
Badges of Honor: Professional Conduct, Consumer Protection, and Accolades in Lawyer Advertising

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Badges of Honor: Professional Conduct, Consumer Protection, and Accolades in Lawyer Advertising

Kiren Dosanjh Zucker and Bruce Zucker***

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I. INTRODUCTION

In its December 2021 advisory, “Look Beyond the Award when you Hire a Lawyer,” the Federal Trade Commission (FTC) warned consumers searching online for an attorney to *cautiously* view the “fancy-looking seals and badges” they may find on attorneys’ websites “claiming they’re the best in the field” when these “might be ‘vanity’ or ‘ego’ awards that lawyers can buy.”¹ The FTC’s advisory then offers guidance on how the consumer can evaluate the merit of such awards, such as researching the requirements for such an award.²

This FTC advisory raises questions about the legal profession’s role in the regulation of attorneys’ accolade advertising. In encouraging solo practitioners and small firms to have an online presence, the American Bar Association (ABA) noted that “the internet can level the playing field significantly” in competing for business.³ In the crowded digital marketplace, attorneys are further advised to “differentiate themselves” as “even with a word-of-mouth referral, many clients will turn to Google before contacting a lawyer.”⁴ Marketing services such as Super Lawyers⁵ have offered attorneys such an opportunity for online distinction. Along with attorney rating systems and specialty certifications, such accolades have been touted by attorneys as evidence that they hold not only a vaulted place among their peers

1. Emily Wu, *Look Beyond the Award when you Hire a Lawyer*, Federal Trade Commission (December 16, 2021) available at: <https://www.consumer.ftc.gov/blog/2021/12/look-beyond-award-when-you-hire-lawyer>, cited in Jenna Greene, *It’s Official: Lawyer Awards (at Least Some of Them) Are Scams*, Reuters (December 22, 2021) available at: <https://www.reuters.com/legal/legalindustry/its-official-lawyer-awards-least-some-them-are-scams-2021-12-22>.

2. *Id.*

3. Allison C. Shields, 2018 Marketing, ABA Tech Report 2018 (January 7, 2019), available at https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/Marketing/.

4. *Id.*

5. Super Lawyers describes itself as a “rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. This selection process includes independent research, peer nominations and peer evaluations.” See <https://www.superlawyers.com/>. This designation is not to be confused with law firms that use the term “super lawyers” as part of the firm name. <https://www.lasuperlawyers.com/>.

but also impliedly can offer clients a higher level of skill and expertise to offer clients.⁶

The ABA Model Rules of Professional Conduct addressing attorneys' communications regarding their legal services have been the basis for states' regulation of comparative advertising, which has faced constitutional challenges.⁷ Part II describes the constitutional protections afforded to attorneys' comparative advertisements as commercial speech and examines judicial treatment of states' disclosure requirements and other restrictions aimed to protect consumers of legal services. Part III explains the current ABA Model Rule of Professional Conduct Rule 7.1 on communications concerning a lawyer's services, and reviews states have expanded on this rule, illuminating potential revisions to Model Rule 7.1. Part IV recommends such a revision based on New Jersey's approach to regulating attorneys' advertising of their awards, honors, and accolades which appears to maintain constitutional boundaries while providing consumers of legal services with the information needed to weigh and measure these "badges of honor."

II. FIRST AMENDMENT AND LAWYERS' COMPARATIVE ADVERTISING

In *Bates v. State Bar of Arizona*,⁸ the United States Supreme Court extended to attorney advertising the same constitutional protections afforded to commercial speech.⁹ In *Bates*, two Arizona lawyers who advertised in a newspaper their "legal clinic" and its "very reasonable prices" for specified routine tasks such as uncontested divorces and simple adoptions, were sanctioned for violating the state's ban on attorney advertising in newspapers and other media.¹⁰ While deceptive, false, or misleading advertising is subject to restrictions,¹¹ the Court concluded that "restrained attorney advertising" such as the Arizona

6. See, e.g., *Kennametal, Inc. v. Sandvik Inc.*, 2012 U.S. Dist. LEXIS 180619 (W.D. PA 2012).

7. See discussion *infra* at Section III. Nevertheless, the ABA's Commission on Ethics 20/20 concluded that lawyer ranking services did not pose a "pervasive problem" that would justify further study James Podgers, *Ethics 20/20 Commission: Doing Nothing About Lawyer Rankings Is the Best Course*, A.B.A. J. (August 11, 2011), available at https://www.abajournal.com/news/article/ethics_20_20_commission_doing_nothing_about_lawyer_rankings/#:~:text=IN%20its%20report%20to%20the%20House%2C%20the%20Ethics,conduct%20further%20in-depth%20study%20%E2%80%9Cwould%20be%20prohibitively%20expensive.%E2%80%9D.

