present, attorney advertising, in some form or fashion, is part of American society. In 1977, the

public, guarding the integrity of the profession, and promoting the pursuit of justice”).

152. See LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 77–84 (rev. ed. 1981) (analyzing the effects of attorney advertising, including the image of lawyers, access to legal services, the effect on the amount and price of litigation, and the reputation of the legal profession).

153. Cf. *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 124–25 (1990) (O’Connor, J., dissenting) (arguing that the First Amendment does not require an “onerous system” of case-by-case review of advertisements); *supra* text accompanying note 34 (explaining that states have the authority to simply prohibit inherently misleading claims).

154. For example, currently in Texas, all attorney and firm websites must be reviewed by the Advertising Committee before posting. See *supra* note 60 and accompanying text.

155. See SHEEHAN, *supra* note 4, at 259–61 (claiming that “socially responsible” advertisements include those that are relevant, contain a clear message, and demonstrate care and commitment to the consumer).

seminal *Bates* decision opened the attorney advertising floodgates to what is now a billion-dollar industry.¹⁵⁶ Given the influx of attorney advertising over the last thirty years, the potential for deceptive and misleading communications is greater than ever.

Although the Supreme Court offers some guidance on this issue, current attorney advertising standards are generally inconsistent among the states. As a result, uncertainty exists as to what is acceptable advertising in today's reality of nationally distributed publications and instant worldwide connectivity via the Internet. In regards to the contemporary controversy concerning the use of comparative designations in attorney advertisements, this Comment contends that states should consider placing tighter restrictions on self-laudatory statements.

Several reasons justify this point of view: to protect the public from false or misleading advertisements; to preserve the integrity of the legal profession; to insulate small firms and solo practitioners from market exploitation; and finally, to comport with Supreme Court precedent and policy concerns, both of which favor tightening regulations. Increased public discourse on this topic is also necessary to educate attorneys and warn consumers about the dangers of misleading advertising. Perhaps most importantly, restricting the use of self-laudatory statements sends the difficult, but important, message to consumers and lawyers alike that ethical values are a non-negotiable priority.

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156. See *supra* notes 24–25 and accompanying text.