

**IMPERVIOUS TO KRYPTONITE: WHY MINNESOTA’S
“SUPER LAWYERS” CAN CONTINUE ADVERTISING**

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IMPERVIOUS TO KRYPTONITE: WHY MINNESOTA'S "SUPER LAWYERS" CAN CONTINUE ADVERTISING

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I. INTRODUCTION

Two years out of law school, John Bates and Van O'Steen decided to leave their Legal Aid jobs and start their own law practice together.² Remaining committed to serving the legal needs of those with modest means, Bates and O'Steen targeted their services to persons who were just above the income guidelines for government subsidies.³ To keep down the fees they charged clients, as well as their own costs, the lawyers offered "routine" legal services: uncontested divorces and adoptions, name changes, and simple personal bankruptcies.⁴ The pair's model thus depended on substantial volume, mostly from one-time clients, rather than lucrative ongoing relationships.⁵ After two years, it was clear the concept would not last without broader public awareness.⁶ In order to achieve this awareness, the pair decided to advertise their services and fees in a major Phoenix newspaper.⁷ The advertising was successful.⁸ However, Bates and O'Steen ran afoul of a disciplinary rule prohibiting advertising by attorneys and were disciplined by the Arizona Supreme Court.⁹ Similar disciplinary rules were in place in every state.¹⁰ Nonetheless, Bates and O'Steen successfully challenged the prohibition's constitutionality as a restriction on their First Amendment right to free speech.¹¹

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² *Bates v. State Bar of Arizona (Bates I)*, 433 U.S. 350, 354 (1977). They certainly were bright and promising young attorneys, each graduating with honors from Arizona State University College of Law. *Id.* at 353 n.2.

³ *Id.* at 354.

⁴ *Id.*

⁵ *Id.*; see also LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 3 (1980).

⁶ *Bates I*, 433 U.S. at 354.

⁷ *Id.* The newspaper they chose, the *Arizona Republic*, was based in Phoenix but had statewide and out-of-state circulation. *In re Bates (Bates II)*, 555 P.2d 640 (Ariz. 1976).

⁸ *Bates I*, 433 U.S. at 354 n.4. The Court noted only that Bates and O'Steen had more business after the advertisement appeared. *Id.* However, the Court also questioned whether the advertisement was directly responsible, since the advertisement prompted several news stories. *Id.*

⁹ *Bates II*, 555 P.2d at 646 (censuring Bates and O'Steen).

¹⁰ See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* xiv (3d ed. 2000).

¹¹ *Bates I*, 433 U.S. at 384 (holding application of the disciplinary rule to Bates and O'Steen's advertisement as violative of the First Amendment).

Almost thirty years after the U.S. Supreme Court first granted attorney advertising First Amendment protection, New Jersey attorney Lloyd Levenson was invited to advertise his recognition as a “Super Lawyer.”¹² Like other “Super Lawyers,” Levenson was nominated either by his peers in the New Jersey bar or by an attorney-led research team seeking potential honorees who might be overlooked by the peer nomination process.¹³ Levenson was offended by the offer to publicize the honor at a cost of up to \$15,000 for a full-page ad.¹⁴ He wrote a letter of complaint to the New Jersey Supreme Court Advisory Committee on Attorney Advertising (“Advertising Committee”).¹⁵ The Advertising Committee examined the “Super Lawyers” designation and banned its use by New Jersey attorneys because the designation is potentially misleading in that it compares attorneys and creates an unjustified expectation of results delivered by “Super Lawyers.”¹⁶

The “Super Lawyers” franchise is one of the most popular forms of attorney recognition in Minnesota, in part because it is a home-grown concept.¹⁷ This Comment will begin by discussing what the “Super Lawyers” advertising medium is all about, how “Super Lawyers” are selected and what they say about themselves in the advertising supplements.¹⁸ Part II will continue with a review of the history of attorney advertising in the United States, noting its origins date back to before the

¹² Karen Donovan, *Some Lawyers Ranked ‘Super’ Are Not the Least Bit Flattered*, N.Y. TIMES, Sept. 15, 2006, at C6. Levenson was invited to advertise the honor by the granting entity, the publisher of the “Super Lawyers” supplement to *New Jersey Monthly* magazine. *Id.*

¹³ Super Lawyers, *About*, http://www.superlawyers.com/index.php?option=com_content&task=blogcategory&id=4&Itemid=37 (last visited Mar. 30, 2007).

¹⁴ Donovan, *supra* note 12, at C6. Levenson later indicated to a reporter that his offense was caused by the suggestion to the public that attorneys who paid “grand sums of money” for advertisements are better than those attorneys who did not pay to advertise or who are not even listed at all. *Id.* However, it seems doubtful that Levenson was put off by the advertising rate. His firm, Cooper Levenson, has more than sixty attorneys practicing in eight locations in Delaware, New Jersey and Pennsylvania. Cooper Levenson, *List of Attorneys*, <http://www.cooperlevenson.com/people.asp> (last visited Mar. 30, 2007); Cooper Levenson, *List of Offices*, <http://www.cooperlevenson.com/offices.asp> (last visited Mar. 30, 2007). Levenson is the chief executive officer of the firm and chairs its casino law department. Cooper Levenson, *Lloyd D. Levenson Biography*, http://www.cooperlevenson.com/people_attorneys.cfm?pgfn=display&ID=26 (last visited Mar. 30, 2007). He has represented casinos, governments, gaming professionals and casino suppliers. *Id.* Levenson has also been recognized by many other organizations; for example, he is one of sixteen “Counselors” of the International Association of Gaming Attorneys. *Id.*

¹⁵ Donovan, *supra* note 12, at C6.

¹⁶ New Jersey Supreme Court Advisory Committee on Attorney Advertising, Op. 39 (July 24, 2006), available at http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf [hereinafter N.J. Op. 39].

¹⁷ About Super Lawyers, *supra* note 13. The first “Super Lawyers” edition was published in Minnesota in 1991 by *Minnesota Law & Politics*, a publication of Key Professional Media, Inc. About Super Lawyers, *supra* note 13.

¹⁸ See *infra* notes 24-51 and accompanying text.

Louisiana Purchase.¹⁹ It will then proceed to review attorney advertising jurisprudence in the U.S. Supreme Court and lower courts.²⁰ Having discussed the historical and constitutional context, Part II will explore the New Jersey Rules of Professional Conduct and the rationale articulated by the Advertising Committee in banning the use of “Super Lawyers” in New Jersey.²¹ Next, this Comment will examine the similar provisions under the Minnesota Rules of Professional Conduct and the Minnesota Supreme Court’s treatment of attorney advertising.²² Finally, Part III evaluates whether either the Minnesota Rules or *Bates* and its progeny mean the end of “Super Lawyers” in Minnesota.²³

II. BACKGROUND

A. Attorney Advertising: A Short Primer

1. Two Types of Reputational Advertising Explained

a. What Is A “Super Lawyer”?

An innovative magazine publisher created the “Super Lawyers” concept in Minnesota in 1991.²⁴ Since then, the franchise has been expanded to 48 of the 50 states.²⁵ In both Minnesota and New Jersey, the “Super Lawyers” listings and advertisements are carried in general interest magazines targeted at affluent consumers: *Mpls. St. Paul* and *New Jersey Monthly*.²⁶ The average household income of readers of *Mpls. St. Paul* is \$145,000; readers have an average household net worth just under \$1 million.²⁷ The comparable figures for *New Jersey Monthly* are \$181,800 and over \$1.1 million, respectively.²⁸ Minnesota readers have two additional sources for “Super Lawyers” listings: *Minnesota Law & Politics* and *Twin*

¹⁹ See *infra* notes 52-68 and accompanying text.

²⁰ See *infra* notes 69-149 and accompanying text.

²¹ See *infra* notes 150-172 and accompanying text.

²² See *infra* notes 173-187 and accompanying text.

²³ See *infra* notes 189-259 and accompanying text. The current director of the Minnesota Office of Lawyers Professional Responsibility (“OLPR”) has disclaimed any intent to follow New Jersey’s lead. Martin Cole, *What We Won’t Do*, 63 BENCH & B. MINN. 11, 12 (Nov. 2006).

²⁴ About Super Lawyers, *supra* note 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Mpls. St. Paul Magazine, Sales + Advertising*, <http://www.mspmag.com/advertise/default.asp> (last visited Mar. 30, 2007).