8. 433 U.S.350 (1977)

9. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

10. *Id.* at 355, citing Rule 29(a) of the Supreme Court of Ariz. 17A Ariz. Rev. Stat., p. 26 (Supp. 1976).

11. *Id.* at 383 citing *Va. Pharmacy Board v. Va. Consumer Council*, 425 U.S. 748, 771-772 (1976).

lawyer's advertisement for routine legal tasks was not inherently misleading, and thus within the full protection of the First Amendment.¹² Further, in rejecting the State Bar of Arizona's argument that lawyers' advertisements would burden the administration of justice by encouraging litigation, the Court opined that allowing "restrained advertising" would instead support "the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.'"¹³

Notably, however, while prohibiting a blanket suppression of attorney advertising, the Court underscored that attorney advertisements may still be regulated.¹⁴ In particular, the Court noted that "advertising claims relating to the quality of legal services. . . probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."¹⁵

In a subsequent decision, *Central Hudson Gas and Electric Corporation v. Public Services Commission of New York*, the Supreme Court established that while communications "more likely to deceive the public rather than to inform" may be banned,¹⁶ the governmental power to restrict commercial speech that is "neither misleading nor related to unlawful activity" is limited.¹⁷ The Court offered a "four-step analysis for commercial speech"¹⁸ that has been applied in constitutional challenges of regulations of attorney advertising.¹⁹

First, constitutional protection of commercial speech requires that the communication concerns "lawful activity and is not misleading."²⁰ Second, for a restriction on commercial speech to pass constitutional muster, the government's substantial interest must be established. Third, the restriction must be proportionate to that interest. This proportionality is measured by the extent to which it "directly advances the asserted governmental interest"; regulations offering "only ineffective or remote support for the government's purpose" would not survive.²¹ Finally, *Central Hudson* requires that the consti-

12. *Id.* at 372, 382.

13. *Id.* at 376-377 citing ABA Code of Professional Responsibility EC 2-1 (1976).

14. *Id.* at 383.

15. *Id.* at 366.

16. *Id.* at 563 citing *Ohralik v. Ohio State Bar Assn*, 436 U.S. 447 at 464-465; *see also* *Bates v. State Bar of Arizona*, *supra* note 9, at 381.

17. *Id.* at 564.

18. 447 U.S. 557, 566 (1980).

19. *Id.*, cited by, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *see also* *In re R. M. J.*, 455 U.S. 191 (1982).

20. *Id.* at 566.

21. *Id.* at 564.

tutionally protected restriction “cannot be more extensive than is necessary to serve that interest.”²² The last criterion was “slightly modified” in *Board of Trustees of the State of New York v. Fox* to read that the restriction must be “narrowly tailored to achieve the desired objective.”²³

As the Supreme Court in *Bates* noted, attorney advertisements making assertions relating to the quality of service could be potentially misleading.²⁴ Such possible consumer confusion has been the subject of state regulation, resulting in constitutional challenges.

A. *Communication of Certification or Specialty*

Attorneys’ use of certifications or specialties to advertise the quality of the services they offer, and state bar rules addressing this practice, have raised questions of whether such advertisements are constitutionally protected commercial speech.

1. Prohibition of Certification or Specialty

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, the Supreme Court considered whether an Illinois rule barring licensed attorneys from advertising themselves as “certified” or “specialists” violated constitutional protections of commercial speech.²⁵ At issue was Peel’s letterhead describing him as a “Certified Civil Trial Specialist/By the National Board of Trial Advocacy/Licensed: Illinois, Missouri, Arizona.”²⁶ The National Board of Trial Advocacy (NBTA) had issued petitioner a “Certificate in Civil Trial Advocacy” which it had renewed.²⁷ The Court stated that the NBTA certification, which had arisen after former Chief Justice Warren Burger encouraged the certification of trial lawyers, is based on “objective and demanding” standards “approved by a board of judges, scholars, and practitioners” and lauded by two state Supreme Courts.²⁸

The Illinois Supreme Court had previously concluded that the letterhead’s statements were inherently misleading, and accordingly outside the protections of the First Amendment. The United States

22. *Id.* at 566.

23. Daniel Kim, *Regulating Misleading, Comparative Lawyer Advertising: Proposed Changes to the American Bar Association Model Rules of Professional Conduct*, 32 GEO. J. LEGAL ETHICS 717, 721 (Fall 2019), citing *Bd. Of Trustees of the State University of New York v. Fox*, 492 US 469, 480 (1989).

24. See *supra* note 11.

25. 496 U.S. 91, 97 citing Ill. Disciplinary Rule 2-105(a)(3) (1988).

26. *Id.* at 96.

27. *Id.*

28. *Id.* at 94-96.

Supreme Court framed the issue as to “whether [Peel’s] statement is misleading, and even if it was not, whether the potentially misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use.”²⁹ In a plurality opinion written by Justice Stevens, joined by Justices Brennan, Blackmun, and Kennedy, the Court held that the blanket suppression of attorneys communicating their certification violated the First Amendment.³⁰

Although the plurality opinion found that Peel’s letterhead was not actually or inherently misleading, it entertained the hypothetical that advertising as having a specialist certification was “potentially misleading.”³¹ For example, if a certifying organization had made no inquiry into the attorney’s fitness, or were paid by attorneys to award certificates, then the certification statement in the attorney’s advertising could be misleading.³² Citing *Bates*, the plurality opinion noted that if the general public needed more information to place an attorney advertisement in perspective, then the bar should assure that these consumers are sufficiently informed.³³ Further, a state might screen certifying organizations or require a disclaimer about the certifying organization or the standards under which the specialty was certified.³⁴ This possibility supported the Court’s final 5-4 decision that the state’s concern with consumer confusion over certification statements does not support a complete ban on attorney advertising.

In his concurring opinion, Justice Marshall asserted that although Peel’s letterhead was not misleading, Peel’s certification statement was “nonetheless *potentially* misleading” given that it could create the wrong impression to “nonlawyers” that the NBTA is a federal government agency.³⁵ Justice Marshall suggested that the state could require attorneys advertising their NBTA certification to include a disclaimer that NBTA is a private organization without governmental affiliation.³⁶

Dissenting, Justice O’Connor, joined by then Chief Justice Rehnquist and Justice Scalia, reasoned that the certification statement was “inherently likely to deceive” by creating the impression that a certified attorney is better than an attorney who lacks certification and

29. *Id.* at 100.

30. *Id.* at 111.

31. *Id.* at 109.

32. *Id.* at 102.

33. *Id.* at 110, citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

34. *Id.* at 110.

35. *Id.* at 112 (Marshall, J. concurring).

36. *Id.* at 117 (Marshall, J. concurring).

that the certification was sanctioned by the state.³⁷ However, as the plurality opinion noted, “information about certification and specialties facilitates the consumer’s access to legal services and thus better serves the administration of justice.”³⁸

2. Restrictions on Certification or Specialty Advertising

Following *Peel*, Federal courts had the opportunity to review state bar rules restricting attorney advertisements of their certification or specialty. The following cases address disclosure in advertising attorneys’ specialty certification, a certification requirement in advertising attorneys’ specialty, and disclaimers in advertising ratings.

a. Disclosure in Advertising Attorneys’ Specialty Certification

In *Hayes v. New York Attorney Grievance Committee of the Eight Judicial Dist.*, the Second Circuit Court of Appeals considered a First Amendment challenge to a New York rule requiring that attorneys advertising their specialty certification by a private organization also provide a particular disclosure statement.³⁹ At issue was the New York Rules of Professional Conduct 7.4, which set forth several requirements for lawyers identifying themselves as certified specialists.⁴⁰ As a preliminary matter, the private certifying organization should be ABA-approved, and the disclosure statement “prominently made.”⁴¹ Additionally, the disclosure statement must state: (1) the certifying organization lack of governmental affiliation; (2) New York attorney licensure does not require such certification; and (3) the certification “does not necessarily indicate greater competence than other attorneys experienced in this field of law.”⁴²

Similar to the Florida attorney’s advertisement at issue in *Peel*,⁴³ Hayes earned his certification by the NBTA as a civil trial specialist and began to identify himself as “Board Certified.”⁴⁴ Prior to Rule 7.4 going into effect, the New York Attorney Grievance Committee (“Grievance Committee”) contacted Hayes to object to the term “spe-

37. *Id.* at-119-121 (O’Connor, J. dissenting).

38. *See* case cited *supra* note 36 at 110, citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977).

39. *Hayes v. New York Attorney Grievance Committee of the Eight Judicial Dist.*, 672 F.3d 158 (2d. Cir. 2012).

40. *Id.* at 162, citing Disciplinary Rule 2-105(C)(1) of New York’s Code of Professional Responsibility, N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.10 (c)(1),

41. *Id.*

42. *Id.*

43. *See supra* note 39.