²⁸ *New Jersey Monthly, Media Kit: Overview*, <http://www.njmonthly.com/pdfs/overview06.pdf> (last visited Mar. 30, 2007); see also *New Jersey Monthly, Media Kit: Subscriber Demographics*, <http://www.njmonthly.com/pdfs/demo06.pdf> (last visited Mar. 30, 2007).

Cities Business.²⁹ The readership of *Minnesota Law & Politics* is almost exclusively lawyers, judges and business leaders.³⁰ Readers of *Twin Cities Business* are well-educated, well-compensated business decision makers with the ability to hire professionals, including lawyers, for their corporations.³¹

“Super Lawyers” advertising supplements provide information about listed attorneys in a variety of ways. A single supplement can run more than sixty pages.³² It is designed to provide readers with the names of attorneys, in a variety of specialties, whom other lawyers would recommend.³³ The “Super Lawyers” selection process involves a statewide poll of attorneys, with weighting and other procedures in place to avoid back scratching and block balloting, and evaluations by the publisher’s research team.³⁴ Candidates’ good standing with ethics officials is verified.³⁵ The final list of honorees is limited to five percent of a state’s practicing attorneys.³⁶ All selected attorneys are listed by their primary area of practice, ranging from administrative law to workers’ compensation.³⁷ Some attorneys may choose to pay for small, one-sixth-of-a-page profiles that include the attorney’s photograph, contact information, practice areas, and background.³⁸ The profiles include the attorney’s work experience, education, professional and civic memberships, publications, and other honors.³⁹ Some law firms choose

²⁹ About Super Lawyers, *supra* note 13.

³⁰ See Minnesota Law & Politics, *Media Kit: Circulation*, <http://www.lawandpolitics.com/mediakit/Circulation2006.pdf> (last visited Mar. 30, 2007) (indicating that out of 16,006 subscribers, no more than 3,281 are not legal, business or political professionals).

³¹ Twin Cities Business, *Circulation & Demographics*, <http://www.msppcommunications.com/filerepository/Circ&Demos07.pdf> (last visited Mar. 30, 2007).

³² See, e.g., *Minnesota Super Lawyers 2006*, MPLS. ST. PAUL, Aug. 2006, at S-1, S-1 to S-63.

³³ *Id.* at S-2 (“Someday, you or someone you know will need a lawyer. Imagine if you could ask nearly every attorney in Minnesota to recommend a great lawyer. Law & Politics has done the work for you.”)

³⁴ *Id.*; About Super Lawyers, *supra* note 13.

³⁵ *Minnesota Super Lawyers 2006*, *supra* note 32, at S-2.

³⁶ *Id.*

³⁷ See *id.* at S-7 to S-27 (listing honorees by practice area).

³⁸ See *id.* at S-28 to S-63 (displaying biographic profiles alphabetically).

³⁹ See, e.g., Profile of Carolyn Agin-Schmidt, in *Minnesota Super Lawyers 2006*, *supra* note 32, at S-28 (indicating Agin-Schmidt has emerged victorious at the trial and appellate levels in both federal and state court, has served as an officer of the Criminal Law Section of the Minnesota State Bar Association, graduated from William Mitchell College of Law, and belongs to the Minnesota Society for Criminal Justice); Profile of David L. Ayers, in *Minnesota Super Lawyers 2006*, *supra* note 32, at S-28 (indicating Ayers has tried cases in both Minnesota and Wisconsin and is one of eight lawyers to be named in three categories of the Minnesota Judges’ Choice Awards); Profile of Ronald A. Zamansky, in *Minnesota Super Lawyers 2006*, *supra* note 32, at S-63 (indicating Zamansky was a partner at Doherty, Rumble & Butler before he started his own firm, has been named an alumnus of notable achievement by his undergraduate alma mater, and is active with the Oak Ridge Country Club, Create A Memory Foundation and Jewish Community Foundation); Profile of Sylvia Ivey Zinn, in *Minnesota Super Lawyers 2006*, *supra* note 32, at S-63 (indicating Zinn is an active civil

to purchase graphically-designed advertisements recognizing lawyers within their firms who have been named “Super Lawyers.”⁴⁰ Even entities not related to the practice of law advertise in the supplement.⁴¹ Attorneys or their law firms may also choose to advertise their recognition as “Super Lawyers” in media outside the supplement, such as the firm’s web site.⁴²

b. An Alternative: Martindale-Hubbell

Other publishers have also undertaken attorney rating systems.⁴³ For example, legal directory Martindale-Hubbell’s system rates attorneys as AV, BV, or CV.⁴⁴ The ratings are developed through interviews with an attorney’s peers, conducted by a Martindale representative, and through online surveys or paper review sheets sent to lawyers and judges in the same

litigator, serves as an arbitrator with the American Arbitration Association, co-authored a chapter in a treatise on Minnesota practice, and is on the alumni board for her law school alma mater).

⁴⁰ See, e.g., *Minnesota Super Lawyers 2006*, *supra* note 32, at S-3 (showing a full page advertisement from Winthrop & Weinstine); *id.* at S-27 (providing a one-third page advertisement from Stich, Angell, Kreidler & Dodge).

⁴¹ See *id.* at S-27 (advertising for “4 Cast 4 Fun,” a three-day, three-event charitable extravaganza benefiting Suicide Awareness Voices of Education).

⁴² See, e.g., Rider Bennett, LLP, *24 Rider Bennett Attorneys Named 2006 Super Lawyers* (July 20, 2006), available at http://www.riderlaw.com/news_pubs/article_detail.cfm?ARTICLE_ID=4457 (last visited Mar. 30, 2007) (online press release); Rider Bennett, LLP, *Diane Bratvold Biography*, http://www.riderlaw.com/our_people/attorney_detail_90.cfm (last visited Mar. 30, 2007) (displaying “Super Lawyers” logo on attorney’s official biography); Robins, Kaplan, Miller & Ciresi, LLP, *Michael Ciresi Biography*, http://www.rkmc.com/Michael_Ciresi.htm (last visited Mar. 30, 2007) (listing “Super Lawyers” recognition first in list of more than a dozen honors). Ciresi’s biography includes a disclaimer stating that being named “is not intended and should not be viewed as comparative to other lawyers or to create an expectation about results that might be achieved in a future matter.” *Id.*

⁴³ See, e.g., N.J. Sup. Ct. Advisory Comm. on Att’y Advertising, Op. 39 (July 24, 2006), available at http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf [hereinafter N.J. Op. 39] (discussing “Super Lawyers,” “Best Lawyers in America,” and Martindale-Hubbell attorney rating systems); *Michael Ciresi Biography*, *supra* note 42 (listing recognitions including “Best Lawyers” and “Lawyer of the Year” honors from the *National Law Journal* and *Minnesota Law & Politics*).

⁴⁴ N.J. Op. 39 at 3. Martindale-Hubbell is a unit of Reed-Elsevier PLC, which provides information resources to professionals in the legal, business, medical, and educational fields. Reed-Elsevier, *History*, <http://www.reed-elsevier.com/index.cfm?articleid=113> (last visited Mar. 30, 2007). The first *Martindale Directory* was published in 1868 to serve lawyers, bankers, merchants, real estate agents and others. The History of Martindale-Hubbell, http://www.martindale.com/xp/Martindale/About_Us/History/about_history.xml (last visited Mar. 30, 2007). Martindale’s directory is publicly available, without registration or password, online at <http://www.martindale.com>, <http://www.lawyers.com> and a list of affiliates that includes <http://www.cnn.com> and <http://www.divorcenet.com>. About Martindale-Hubbell, http://www.martindale.com/xp/Martindale/About_Us/about_company.xml (last visited Mar. 30, 2007); Martindale-Hubbell Affiliates, http://www.martindale.com/xp/Martindale/Site_Info/alliances.xml (last visited Mar. 30, 2007).

region or area of practice as the lawyer being rated.⁴⁵ The “V” portion of the rating denotes that the attorney has maintained a very high adherence to professional ethical conduct standards.⁴⁶ The “A,” “B,” or “C” portion reflects an evaluation of the attorney’s professional skill, ability and competence.⁴⁷ A “CV” rating is the entry-level rating and the highest rating an attorney in her first three to four years of practice could achieve.⁴⁸ It is described as a “definitive statement of [the lawyer’s] above-average ability and unquestionable ethics.”⁴⁹ The “BV” rating is the next step on the scale, “an excellent rating for a lawyer with more experience,” usually five to nine years.⁵⁰ The highest Martindale rating is the “AV,” which is described as “a testament to the fact that a lawyer’s peers rank him or her at the highest level of professional excellence.”⁵¹

2. Attorney Advertising Has Deep Historical Roots

The practice of law as a business has been a matter of no small dispute that predates the Republic.⁵² Nonetheless, attorneys have engaged in the common business practice of advertising, at least since 1802.⁵³ No less a legend than Abraham Lincoln advertised in newspapers.⁵⁴ City address directories, the precursors to today’s telephone directories, included attorney advertisements as early as 1846.⁵⁵

⁴⁵ Martindale-Hubbell, *Peer Review Ratings – The Process*, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_process.xml (last visited Mar. 30, 2007).

⁴⁶ Martindale-Hubbell, *Peer Review Ratings – Explanation*, http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_explanation.xml (last visited Mar. 30, 2007).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See J. GORDON HYLTON, PROFESSIONAL VALUES AND INDIVIDUAL AUTONOMY: THE UNITED STATES SUPREME COURT AND LAWYER ADVERTISING 10 (1998) (citing a 1645 Virginia statute prohibiting the practice of law for a fee because attorneys “have more intended their own profit, and their inordinate lucre[,] than the good of their clients”). This tension between the business and idealistic sides of the practice continues today. See, e.g., Hany S. Brollesy, *The Tension Between Law as a Business and as a Profession*, 6 GEO. J. LEGAL ETHICS 1111 (1993); Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988).

⁵³ HYLTON, *supra* note 52, at 6 (noting that Daniel Calhoun found lawyers advertising in central Tennessee newspapers in that year).

⁵⁴ *Id.*; ANDREWS, *supra* note 5, at 1. Some modern commentators might like to believe attorney advertising was not so historically rooted. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996) (disputing the notion that the “good old days” of the profession were as golden as their proponents imagine).

⁵⁵ HYLTON, *supra* note 52, at 6 (referring to Milwaukee city directory). A current St. Paul telephone directory has attorney advertisements on the front and back covers (both inside and outside) and on the spine; the advertisements are in full-color and include images of

By the late nineteenth century, attorneys were being publicly disciplined for advertising the availability of their services.⁵⁶ Alphonso Goodrich, a Chicago divorce lawyer, was disbarred for advertising low-publicity divorces at a low cost.⁵⁷ Denver attorney Isaac MacCabe's license was suspended for six months because he too had advertised low profile divorces.⁵⁸ In *People ex rel. Attorney General v. MacCabe*, the Colorado Supreme Court drew a class line in the sand: attorneys were members of a profession and thus above the business practices of workaday occupations and trades.⁵⁹ After the twentieth century dawned, law students were told that advertising was to be avoided as dishonorable.⁶⁰ The relatively new voluntary bar associations—both at the local level and the national American Bar Association (“ABA”)—began to adopt codes of ethics expressing varying levels of distaste for advertising.⁶¹ The ABA promulgated, in 1908, its Canons of Ethics that served as a model for many jurisdictions.⁶² The local associations succeeded in convincing courts to enforce the ethics codes, even against non-member attorneys.⁶³ Additionally, the ABA started issuing opinions interpreting the canons; in short order, a combination of revisions and interpretations effectively decreed all advertising as beyond the pale, even where local custom had sanctioned some promotional activity.⁶⁴

the attorneys, the Statue of Liberty or the American flag. See DEX MEDIA, INC., OFFICIAL DIRECTORY OF ST. PAUL (2006).

⁵⁶ HYLTON, *supra* note 52, at 5 n.7 (indicating that Alphonso Goodrich's case is the earliest reported attorney discipline matter relating to advertising).

⁵⁷ *People ex rel. Moses v. Goodrich*, 79 Ill. 148 (1875).

⁵⁸ *People ex rel. Att'y Gen. v. MacCabe*, 32 P. 280 (Colo. 1893).

⁵⁹ *Id.* at 280 (stating “[t]he ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares”)

⁶⁰ HYLTON, *supra* note 52, at 13-14. A 1902 speaker told Northwestern University law students that some things “honorable enough for a tradesman” simply “must not be done” by lawyers. *Id.* An ethics treatise published that year sniffed at the “leaven of commercial influence” and accused a new breed of lawyer of taking on “the features of a mean, sordid, and grasping trade.” *Id.* at 14. Even by mid-century, law school courses on professional responsibility were devoting more attention to unsavory advertising than to conflicts of interests and confidentiality. *Id.* at 35.

⁶¹ *Id.* at 14-16. See also Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 IND. L. REV. 1, 5-6 (1992).

⁶² HYLTON, *supra* note 52, at 15-16. The ABA Canons were themselves inspired by a local ethics code, adopted in Alabama in 1887. Carro, *supra* note 61, at 4-5. The Association of the Bar of the City of New York was the first local bar association, founded in 1870. *Id.* at 3. The ABA was founded in 1878. *Id.* By 1925, every American state or territory had some sort of bar association. *Id.*

⁶³ HYLTON, *supra* note 52, at 18-26.

⁶⁴ *Id.* at 30 (discussing effect of 1937 revisions and Op. 182, issued in 1938). The first ethics committee issuing advisory opinions appears to have been the New York County Lawyers Association Committee in 1912. Leah F. Chanin, *The Scope and Use of State Ethics Opinions*, 14 J. LEGAL PROF. 161, 162 (1989). The ABA Committee on Professional Ethics and Grievances was formed to issue advisory opinions in 1922. *Id.*

Attorneys who sought to protect their ability to practice and advertise were rebuffed by their states' highest courts.⁶⁵ Boston attorney Max Waldo Cohen, for example, argued that his truthful newspaper advertisement was constitutionally protected by the First Amendment.⁶⁶ The Massachusetts Supreme Judicial Court brushed aside his constitutional rights as being limited by his status as a member of the bar.⁶⁷ It declared that "[n]o constitutional liberty of the attorney at law is infringed by the enforcement of the rule" against advertising.⁶⁸

Thus, by the 1970s, generations of attorneys learned and practiced the law in an environment where they were flatly prohibited from advertising.

3. *The U.S. Supreme Court: The Road to Bates*

For most of the twentieth century, attorney advertising was verboten.⁶⁹ In the late 1970s, however, the U.S. Supreme Court recognized that commercial speech had value and merited protection under the First Amendment.⁷⁰ In a case involving a ban on advertisements of prescription drug prices, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court held that speech that merely proposes a commercial transaction does not lack constitutional protection.⁷¹ The Court was careful to leave some regulatory power over commercial speech in state hands.⁷² States could impose appropriate time, place and manner restrictions on commercial speech, could ban untrue or misleading commercial speech, and could flatly prohibit speech proposing illegal transactions.⁷³ The Court

⁶⁵ See HYLTON, *supra* note 52, at 31-32.

⁶⁶ *In re Cohen*, 159 N.E. 495, 497 (Mass. 1928).

⁶⁷ *Id.* The case cited by the court as supporting the proposition that one's rights are limited by his status as a public servant is inapposite; there the claimant was a police officer fired for engaging in political activity, contrary to department regulations. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). The court stated that "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* However, McAuliffe's political activity was likely not as vital to the continued vitality of his police career as Cohen's advertising was to his success as a lawyer.

⁶⁸ *Cohen*, 159 N.E. at 497. During the first part of the twentieth century, the Supreme Court took the position that commercial speech was not protected. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

⁶⁹ See *supra* notes 62-68 and accompanying text (recounting the recent bans on attorney advertising, beginning with the 1908 ABA Canons).

⁷⁰ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (striking down statute prohibiting prescription drug price advertisements).

⁷¹ *Id.* at 762.

⁷² *Id.* at 771.