44. *Id.* at 161.

cialist” on his letterhead. In response, Hayes agreed to identify NBTA as the certifying organization.⁴⁵ After Rule 7.4 went into effect, the Grievance Committee contacted Hayes regarding the size of the requisite disclaimer on his billboard advertisement.⁴⁶ The Grievance Committee also informed Hayes that it was once again investigating his letterhead. This time the Grievance Committee cited Rule 7.4 and Hayes’s omission of a disclaimer, although the letterhead no longer used the term “specialist” in stating he was “board certified.”⁴⁷ The Grievance Committee asserted that the statement “board certified” implied a specialty, requiring the disclaimer be included to avoid disciplinary action.⁴⁸ Hayes sought declaratory and injunctive relief that Rule 7.4 “was unconstitutional both facially and as applied to his advertising.”⁴⁹ The district court granted partial summary judgment and Hayes appealed.⁵⁰

The Second Circuit reversed and remanded the district court’s decision, by holding that Rule 7.4’s requisite disclaimer that private certifying organizations lacked governmental affiliation did not violate First Amendment protections of commercial speech.⁵¹ Citing *Peel*, the Second Circuit found that such disclaimer was sufficiently tailored to the “substantial governmental interest in consumer education.”⁵² However, it also found that the New York Rules of Professional Conduct 7.4’s second and third requirements, requiring disclosure that lawyers could practice in New York without being certified, and that certification did not necessarily indicate that a certified specialist possessed relatively greater competence, both violated First Amendment protections of commercial speech.⁵³ Expressing doubt that a significant portion of legal consumers would believe that attorneys not certified were unlawfully practicing law,⁵⁴ the Second Circuit found that the second disclosure requirement did not meet the *Central Hudson* test for constitutional restrictions on commercial speech⁵⁵ Further, the third requirement created “misconceptions at least as likely and as serious” as the confusion the rule sought to avoid. For example, a

45. *Id.* at 161-162.

46. *Id.* at 162.

47. *Id.*

48. *Id.* at 162-163.

49. *Id.* at 163.

50. *Id.*

51. *Id.* at 167.

52. *Id.* at 166-167, citing *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1988)

53. *Id.* at 167-168.

54. *Id.* at 168.

55. *Id.* at 168.

consumer could be misled to think that Hayes' NBTA certification made him no more qualified than non-certified attorneys. As such, that requirement did not serve a substantial state interest required by restrictions on commercial speech.⁵⁶

Additionally, the Second Circuit found the requirement that the disclaimer be "prominently made" was unconstitutionally vague in its application to Hayes' billboards. Such "prominence requirement would likely survive a facial challenge" given the instances in which a reasonable lawyer would clearly be on notice of the requirement's violation, such as including an illegible disclaimer in an advertisement.⁵⁷ The Second Circuit further offered that while it understood the Grievance Committee's reluctance to further define the prominence requirement given the different media available for attorney advertising, it observed that the vagueness issue could be resolved with "pre-enforcement guidance" that was not available to Hayes.⁵⁸

b. Certification Requirement in Advertising Attorneys' Specialty

A Florida State Bar rule prohibiting attorneys from claiming to be specialists in any area of law without certification from specific organizations was successfully challenged as an unconstitutional restriction on commercial speech.⁵⁹ In *Searcy v. Florida Bar*, a Florida personal injury law firm, which had handled numerous mass tort and unsafe product litigation cases, asserted that Florida Bar Rule 4-7.14(a)(4) violated the firm's First Amendment rights to advertise its specialty in mass tort and unsafe product cases. In particular, the rule "prohibits 'a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms,' unless the lawyer has been certified under The Florida Bar's certification plan, another state's comparable plan, or another certification plan accredited by The Florida Bar or the American Bar Association."⁶⁰ The district court found that Florida Bar Rule 4-7.14(a)(4) failed the *Central Hudson* test for a permissible restriction on commercial speech.⁶¹

In response to The Florida Bar's argument that it had a substantial interest in supporting consumers' ability to discern a lawyer's expertise without engaging in extensive research, the district court noted that The Florida Bar could use narrower means, such as "requiring a

56. *Id.*

57. *Id.* at 169.

58. *Id.* at 169-170.

59. *Searcy v. Florida Bar*, 140 F.Supp.3d 1290 (N.D. Fla. 2015).

60. *Id.* at 1293.

61. *Id.* at 1298.

disclaimer—a statement by the attorney explaining that the attorney specializes or has expertise but is not board certified.”⁶² The court further noted that the rule reached attorneys in all areas of law, such as mass tort, for which there are no certifications available.⁶³ These attorneys would not be able to claim expertise in their area, despite their experience. Thus, the Florida rule “prohibits even truthful claims” in attorney advertising.⁶⁴

c. Disclaimers in Advertising Ratings

In *Mason v. Florida Bar*, the Eleventh Circuit considered a challenge to The Florida Bar’s application of Florida Rule 4-7.2(j), which prohibited attorneys from making “self-laudatory statements” or “describing or characterizing the quality of their services” in their written communications.⁶⁵ Mason, a criminal defense attorney, had requested an ethics advisory opinion on his planned advertisement which stated that he was “AV Rated, the Highest Rating Martindale-Hubbell National Law Directory.”⁶⁶ The Florida Bar notified Mason that the advertisement violated Florida Rule 4-7.2(j), and accordingly, he must fully explain the meaning of the Martindale–Hubbell AV rating and its selection process for it.⁶⁷ Mason brought his challenge to federal district court. In its ruling, the district court granted summary judgment in favor of The Florida Bar, and Mason appealed.⁶⁸