⁷³ *Id.* at 771-73. A common prohibition on speech proposing illegal transactions is a ban on advertisements for drug paraphernalia. See, e.g., *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *New England Accessories Trade Ass'n v. Nashua*, 679 F.2d 1 (1st Cir. 1982); *Fla. Businessmen for Free Enter. v. Hollywood*, 673 F.2d 1213 (11th Cir. 1982); *High Gear & Toke Shop v. Beacom*, 689 P.2d 624 (Colo. 1984). *Cf.*

also reserved questions relating to professions other than pharmacy—including, explicitly, law—for another day.⁷⁴

The day for law came quickly: oral arguments in *Bates v. State Bar of Arizona* were heard less than eight months after the decision in *Virginia Pharmacy Board* came down.⁷⁵ The advertisement at issue in *Bates* claimed the office offered legal services “at very reasonable fees,” listed the legal services available along with the exact fees, and provided basic contact information: address and phone number.⁷⁶ The advertisement violated the Arizona Supreme Court’s Disciplinary Rule 2-101(B), which prohibited a lawyer from “publiciz[ing] himself . . . as a lawyer through newspaper or magazine advertisements.”⁷⁷ Accordingly, Bates and O’Steen were disciplined.⁷⁸

In reversing the discipline, the U.S. Supreme Court emphasized that substantial interests—such as the consumer’s right to be informed of available services and the efficient allocation of resources in a market economy—weigh in favor of the free flow of commercial speech.⁷⁹ On the other side of the balance, said the Court, was the interest in maintaining professionalism and the public’s regard for the profession.⁸⁰ The Court found the asserted professionalism interests wanting, noting that attorneys were only deceiving themselves if they thought clients did not know attorneys made money from providing legal services.⁸¹ Advertising was not likely to damage the legal profession, since it had not damaged other professions.⁸² Rather, advertising would make more citizens aware of the availability of legal services to those who do not regularly socialize with

This That & the Other Gift & Tobacco, Inc., v. Cobb County, 439 F.3d 1275 (11th Cir. 2006) (analyzing a Georgia statute prohibiting both the sale and advertising of sex toys).

⁷⁴ *Va. State Bd. of Pharmacy*, 425 U.S. at 773 n.25.

⁷⁵ *Compare id.* at 748 (stating date of decision as May 24, 1976) with *Bates v. State Bar of Arizona (Bates I)*, 433 U.S. 350, 350 (indicating arguments held Jan. 18, 1977).

⁷⁶ *Bates I*, 433 U.S. at 385 (reproducing the advertisement). Numerous treatises and monographs have also reproduced the *Bates* advertisements. See, e.g., AM. BAR ASS’N COMM’N ON ADVERTISING, *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS* 36 (1995); ANDREWS, *supra* note 5, at 89; HORNSBY, *supra* note 10, at 3; HYLTON, *supra* note 52, at 42. Interestingly, the advertisement does not include the lawyers’ full names, any statement of experience or education, or their photographs. *Bates I*, 433 U.S. at 385. The only image is a graphic representation of the scales of justice. *Id.*

⁷⁷ *Bates I*, 433 U.S. at 355. The rule did permit Bates’s and O’Steen’s former employer, a Legal Aid organization, to advertise the availability and nature of its legal services, though it could not name any of the lawyers it employed. *Id.* at 355 n.5.

⁷⁸ *Id.* at 356. A three-member administrative panel of the State Bar of Arizona held a hearing, precipitated by a complaint from the State Bar’s president, and recommended each attorney be suspended for at least six months. *Id.* The penalty was reviewed and reduced, first to consecutive one-week suspensions for each attorney by the State Bar’s Board of Governors, and then to censure by the Arizona Supreme Court. *Id.* at 356-58.

⁷⁹ *Id.* at 364.

⁸⁰ *Bates I*, 433 U.S. at 364-65.

⁸¹ *Id.* at 368.

⁸² *Id.* at 369-70.

attorneys at country clubs or serve with them on community boards.⁸³ In fact, the Court reasoned, in a nation of increased urbanization, an attorney's reputation is not likely to be widely known by average citizens; advertising serves as a logical, modern replacement for reputation.⁸⁴

An additional justification asserted for banning advertising was that it is inherently deceptive or misleading.⁸⁵ The Court acknowledged that advertising has its limits and cannot fully inform a potential client about why to choose Law Office A over Law Office B.⁸⁶ However, the remedy chosen by Arizona—maintaining complete public ignorance—was not the right response.⁸⁷ Given that the public is savvy enough to understand the limits of advertising, according to the Court, the proper response to deceptively incomplete information is to require more information, not less.⁸⁸

The Court carefully reserved for later consideration several related matters in attorney advertising, including the regulation of direct solicitation of clients and the regulation of statements regarding the quality of services provided.⁸⁹ Even though the Court was not facing quality statements head on, it glanced at them with suspicion.⁹⁰ Nonetheless, attorney advertising that was truthful and did not concern illegal transactions could not constitutionally be restrained.⁹¹

With *Bates*, the door between attorneys and advertising was reopened; what would be permitted to pass remained unclear.⁹²

⁸³ *Id.* at 370-71.

⁸⁴ *See id.* at 374 n.30.

⁸⁵ *Id.* at 372. With regard to price advertising, so long as the attorney rendered the stated service at the stated price, there was no misinformation or deception involved. *Id.* at 372-73.

⁸⁶ *Bates I*, 433 U.S. at 374.

⁸⁷ *Id.* at 374-75.

⁸⁸ *Id.*

⁸⁹ *Id.* at 366. In a statement that may strike modern readers as odd, the Court said advertising on the electronic broadcast media—television and radio—also merited “special consideration.” *Id.* at 384.

⁹⁰ *Id.* at 366 (stating that quality claims “probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive[.] . . . misleading . . . or even false.”); *see also Bates I*, 433 U.S. at 383-84 (determining that “advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.”).

⁹¹ *Id.* at 383-84.

⁹² *See Bates I*, 433 U.S. at 366. After attorney advertising gained constitutional protection, attorneys began to advertise in a variety of media, with newspapers and telephone directories being common print media for this advertising. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (newspapers); *In re R.M.J. (R.M.J. I)*, 455 U.S. 191 (1982) (newspapers and telephone directory); *Bates v. State Bar of Ariz. (Bates I)*, 433 U.S. 350 (1977) (newspapers). Attorneys also ventured into the electronic media with advertisements on television. *See, e.g., Comm. on Prof'l Ethics & Conduct v. Humphrey*, 377 N.W.2d 643 (Iowa 1985); *In re Felmeister & Isaacs*, 518 A.2d 188 (N.J. 1986). As the Information Age dawned, attorneys jumped online to advertise their services. *See Matthew Garner Mercer, Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the*

4. Advertising After Bates in the U.S. Supreme Court and Lower Courts

Less than half a decade after *Bates*, the Court articulated a comprehensive test for evaluating regulations of commercial speech.⁹³ The test proceeds through four questions:

1. Does the speech neither mislead nor promote illegal activity?
2. Is the asserted governmental interest behind the regulation substantial?
3. Does the regulation directly advance the asserted governmental interest?
4. Is the regulation no more extensive than necessary to serve the asserted governmental interest?⁹⁴

The Court reiterated the important function commercial speech serves in bringing suppliers and consumers together and rejected paternalistic notions that government officials know better than market players.⁹⁵ At the same time, the Court said commercial speech was “of less constitutional moment than other forms of speech.”⁹⁶

While the Court has not directly addressed reputational advertising akin to “Super Lawyers,” it has applied the four-part *Central Hudson* test to other forms of advertising that arguably relate to the quality of a lawyer’s services: areas of practice and prior experience in a practice area,⁹⁷ where an attorney is admitted to practice,⁹⁸ and certification as a specialist in an area or type of practice.⁹⁹ At least one lower court has addressed reputational advertising.¹⁰⁰ At all levels, the courts have expressed some approval of required disclaimers, while limiting the state’s ability to make them too onerous.¹⁰¹

Advertising Rules Replace the Flat Tire with a Square Wheel, 39 BRANDEIS L.J. 713, 721 & nn.37-39 (indicating that the number of law firms with web sites grew from six in November 1994 to over 600 in May 1995).

⁹³ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (holding that utility regulator’s ban on advertising promoting use of electricity violated the First Amendment).

⁹⁴ *Id.* at 566. The Court explicitly reaffirmed that speech which is more likely to deceive than inform, or that relates to illegal activity, may be banned. *Id.* at 563-64.

⁹⁵ See *id.* at 561-62.

⁹⁶ *Id.* at 563 n.5.

⁹⁷ See *infra* notes 103-115 and accompanying text.

⁹⁸ See *infra* notes 116-121 and accompanying text.

⁹⁹ See *infra* notes 122-131 and accompanying text.

¹⁰⁰ See *infra* notes 132-139 and accompanying text.

¹⁰¹ See *infra* notes 140-146 and accompanying text.

a. Limits on How Attorneys Describe Their Practice Areas and Experience

Shortly after deciding *Central Hudson*, the U.S. Supreme Court took up two cases addressing attorneys' advertising their practice areas and practice experience; the Court focused on whether the speech was deceptive and decided to allow factually accurate statements.¹⁰² The Court applied the four-part *Central Hudson* test to a state's attempt to limit how attorneys described their practice areas in *In re R.M.J.*¹⁰³ Under a state disciplinary rule, if lawyers chose to list practice areas, they could include one of three general descriptions or any of twenty-three subject area specialties.¹⁰⁴ Since the advertisements in question included information beyond what was permitted and used synonymous terms for some practice areas, the attorney was issued a private reprimand.¹⁰⁵

Though the Court remained committed to permitting bans on deceptive advertising, it said, regulation and discipline "are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive."¹⁰⁶ The concern about deception was grounded in

¹⁰² *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.* ("R.M.J. I"), 455 U.S. 191 (1982).

¹⁰³ *R.M.J. I*, 455 U.S. at 203.

¹⁰⁴ *Id.* at 194-95. The three general areas were general civil practice, general criminal practice, or general civil and criminal practice. *Id.* at 195. The more specific subject area alternatives were administrative law, antitrust law, appellate practice, bankruptcy, commercial law, corporation law and business organizations, criminal law, eminent domain law, environmental law, family law, financial institution law, insurance law, international law, labor law, local government law, military law, probate and trust law, property law, public utility law, taxation law, tort law, trial practice, and workers compensation law. *Id.* at 195-96 n.6. Absolutely no deviation from the exact verbiage proscribed was tolerated. *Id.* at 195. Attorneys who listed areas of practice were also required to disclaim certification of expertise in the practice areas. *Id.* Additionally, the rule permitted only certain information to be advertised: name and contact information, areas of practice (in conformity with the proscribed list), date and place of birth, educational background, foreign language ability, office hours, initial consultation fee, fee schedule availability, credit arrangements, and the sort of fixed fee information at issue in *Bates*. *R.M.J. I*, 455 U.S. at 194.

Restrictions on how professionals describe their limited fields of practice are not unique to the legal profession. *See, e.g.*, *Douglas v. State*, 921 S.W.2d 180 (Tenn. 1996) (involving general dentist who practiced both a recognized specialty, orthodontics, and non-recognized specialties, cosmetic dentistry and TMJ treatment).

¹⁰⁵ *R.M.J. I*, 455 U.S. at 196-98. He had also failed, in some of the advertisements, to include the required disclaimer of certification of expertise. *Id.* at 197; *see also In re R.M.J.* ("R.M.J. II"), 609 S.W.2d 411, 412 (Mo. 1980) (choosing reprimand over disbarment because attorney's violation was minimal and the case was a test case). The majority on the Missouri Supreme Court explicitly rejected extension of *Central Hudson's* logic to attorneys. *Id.* at 412. It went so far as to refuse "to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court." *Id.*

¹⁰⁶ *R.M.J. I*, 455 U.S. at 202-203 ("Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially

consumers' lesser knowledge about professional services and the absence of standardized service offerings.¹⁰⁷ According to the Court, the practice area descriptions were not misleading, but were, in some cases, more understandable to non-lawyers than the required terms.¹⁰⁸ The rule could not be enforced because this part of the advertisement was unlikely to mislead consumers, and because the state had shown no substantial interest promoted by mandating specific terminology.¹⁰⁹

Another piece of information potentially relevant to evaluating in advance the quality of a lawyer's services is the lawyer's experience handling the sort of case the client has. In advertisements directed at women who had used the Dalkon Shield intrauterine device, a firm stated it was already representing women pursuing legal action against the manufacturer.¹¹⁰ The Court rejected the notion that the statement was a claim of expertise in Dalkon Shield litigation or a promise of success.¹¹¹ Instead, the advertisement was composed of a series of accurate statements: the device had prompted litigation by many women, including women represented by Zauderer's firm, and the firm was available to represent additional potential plaintiffs.¹¹² Statements of fact about the nature of an attorney's practice, according to the Court, could not be banned merely because some consumers might infer the attorney has some expertise in an area.¹¹³ The state sought to justify a broad ban by claiming that deceptive attorney advertising was harder to identify than deceptive advertising for other services or products.¹¹⁴

misleading information . . . if the information also may be presented in a way that is not deceptive.”).

¹⁰⁷ *Id.* at 202. Most lawyers' services are not standardized in that they are not like cans of soup or boxes of cereal that are the same when pulled off the shelf. See Peter Sanderson & Hilary Sommerlad, *Exploring The Limits to the Standardization of the Expert Knowledge of Lawyers: Quality and Legal Aid Reforms in the United Kingdom*, 52 SYRACUSE L. REV. 987, 1002-10 (2002) (describing provision of standardized legal services as a “supermarket approach”). Some legal services can be somewhat standardized, such as the preparation of wills. See Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?* 1 FLA. COASTAL L.J. 293, 299 (1999).

¹⁰⁸ *R.M.J. I*, 455 U.S. at 205. For example, the attorney used the term “real estate” instead of the permitted word “property.” *Id.* He also used the term “personal injury” instead of “tort law.” *R.M.J. II*, 609 S.W.2d at 414 (Blodgett, J., dissenting). Additionally, the attorney listed areas that were not in the approved list, such as contracts and securities. *R.M.J. I*, 455 U.S. at 205.

¹⁰⁹ *Id.*

¹¹⁰ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 630-31 (1985).

¹¹¹ *Id.* at 639-40.

¹¹² *Id.* at 640.

¹¹³ *Id.* at 640 n.9.

¹¹⁴ *Zauderer*, 471 U.S. at 644-45. The state also asserted a substantial interest in preventing attorneys from encouraging “meritless litigation against innocent defendants.” *Id.* at 643.

The Court was unimpressed by this justification, indicating that non-legal commercial activity posed just as great a risk for deception.¹¹⁵

b. Advertising Where One Is Admitted to Practice

Similarly, the U.S. Supreme Court has upheld advertising of the courts before which an attorney is admitted to practice.¹¹⁶ At least one attorney has sought to bolster his bona fides by prominently advertising his admission to practice before the nation's highest court.¹¹⁷ The attorney's advertisements also included the states where he was admitted to practice.¹¹⁸ Disciplinary rules that implicitly prohibited listing where an attorney is admitted to practice, the Court said, served no substantial state interest, especially when the attorney was advertising his admission in a border state.¹¹⁹ It admitted that, because most non-attorneys are unfamiliar with the rules governing admission to the Supreme Court Bar, such a statement might be misleading.¹²⁰ However, because no actual deception had been established, the Court declined to uphold the reprimand for this transgression.¹²¹

c. Certification as a Specialist

A more explicit claim of expertise is certification as a specialist in a field or type of practice; advertising this information is protected as long as the certification is a verifiable fact.¹²² The Court addressed specialty

¹¹⁵ *Id.* at 645. *See, e.g.,* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (challenging an advertisement for mouthwash); Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977) (challenging an advertisement for eggs). In *Warner-Lambert*, the manufacturer advertised that Listerine had the added benefit of curing the common cold. *Warner-Lambert*, 562 F.2d at 752. The other example involved an egg industry trade association that had advertised that no scientific evidence indicated eating eggs increased one's risk for heart attacks and heart disease. *Nat'l Comm'n on Egg Nutrition*, 570 F.2d at 158.

¹¹⁶ *R.M.J. I*, 455 U.S. 191, 205-06 (1982).

¹¹⁷ *Id.* at 197.

¹¹⁸ *Id.* at 196-97.

¹¹⁹ *Id.* at 205.

¹²⁰ *Id.* The Court also indicated it found trumpeting membership in its Bar to be in bad taste. *Id.* Admission to the Supreme Court Bar is hardly exclusive. *See* SUP. CT. R. 5 (requiring applicants for admission to be admitted to practice in a state's highest court for at least three years, to be free from disciplinary action for at least three years, to be of sound character, to complete an application and personal statement, to secure two members of the Court's bar as sponsors, and to pay a \$100 fee).

¹²¹ *R.M.J. I*, 455 U.S. at 205-06. In addressing how the regulation serves the asserted governmental interest, the state cannot rely on speculation or conjecture about either the nature of the asserted harm to the public or the utility of the regulation. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Instead, the asserted harms must be real and the government's regulation must actually alleviate the harms to a material degree. *Id.* at 771.