The Eleventh Circuit concluded that while agreeing that The Florida Bar had a substantial interest in ensuring that attorney advertising was not misleading and that consumers had access to relevant information in selecting attorneys, the Bar’s restrictions on Mason’s commercial speech were not appropriately aligned with those interests. Like certification, a rating is a fact that consumers may or may not use to judge an attorney’s quality. Consumers’ perceived unfamiliarity with a rating system did not justify The Florida Bar’s imposition of the disclaimer requirement on a truthful advertisement.⁶⁹ However, the Eleventh Circuit expressly left open the possibility that the Bar’s “in-

62. *Id.* at 1298.

63. *Id.*

64. *Id.*

65. 208 F.3d 952 (11th Cir. 2000) citing Rules Regulating the Florida Bar Rule 4-7.2(j).

66. *Id.* at 954.

67. *Id.* at 954.

68. *Id.* at 954-955.

69. *Id.* at 957, citing *Peel v. Atty. Reg. & Disc. Comm’n of Ill.*, 496 U.S. 91 at 101 (1990).

sistence on a disclaimer” might well serve the substantial interest in preventing consumers’ deception or confusion.⁷⁰

3. Regulation of New Jersey Super Lawyers

New Jersey lawyers’ own complaints about the advent of Super Lawyers led to advisory opinions, a state Supreme Court ruling, and its revised rule of professional conduct on comparative advertising.⁷¹

a. Opinion 39: New Jersey Supreme Court Committee on Advertising

After advertising inserts promoting attorneys designated as “New Jersey Super Lawyers,” followed by the appearance of a stand-alone “New Jersey Super Lawyers” magazine, and the proliferation of Super Lawyer designations in attorneys’ websites and other communications, the Supreme Court of New Jersey Committee on Attorney Advertising (The Committee) received complaints and inquiries of whether using “Super Lawyer” in attorney advertising was aligned with attorneys’ professional responsibility. The Committee partially based its conclusion that such advertising violated the New Jersey Rules of Professional Conduct on its interpretation of New Jersey Rule 7.1(a)(3), which provided that “a communication is misleading ‘if it compares the lawyer’s service with other lawyers’ services.’”⁷² The Committee found that “superlative designations by lawyers is inherently comparative” in violation of Rule 7.1(a)(3).⁷³

b. In Re Opinion 39

Opinion 39 was soon challenged by several groups in the Supreme Court of New Jersey, and a Special Master was appointed to make an inquiry.⁷⁴ The Special Master’s Report concluded that prohibiting the advertising of a lawyer’s superlative designation could be deemed unconstitutional absent the state’s showing the statement to be actually or inherently misleading.⁷⁵ The Report also noted that consumers’ unfamiliarity with an award or honor does not make advertising of such an accolade misleading.⁷⁶ The Supreme Court of New Jersey

70. *Id.* at 958, citing *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 at 146 (1994).

71. *See* In re Opinion 39 of the Committee on Advertising, 197 NJ 66 (NJ 2008).

72. New Jersey Supreme Court Committee on Attorney Advertising Op. 39 (2008) citing N.J. RULES PROF’L CONDUCT r.7.1(a)(3).

73. *Id.*

74. In re Opinion 39 of the Committee on Advertising, 197 NJ 66 (NJ 2008).

75. *Id.*

76. *Id.*

agreed and concluded that Rule 7.1(a)(3) should be modified to address its constitutional limits and developments in attorney advertising.⁷⁷

c. Revised New Jersey Rule and Opinion 42

The resulting revision of New Jersey Rule of Professional Conduct Rule 7.1(a)(3) allowed comparative advertising under the following conditions: (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: “No aspect of this advertisement has been approved by the Supreme Court of New Jersey.”⁷⁸ New Jersey lawyers’ advertisements containing unsubstantiated comparisons would not be able to meet Rule 7.1(a)(3)’s second condition, and therefore would be prohibited as misleading.

In Opinion 42, The Committee offered further guidance for New Jersey lawyers using accolades in their advertising. The Committee considered whether lawyers can advertise themselves as being a “Super Lawyer” by virtue of their inclusion in the Super Lawyers list published by Thomson Reuters. In concluding that hyperbolic adjectives such as “super” or “best” are inherently misleading and, therefore, cannot be included in attorneys’ advertising, the Committee asserted an “obvious and crucial difference” between describing oneself as “a Super Lawyer” and stating that one has been “included on a list called ‘Super Lawyers.’”⁷⁹ This difference hinges on whether the assertion can be factually substantiated. Claims of being “super” cannot be substantiated, unlike inclusion in a Super Lawyers list. However, the Committee warned New Jersey attorneys not to offer inaccurate or misleading statements about the reasons for their inclusion in such a list.⁸⁰

Extending constitutional protections of commercial speech to attorney advertising created a platform for lawyers to distinguish themselves among their competition in the legal marketplace. Organizations offering attorneys distinctive certificates and attention-grabbing accolades gained a foothold in attorney advertising. Without restrictions, such advertising can inherently mislead those seeking legal services. State bar rules may constitutionally limit attorneys’ com-

77. *Id.*

78. N.J. R. PROF’L COND. R. 7.1(a)(3) (2021).

79. See Article cited *supra* note 25, at 32 723 citing N.J. Sup. Ct. Advisory Comm. on Att’y Advert., Op. 42 (2010), at 2. See *infra* text accompanying notes 103 and 104.

80. N.J. Sup. Ct. Advisory Comm. on Att’y Advert., Op. 42 (2010).

parative advertisements with narrowly tailored requirements to place attorneys' honors, certificates, and accolades in a factual context for legal consumers.

III. THE RULES OF PROFESSIONAL CONDUCT AND ACCOLADE ADVERTISING

The 2018 amendments to the ABA Model Rules of Professional Conduct (Model Rules) pertaining to lawyer advertising replaced the term "advertisement" with "communication." In doing so, the Model Rules encompassed the evolving modes of communications utilized by attorneys creating their presence in the legal marketplace.⁸¹

A. *ABA Model Rules of Professional Conduct*

The Model Rules addresses "Information about Legal Services" in Rule 7.1, which prohibits "false or misleading communication" including factual omissions.⁸² Rule 7.1, Communications Concerning a Lawyer's Services: Information about Services, provides: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading."⁸³

B. *State Rules Prohibiting or Restricting Comparisons of Quality of Lawyer's Services or Describing Quality of Service*

Twenty-one states have adopted rules expanding the ABA Model Rule of Professional Conduct 7.1, either prohibiting or restricting attorneys from communicating comparisons or descriptions of the quality of their services.⁸⁴

81. Daniel Kim, *Regulating Misleading, Comparative Lawyer Advertising: Proposed Changes to the American Bar Association Model Rules of Professional Conduct*, 32 Geo. J. Legal Ethics 717, 725 (Fall 2019), citing Bd. Of Trustees of the State University of New York v. Fox, 492 US 469, 480 (1989). However, Rule 7.2(b)(1), Communications Concerning a Lawyer's Services: Specific Rules permits payment of reasonable costs for permitted "advertisements or communications." MODEL RULES OF PROF'L CONDUCT R. 7.2(b)(1) (2022).

82. MODEL RULES OF PROF'L CONDUCT R. 7.1(2022).

83. *Id.*

84. American Bar Association, *Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, June 2, 2016, available at [state_advertising_and_solicitation_rules_differences_update.pdf](https://www.americanbar.org/state_advertising_and_solicitation_rules_differences_update.pdf) (americanbar.org).

1. Prohibition: Alabama Rule of Professional Conduct 7.1

Alabama Rule of Professional Conduct 7.1 defines a prohibited “false or misleading communication about the lawyer or the lawyer’s services” to include qualitative comparisons. It states: “A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it: . . . (c) compares the quality of the lawyer’s services with the quality of other lawyers’ services, except as provided in Rule 7.4.”⁸⁵

Alabama Rule of Professional Conduct 7.4 addresses communications of fields of practice, such as asserting or implying a specialty in a particular field of law.⁸⁶ This prohibition appears to be applied to self-laudatory, comparative remarks rather than awards, honors, or accolades bestowed by a third party. In its ethics opinion addressing lawyer advertising, the Alabama State Bar’s Office of General Counsel offered the Disciplinary Commission’s response to the following question:

A lawyer proposes to publish an advertisement which contains the following language: “Experienced, Driven & Knows the System – The Lawyer You Choose Makes A Difference.” Is this language permissible?⁸⁷

The Disciplinary Commission replied:

The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney does, in fact, provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.”⁸⁸

85. ALA. R. PROF’L. COND. R. 7.1 (2021).

86. Alabama Rule of Professional Conduct 7.4 provides, “A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation;(b) a lawyer engaged in admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty,” or a substantially similar designation; or(c) a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority, but only if such certification is granted by an organization previously approved by the Alabama State Bar Board of Legal Certification to grant such certifications. ALA. R. PROF’L. COND. R. 7.4 (2021).