¹²² *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990).

certification in *Peel v. Attorney Registration and Disciplinary Commission*, a case involving a certified civil trial specialist.¹²³ The state justified its prohibition on promoting one's certification by claiming that consumers might confuse certification with licensure.¹²⁴ While the state did not dispute the facial accuracy of Peel's claim of certification, the regulators characterized certification as a claim of quality and relied on the Court's prior statements that qualitative claims "might be so likely to mislead as to warrant restriction."¹²⁵ However, the Court chastised the state for failing to distinguish between two types of qualitative assertions: opinions and objective facts.¹²⁶ Certification by the board is a verifiable fact, as are the underlying requirements.¹²⁷

Having established that Peel's claim of certification was not actually misleading to consumers, the Court turned to the state's assertion that it had a substantial interest in protecting consumers of legal services from potentially misleading claims of expertise.¹²⁸ The Court said the state had employed a blunt weapon in facing a specific perceived ill.¹²⁹ The need for a broad ban was undercut by the explicit exception for some claims of certification, including for patent and admiralty specialists.¹³⁰ Claims of

¹²³ *Id.* Illinois attorney Gary Peel was certified by the National Board of Trial Advocacy. *Id.* at 96. The board was founded by a number of legal interest organizations in response to a statement by Chief Justice Warren E. Burger that training for and certification of trial specialists was essential to justice. *Id.* at 94. NBTA was established by the American Board of Professional Liability Attorneys, the Association of Trial Lawyers of America, the International Academy of Trial Lawyers, the International Society of Barristers, the National Association of Criminal Defense Lawyers, the National Association of Women Lawyers, and the National District Attorneys Association. *Id.* at 94 n.3. Peel listed the certification on his letterhead. *Id.* at 93. The relevant portion of the letterhead had four lines: his name; an indication that he was a certified civil trial specialist; the name of the certifying organization; and a listing of the states in which he was licensed. *Peel*, 496 U.S. at 96. Peel's name and the licensing line were flush with the left margin; the certification information was indented. *Id.* at 96, 103. A sample sheet of the letterhead is reproduced in HYLTON, *supra* note 52, at 152.

¹²⁴ *Peel*, 496 U.S. at 98. According to the state, consumers might not understand that certification was merely the work of a private body, while licensure was the imprimatur of the state. *Id.*

¹²⁵ *Id.* at 101 (indicating the Illinois Supreme Court quoted from *R.M.J. I.*).

¹²⁶ *Id.*

¹²⁷ *Id.* A statement of one's certification "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact . . . from which a consumer may or may not draw an inference of the likely quality" of the attorney's work in the certified area. *Id.* at 101 (citation omitted). The requirements for certification faced by Peel are recounted in detail in the Court's opinion. See *Peel*, 496 U.S. at 95 & n.4. However, the Court stated, a statement of certification would be misleading if the certifying organization had not inquired into the attorney's fitness or had merely issued certification for a price. *Id.* at 102. To prevent such unsavory practices, the Court recommended three alternatives: screening certifying bodies; requiring attorneys to demonstrate the standards underlying the certification are objective, consistent and relevant; or mandating the use of disclaimers. *Id.* at 109-10.

¹²⁸ *Id.* at 106.

¹²⁹ *Id.* at 107.

¹³⁰ *Id.*

certification in the excepted fields are just as susceptible to vacuity as in any area of law.¹³¹

d. Reputational Advertising: A Martindale Advertisement Analyzed

The Eleventh Circuit addressed reputational advertising when an attorney sought to advertise his Martindale rating; the court found that the state had not proven consumers were actually being misled.¹³² The attorney included, in a telephone directory advertisement, a statement that he was ““AV” Rated, the Highest Rating Martindale-Hubbell National Law Directory.”¹³³ The Bar did not object to Mason’s listing of his “AV” rating, but asserted that the full statement was misleading or potentially misleading.¹³⁴ The dispositive question was the third prong of the *Central Hudson* framework.¹³⁵ The court sought evidence of actual harm to consumers by Mason’s characterization of his rating or his failure to describe Martindale’s rating system.¹³⁶ If consumers were not being misled by

¹³¹ *Peel*, 496 U.S. at 107, 110. *Peel* represents the Supreme Court’s last statements on attorney advertising. One later case, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), does address related issues. Some commentators read the case as indicating a new anti-*Bates*, anti-advertising, majority forming. See, e.g., HYLTON, *supra* note 52, at 211. However, *Went for It* was a case involving targeted solicitation of potential clients. *Went for It*, 515 U.S. at 620. As such, it is of a piece with a line of cases recognizing unique state interests in the solicitation context. See *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 472 (1988); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455 (1978); *In re Primus*, 436 U.S. 412, 421-22 (1978); see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (addressing solicitation by accountants). Solicitation is prone to overreaching, invasion of privacy, undue influence, and outright fraud; advertising, on the other hand, permits the consumer to reflect and exercise choice in selecting an attorney. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985). But see *In re Discipline of Appert*, 315 N.W.2d 204, 212 (Minn. 1981) (saying distinction serves no useful purposes, because analysis depends on weighing of attorney’s, public’s and state’s interests in either case); *Koffler v. Joint Bar Ass’n*, 412 N.E.2d 927, 931-33 (N.Y. 1980) (calling distinction between advertising and solicitation artificial but recognizing that one state interest in prohibiting solicitation was invasion of privacy).

¹³² *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000).

¹³³ *Id.* at 954.

¹³⁴ *Id.* at 954, 956 (noting that the Florida Bar permits attorneys to list their Martindale ratings without elaboration). For a description of the Martindale rating system, see *supra* notes 44-51 and accompanying text.

¹³⁵ See *Mason*, 208 F.3d at 957. With regard to the first prong, whether the speech is misleading or promotes illegal activity, the Bar conceded that Mason’s speech was truthful, and thus could not be banned outright. *Id.* at 956. For the second prong, the state asserted three interests as substantial: ensuring that attorney advertisements are not misleading, ensuring the public availability of relevant information to help consumers compare and select attorneys, and encouraging attorney rating services to use objective criteria. *Id.* at 956. The court accepted the first two interests as substantial, but said that it could find no value in distinguishing between objective and subjective criteria. *Id.* The court’s rejection of the third asserted interest was at least partially due to the Bar’s failure to offer any reason to prefer objective criteria over subjective criteria. *Id.*

¹³⁶ *Id.* at 957.

Mason's advertisement or similar communications, the court indicated, the restriction on his advertising could not advance the state's interest.¹³⁷ The Bar sought to use the public's likely unfamiliarity with Martindale's rating system as proof of misinformation, but the court held that unfamiliarity was not synonymous.¹³⁸ Because the Bar had failed to show any identifiable harm, the court refused to uphold the restriction.¹³⁹

e. The Disclaimer as an Alternative: How Much Is Enough and How Much Is Too Much?

In many cases, states or reviewing courts have turned to disclaimer requirements as a form of restriction less severe than a complete ban. The U.S. Supreme Court has suggested that attorneys who advertise their admission to appear before the Court could be required to include a disclaimer indicating that their admission is not as impressive as laypeople might believe.¹⁴⁰ The Court also suggested the use of disclaimers to resolve any potential misinformation in the advertisement of certifications.¹⁴¹ However, a state's ability to require disclaimers is not unchecked; disclosure requirements pass constitutional muster only if they are reasonably related to the state's interest in preventing deception.¹⁴² In a case involving an attorney also licensed as an accountant, the Court indicated that required disclaimers might be so lengthy as to be virtual bans.¹⁴³ In several cases, the federal Courts of Appeal and state courts upheld required disclaimers that

¹³⁷ See *Mason*, 208 F.3d at 957.

¹³⁸ *Id.* The court noted that the Supreme Court noted in *Peel* that consumers are not necessarily misled simply because they do not know the precise standards for certification as a trial specialist. *Id.* at 957; see also *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 102-03 (1990).

¹³⁹ *Mason*, 208 F.3d at 958. The court did not reach the fourth prong, whether the regulation was more extensive than necessary. *Id.*

¹⁴⁰ See *R.M.J. I*, 455 U.S. at 205.

¹⁴¹ *Peel*, 496 U.S. at 110. Justice Marshall suggested the disclaimers could include a statement that the certifying organization was a private entity without any government sanction or affiliation, or a more complete disclosure of the requirements for certification. *Id.* at 117 (Marshall, J., concurring). However, he declined to set forth the details of how much disclosure of the requirements was necessary to "avoid misunderstandings." *Id.* at 117 n.2.

¹⁴² *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The Court also refused to subject disclosure requirements to a least restrictive means analysis. *Id.* at 651 n.14.