87. Alabama Ethics Opinion, *RO 2003-01-1* (June 3, 2003) available at: <https://www.alabar.org/office-of-general-counsel/formal-opinions/2003-01/>

88. *Id.* Notably, Super Lawyers publishes an annual Alabama Super Lawyers Top List. See <https://www.superlawyers.com/alabama/toplists/>

2. Restrictions

Seventeen of the twenty-one states provide an exception for comparison advertising grounded in fact. These rules typically use language such as the following:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.⁸⁹

Two states, Florida and Texas, require that the comparative communication be "objectively verifiable." Such restrictions do not require a disclosure of the factual substantiation or objective verification of the comparison being offered.

3. New Jersey Rule of Professional Conduct 7.1(a)(3)

Comparatively, although New Jersey generally prohibits lawyers' advertisement of comparative honors, awards, and accolades as "false and misleading communication," the current New Jersey Rule of Professional Conduct 7.1(a)(3) creates an exception to allow comparative advertising that meets certain requirements.⁹⁰

In 2021, The Committee issued a Notice to the Bar (2021 Notice) reminding New Jersey lawyers that they could refer to comparative accolades, awards, and honors "only when the basis for the comparison can be verified and the organization has made adequate inquiry into the fitness of the individual lawyer. Further, the New Jersey Rule of Professional Conduct 7.1 requires that additional language be displayed to provide explanation and context."⁹¹

89. COL. R. PROF'L. COND. R. 7.1(a)(2) (2021).

90. New Jersey Rule of Professional Conduct Rule 7.1 provides: "Communications Concerning a Lawyer's Service (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; 42 (3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey. . ." N.J. R. PROF'L. COND. R. 7.1.

91. Jeffrey S. Apell, Chair, Committee on Attorney Advertising, New Jersey Supreme Court Committee on Attorney Advertising, Notice to the Bar, *Supreme Court Committee on Attorney Advertising Reminder: Advertising Awards, Honors, and Accolades that Compare a Lawyer's Services to Other Lawyers' Services*, (May 5, 2021). A similar Notice to the Bar was issued by the New Jersey Supreme Court Committee on Attorney Advertising in 2016. See Jonathan M. Korn, Chair, Committee on Advertising, *Notice – Attorney Advertising of Awards, Honors and Acco-*

a. Adequate Inquiry by Conferring Organization

The Committee's 2021 Notice synthesized the Official Comment to Rule of Professional Conduct 7.1, *In re Opinion 39 of Committee on Attorney Advertising*,⁹² and The Committee's Opinion 42.⁹³ In describing the preliminary requirement that before advertising their receipt of a comparative award, accolade, or honor, "a lawyer must first ascertain whether the organization conferring the award has made 'inquiry into the attorney's fitness.'⁹⁴ Similar to other states' requirements, the comparison must be "substantiated and *verifiable*"⁹⁵ Further, The Committee explained that the inquiry into the lawyer's fitness "must be more rigorous than a survey or a simple tally of the lawyer's years of practice and lack of disciplinary history."⁹⁶

The Committee warned that it had reviewed several awards, honors, and accolades that were not based on a genuine inquiry into lawyers' fitness.⁹⁷ Some awards operate as "popularity contests" based on the number of votes received by email, telephone, or text; in contrast, others are given for a price or as a reward for joining the conferring organization or "participating" in the organization's website by, for example, endorsing other lawyers.⁹⁸ According to The Committee, factors such as payment of money or a level of online participation in the organization "render such awards suspect."⁹⁹

b. The Committee's Inclusion of Explanatory Statement

In its 2021 reminder, the Committee cautioned that "numerous law firm advertising. . . includes badges or logos of comparative awards, such as the yellow 'Super Lawyers' badge" without offering the requisite explanation.¹⁰⁰ Citing the Official Comment to RPC 7.1, the Committee noted that an advertisement must describe "the standard or methodology" used in bestowing the award, honor or accolade "either in the advertising itself or by reference to a 'convenient publicly avail-

lades that Compare a Lawyer's Services to Other Lawyers' Services – Reminder from the Committee on Attorney Advertising (May 5, 2016). The Committee's history of active engagement in the issue of lawyers' accolade advertising has yielded two Committee Opinions and a Supreme Court of New Jersey ruling, each cited by the Committee. See discussion *supra* at II. B.

92. 197 N.J. 66 (2008)

93. Committee on Attorney Advertising Opinion 42 (December 2010)

94. *Id.* Notice to the Bar (2021) citing Official Comment to Rule of Professional Conduct 7.1.

95. Notice to the Bar (2021) citing Official Comment to Rule of Professional Conduct and New Jersey Rule of Professional Conduct 7.1(a)(3)(ii) (emphasis in original).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

able source’” such as a website hyperlink. This requirement aligns with the FTC’s December 2021 consumer advisory encouraging consumers to research the bases for lawyers’ advertised awards.¹⁰¹

As set forth in New Jersey Rule of Professional Conduct 7.1(a)(3)(i) and (iii), The Committee further reminded New Jersey lawyers of express statements that must be stated clearly in the advertising.¹⁰² Along with the name of the organization bestowing the comparative award, the advertisement must directly state: “No aspect of this advertisement has been approved by the Supreme Court of New Jersey.”¹⁰³

Additionally, The Committee reminded New Jersey attorneys that superlatives such as “super” or “best” must not be used as adjectives to describe a lawyer “as being a ‘Super Lawyer’ or *the* ‘Best Lawyer.’”¹⁰⁴ Rather, lawyers’ advertising can only state their inclusion in such a list, rather than assert their superlative attribute.¹⁰⁵

IV. RECOMMENDATION AND CONCLUSION

An advertisement for a legal clinic’s services became the foundation for the Supreme Court’s recognition of attorney advertising as constitutionally protected commercial speech. The services at issue were routine tasks, and the legal clinic’s competitive edge lay in its reasonable fees. In affording attorney advertising the constitutional protections of commercial speech, however, the Supreme Court in *Bates* created a platform for lawyers to distinguish themselves, and an industry aimed at providing lawyers with distinctive certificates and accolades.

In the legal marketplace, comparative attorney advertising has tested the limits of such constitutional protection. While state bars’ outright bans of attorneys’ comparative advertising have failed constitutional muster, judicial opinions suggested that state bars regulate these advertisements through, for example, disclaimer or disclosure requirements to protect consumers against misleading advertising.

Currently, the ABA Model Rules of Professional Conduct’s prohibition of false or misleading communications about legal services, in alignment with the constitutional limits placed on commercial speech generally, provides a basis for more particularized state bar rules. Alabama’s expanded definition of false or misleading communications to

101. *See supra* notes 1 and 2.

102. *Id.* The Committee’s Notice to the Bar applies the “discernible manner” requirement of Rule 7.1.(a)(3)(iii) to Rule 7.1(a)(3)(i).

103. Notice to the Bar (2021).

104. *Id.* (emphasis in original). *See also supra* note 79.

105. Notice to the Bar (2021).

include qualitative comparisons has been interpreted to prohibit self-laudatory remarks in Alabama attorneys' advertisements. Other states allow an attorney's comparative communication if it can be factually substantiated or objectively verified but leaves it to the attorney whether and how to disclose such substantiation or verification. More importantly, in the absence of such disclosure requirements, legal consumers may not be offered this information to support their discernment of comparisons drawn by Alabama attorneys' advertisements in violation of state bar rules.

In order to survive constitutional scrutiny, state bar rules should not place an outright ban on comparative advertising. Rather, state bar rules should require disclosures and disclaimers narrowly tailored to provide legal consumers with sufficient information to assess the merit and weight of certificates, honors, awards, and accolades presented in an attorney's advertisement.

New Jersey's current Rule 7.1(a)(3) was the result of its State Supreme Court's review of its own Committee on Attorney Advertising's opinion on the use of superlatives in attorney advertising. The revised rule has been the subject of The Committee's further opinion. In its 2021 Notice to the Bar, the New Jersey Committee on Attorney Advertising set forth an example of a statement meeting the New Jersey Rule of Professional Conduct 7.1(a)(3).

For example, if Jane Doe refers to her selection by Martindale-Hubbell as an AV Preeminent lawyer, then the reference should include:

Jane Doe was selected to the 2021 list of AV Preeminent lawyers. This award is conferred by Martindale-Hubbell. A description of the selection methodology can be found at www.martindale.com/ratings-and-reviews. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.¹⁰⁶

Rule 7.1(a)(3) and its accompanying guidance from the Committee appear to adequately incorporate the constitutional limits on the regulation of attorney advertising. The state's substantial interest in supporting consumers' informed choices is met with requirements tailored to promote rather than suppress the flow of information about lawyers. New Jersey attorneys are furnished with detailed gui-

106. Notice to the Bar (2021) *supra* at 90. A similar example is given in the Committee's 2016 notice for an attorney advertising their Super Lawyers designation. See *Notice – Attorney Advertising of Awards, Honors, and Accolades that Compare a Lawyer's Services to Other Lawyers' Services – Reminder from the Committee on Attorney Advertising* (May 5, 2016): "Jane Doe was selected to the 2016 Super Lawyers list. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection-process-detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey."

dance on the application of the rule, placing reasonable expectations on them.

The ABA Model Rule of Professional Conduct 7.1 should be amended to include New Jersey Rule 7.1(a)(3), with a comment citing Opinion 42 of the New Jersey Supreme Court Committee on Attorney Advertising. Given the Federal Trade Commission's December 2021 consumer advisory, the American Bar Association should promote consumers' access to complete information needed to assess and weigh the meaning behind accolades used in attorney advertising.