¹⁴³ *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146-47 (1994) (observing that a disclaimer requirement to include the standards for recognition or certification effectively makes it impossible to note the designation on business cards or letterhead or in telephone directory listings). In *Mason*, the Bar sought only a lengthy disclaimer explaining the Martindale rating system and clarifying that the rating was based exclusively on other attorneys' opinions. *Mason v. Fla. Bar*, 208 F.3d 952, 954 (11th Cir. 2000).

straightforwardly addressed state concerns about deception.¹⁴⁴ The Iowa Supreme Court, for example, reprimanded an attorney for failing to include in his advertisements a required disclaimer that association memberships do not mean the attorney is an expert or more competent than other lawyers.¹⁴⁵ The disclaimer requirement directly dispelled the possible implication of expertise, the court said, and was narrowly tailored to address only the expertise implication of association membership.¹⁴⁶

An almost-thirty-year period of experimentation with attorney advertising has left the constitutional landscape with significant guideposts. Attorneys may advertise, and states may restrict their advertising.¹⁴⁷ Unless the advertising at issue is inherently misleading, the state cannot restrain advertising without directly advancing a substantial state interest and can impose a restraint no more extensive than necessary.¹⁴⁸ Well-tailored, direct disclaimer requirements are looked on favorably.¹⁴⁹ In this constitutional milieu, New Jersey sought to ban a growing form of advertising.

B. New Jersey

Though New Jersey is one of the oldest states in the Union, a formal judicial ban on advertising by attorneys was not adopted in the state until

¹⁴⁴ See, e.g., Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Kirlin, 570 N.W.2d 643 (Iowa 1997); Douglas v. State, 921 S.W.2d 180 (Tenn. 1996).

¹⁴⁵ Kirlin, 570 N.W.2d at 647 (upholding public reprimand recommended by disciplinary authorities). The court accepted the state's asserted substantial interest in protecting the public from deception, noting that false claims of expertise pose a danger to those in need of legal services. *Id.* at 646.

¹⁴⁶ *Id.* The required disclaimer ran more than sixty words. *Id.* at 644. The court did not address the *Ibanez* dicta regarding verbose disclaimers. See *supra* note 143 and accompanying text (discussing *Ibanez*). In a case involving a dentist, the Tennessee Supreme Court did not take issue with a disclaimer required of generalists who practice a specialty but are not certified as specialists. Douglas, 921 S.W.2d at 188-89 (upholding public reprimand). Douglas was licensed as a general dentist, but he practiced orthodontics and indicated this specialty on his business cards and office door. *Id.* at 182. The business cards read "J. Lee Douglas, DDS, Family Dentistry, Cosmetic Dentistry, Orthopedics/Orthodontics, TMJ Dysfunction." *Id.* The office door read "J. Lee Douglas, D.D.S., Dentistry, TMJ, Orthodontics." *Id.* Orthodontics is among the specialties recognized by the Tennessee State Board of Dentistry, while cosmetic dentistry and the treatment of TMJ are not on the specialty list. *Id.* at 181-82. He did not include the required disclaimer that the specialty services were being provided by a general dentist. *Id.* at 182. The court said a one-sentence explanation that a generalist is not a certified specialist is "scarcely burdensome at all." *Id.* at 188.

¹⁴⁷ See *supra* note 92 and accompanying text (summarizing the post-*Bates* reality as permissive to both advertising and regulation).

¹⁴⁸ See *supra* note 94 and accompanying text (setting forth the *Central Hudson* test).

¹⁴⁹ See *supra* notes 140-146 and accompanying text (discussing cases involving disclaimer requirements).

relatively late, in 1948.¹⁵⁰ The state's highest court remained committed to prohibiting advertising by attorneys until the *Bates* decision came down.¹⁵¹ The New Jersey Supreme Court responded to *Bates* by amending its disciplinary rules to permit only the sort of advertising directly at issue in *Bates*: print advertisements of fee schedules for routine services.¹⁵² After being challenged by a national firm that wished to use its name in New Jersey, which was prohibited unless all the name partners were licensed in New Jersey, the disciplinary rules were further amended to permit advertising on broadcast media, to require all forms of advertising to be dignified, and to prohibit the use of drawings, animations, dramatizations and music.¹⁵³ Shortly thereafter, the court adopted the ABA's Model Rules of Professional Conduct, but modified the advertising provisions to conform to the court's pronouncements.¹⁵⁴

Thus, when Lloyd Levenson complained about the "Super Lawyers" recognition and offer to advertise, his inquiry was grounded in New Jersey Rule of Professional Conduct 7.1:

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; [or]
- (3) compares the lawyer's services with other lawyers' services. . . .¹⁵⁵

¹⁵⁰ *In re Felmeister & Isaacs*, 518 A.2d 188, 190 (N.J. 1986) (indicating the ABA's Canons of Professional Responsibility adopted in 1948). For a history of the ABA canons, see *supra* notes 62-65 and accompanying text.

¹⁵¹ See *In re Braun*, 293 A.2d 186, 188-89 (N.J. 1972) (justifying the ban on attorney advertising as being in the public interest). The *Braun* court is guilty of historical revisionism, claiming the prohibition was of ancient origin, claiming all lawyers were proud of being members of a profession not practitioners of a business. See *id.* at 188.

¹⁵² *Felmeister & Isaacs*, 518 A.2d at 190.

¹⁵³ *Id.* at 191.

¹⁵⁴ *Id.* at 191, n.6.

¹⁵⁵ N.J. R. PROF'L CONDUCT 7.1(a). Though news reports have said Levenson complained, the Advertising Committee's actions seem more in line with an advisory inquiry than an ethics grievance. See *supra* note 12; compare N.J. Ct. R. 1:19A-3 (advisory opinions) with N.J. Ct. R. 1:19A-4 (ethics grievances).

Attorneys are permitted to advertise, but the advertisements must be purely informational and must conform to the limitations imposed by Rule 7.1.¹⁵⁶ After adopting the loosened rules, the New Jersey Supreme Court admitted that attorney advertising had benefits, including a more informed public and greater access to legal services at reasonable cost.¹⁵⁷ However, the court remained concerned about advertising elements that had no relation to an attorney's competence.¹⁵⁸ The court also admitted that information of vital importance to consumers—an attorney's reputation among his peers and clients—was virtually foreclosed from advertising.¹⁵⁹

The Advertising Committee has exclusive jurisdiction over ethics grievances relating to advertising.¹⁶⁰ It also may accept inquiries seeking advisory opinions.¹⁶¹ Use of a prohibited form of advertisement, with actual or constructive knowledge of the prohibition, is per se unethical conduct.¹⁶²

Consideration of the "Super Lawyers" designation by the Advertising Committee was directed at whether the advertisements violated

¹⁵⁶ N.J. R. PROF'L CONDUCT 7.2(a).

¹⁵⁷ *Felmeister & Isaacs*, 518 A.2d at 192.

¹⁵⁸ *Id.* at 193.

¹⁵⁹ *Id.* at 194. The possibility of allowing advertising about reputation, but requiring a disclaimer about quality, was discussed but not implemented. *Id.* at 194 n.10.

¹⁶⁰ N.J. CT. R. 1:19A-2(a), 1:19A-4(a). Grievances may be filed by an attorney, a non-attorney, or the Advertising Committee itself. N.J. CT. R. 1:19A-4(a). The Advertising Committee initially was established to examine only a ban on television advertising and the restriction on firm name usage. *Felmeister & Isaacs*, 518 A.2d at 190. Shortly thereafter, the committee was institutionalized. *See id.* (noting the expansion of the committee's scope). The Advertising Committee is now composed of seven members, five attorneys and two non-attorneys, serving three-year terms. N.J. CT. R. 1:19A-1(a).

¹⁶¹ N.J. CT. R. 1:19A-3. Inquiries, unlike grievances, only may come from members of the New Jersey bar. N.J. CT. R. 1:19A-3(a). The committee may publish its advisory opinions. N.J. CT. R. 1:19A-3(c). The rule provides for publication in two bar journals, the *New Jersey Law Journal* and the *New Jersey Lawyer*; the Advertising Committee also publishes its opinions online. *See* New Jersey Judiciary, Notices to the Bar, <http://www.judiciary.state.nj.us/notices/index.htm> (last visited Mar. 30, 2007). Commentators disagree about the value of advisory opinions in general. *Compare* Carro, *supra* note 61, at 15-40 (evaluating quantitative and qualitative effects of ethics opinions on court decisions and concluding that courts treat advisory opinions in ways similar to judicial opinions) and Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313 (2002) (suggesting ethics opinions are important and recommending reforms to improve their quality) with CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 67 (1986) (suggesting ethics opinions are minor players in judicial decisionmaking and are rarely cited). *See also* Chanin, *supra* note 64, at 165-67 (noting that courts give ethics opinions some persuasive authority but are often reluctant to treat them as completely authoritative); Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125, 142 (1991) (suggesting judicial response to ethics opinions has ranged from outright hostility to total deference).

¹⁶² N.J. CT. R. 1:19A-3(c). *See also* N.J. R. PROF'L CONDUCT 7.1(b) ("It shall be unethical for a lawyer to use an advertisement . . . known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved."). Publication of an opinion is constructive notice to, and binding on, all members of the bar. N.J. CT. R. 1:19A-3(c).

clauses (2) and (3) of Rule 7.1.¹⁶³ The committee reviewed the selection process for the designation, calling it unclear.¹⁶⁴ The Advertising Committee had little difficulty determining an advertisement touting an attorney's recognition as a "Super Lawyer" is likely to create unjustified expectations about results.¹⁶⁵ It said that consumers are induced to believe that a "Super Lawyer" will deliver results superior to those that can be achieved by the ninety-five percent of the state's attorneys not so recognized.¹⁶⁶ The use of a superlative designation, according to the Advertising Committee, is also inherently comparative and thus squarely in conflict with Rule 7.1.¹⁶⁷ The label was criticized for being developed on the basis of a poll of colleagues and lacking objective verification of the lawyer's ability.¹⁶⁸ Labeling a lawyer as "super" could lead consumers to believe she is in fact superior to her peers.¹⁶⁹ The practical obliteration of the "Super Lawyers" franchise in New Jersey was justified, in the committee's eyes, by the label's "capacity to materially mislead the public."¹⁷⁰

Other attorney rating systems, however, such as the one employed by legal directory Martindale-Hubbell, were spared the committee's censure.¹⁷¹ Because the Advertising Committee determined that Martindale's system was directed primarily at other lawyers, rather than a mass audience, it was not likely to mislead consumers.¹⁷²

¹⁶³ N.J. Op. 39 at 1.

¹⁶⁴ *Id.* at 2 n.1. *But see supra* notes 34-36 and accompanying text (describing "Super Lawyers" selection process as including statewide poll and independent research conducted by publisher). The Advertising Committee also examined the process used to select attorneys recognized as among the "Best Lawyers in America." *See* N.J. Op. 39 at 1-2. "Best Lawyers" and "Super Lawyers" are indirect competitors; "Best Lawyers" publishes an annual book of lawyer rankings developed through a peer-poll methodology. *Best Lawyers, About Best Lawyers: Methodology*, <http://www.bestlawyers.com/aboutus/methodology.asp> (last visited Mar. 30, 2007). The rankings are also licensed to magazine publishers for use in advertising supplements, but no advertisements appear in the original "Best Lawyers" volume. *Id.* Though the Advertising Committee's opinion addresses both "Super Lawyers" and "Best Lawyers," this Comment restricts itself to the "Super Lawyers" franchise.

¹⁶⁵ N.J. Op. 39 at 2.

¹⁶⁶ *Id.* Only five percent of a state's attorneys are designated "Super Lawyers" in a given year. *About Super Lawyers, supra* note 13.

¹⁶⁷ N.J. Op. 39 at 2.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The Advertising Committee did not limit itself to prohibiting attorneys from touting recognition by their peers; it also prohibited participation in the survey used to determine who would be recognized and prohibited attorneys from advertising in any way in the "Super Lawyers" publication. *Id.* at 3.

¹⁷¹ *Id.*

¹⁷² N.J. Op. 39 at 3. The determination was made without explicit findings. *Id.*

C. Minnesota

Minnesota has not been as aggressive as some other states in regulating attorney advertising.¹⁷³ Nonetheless, Minnesota has not left attorney advertising completely unregulated.¹⁷⁴ Minnesota courts have long held that clearly false or untrue speech will rarely merit protection, even in the more constitutionally significant realm of political or “pure” speech.¹⁷⁵ However, the courts have also been careful not to let regulations designed to protect consumers from misleading communications stifle legitimate speech.¹⁷⁶

The current Minnesota Rule of Professional Conduct addressed at misleading advertising prohibits a lawyer from making “a false or misleading communication about the lawyer or the lawyer’s services.”¹⁷⁷ According to Rule 7.1, “[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.”¹⁷⁸ The official comments indicate that a truthful statement is misleading “if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”¹⁷⁹ The commentary also addresses statements comparing a lawyer’s services with those of her peers, saying such statements may be misleading if they are unsubstantiated but would

¹⁷³ Cf. Cole, *supra* note 23, at 12 (noting that advertising complaints do not consume the same level of resources as in other states).

¹⁷⁴ See MINN. R. PROF’L CONDUCT 7.1-7.5; see also Johnson v. Dir. of Prof’l Responsibility, 341 N.W.2d 282 (Minn. 1983) (addressing previous rule prohibiting advertisements regarding an attorney’s specialization or certification).

¹⁷⁵ See Schmitt v. McLaughlin, 275 N.W.2d 587, 590-91 (Minn. 1979) (upholding statute prohibiting political candidates from falsely claiming endorsements).

¹⁷⁶ See Johnson, 341 N.W.2d at 285. In Johnson, the Minnesota Supreme Court struck down its own rule prohibiting advertisements regarding an attorney’s specialization or certification. *Id.* However, the state’s highest jurists have at times shared the historic distaste for attorney advertising. In one disciplinary case, a concurring justice emphasized that the Constitution and ethics rules are merely a floor below which attorney advertising may not descend, but that members of the bar should hold themselves to a higher standard. *In re Discipline of Kotts*, 364 N.W.2d 400, 406 (Minn. 1985) (Simonett, J., concurring specially) (“Simply because free speech allows us to make fools of ourselves is no reason we should avail ourselves of the opportunity.”). Three additional justices indicated they joined in Justice Simonett’s sentiments. *Id.* at 407 (Amdahl, C.J., Peterson, J., and Coyne, J., concurring specially, *seriatim*). While the disciplinary charges in *Kotts* included improper advertising, the opinion of the court addressed itself exclusively to the lawyer’s financial misdeeds. *Id.* at 401-06 (per curiam).

¹⁷⁷ MINN. R. PROF’L CONDUCT 7.1 (2003). The Rule tracks with the current version of the ABA Model Rule. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2003). The evolution of Model Rule 7.1 is charted in ABA CTR. FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 697-707 (2006).

¹⁷⁸ MINN. R. PROF’L CONDUCT 7.1 (2003).

¹⁷⁹ *Id.* cmt. 2.

lead a reasonable person to believe that they could be substantiated.¹⁸⁰ Finally, when making comparisons, an attorney might find protection by including a disclaimer.¹⁸¹

Two reported Minnesota Supreme Court cases meaningfully discuss and apply Minnesota Rule 7.1.¹⁸² In the earlier case, an attorney was disbarred for, among other things, describing himself to a client as one of the state's "top" family law lawyers.¹⁸³ The attorney failed to disclose ongoing disciplinary problems and predicted a likelihood of success.¹⁸⁴ In contrast to these facially misleading claims and omissions, the latter case revolved around whether the way an attorney characterized his office space was a material misrepresentation.¹⁸⁵ Whether the attorney had nine fully staffed offices or merely a collection of locations convenient for clients was not a material misrepresentation, according to the court.¹⁸⁶ However, a dissenting justice would have admonished the attorney, because the advertisement falsely implied the attorney was responsible for a law firm large enough to support offices throughout the metropolitan area.¹⁸⁷

The Minnesota provisions regulating attorney advertising thus hang on whether a statement that is likely to influence a potential client's choice of lawyer is so unsupported as to be misleading.¹⁸⁸ To protect themselves from

¹⁸⁰ *Id.* cmt. 3.

¹⁸¹ *Id.*

¹⁸² *In re Charges of Unprofessional Conduct Against 95-30*, 550 N.W.2d 616 (Minn. 1996); *In re Peters*, 474 N.W.2d 164 (Minn. 1991).

¹⁸³ *Peters*, 474 N.W.2d at 167. The disciplinary charges also included unauthorized practice of law, breach of fiduciary duties, and dishonesty. *Id.* at 166-68.

¹⁸⁴ *Id.* at 167. Peters had previously been suspended from the practice of law and was on probationary status, which prohibited him from practicing alone. *Id.* He quoted an eighty percent chance of success on the client's matter. *Id.*

¹⁸⁵ *In re 95-30*, 550 N.W.2d at 617. The unnamed attorney advertised in the telephone directory, stating "we have offices near you" and listing nine locations scattered throughout the Minneapolis-St. Paul metropolitan area. *Id.* at 616. In reality, the attorney maintained only one fully staffed office; the other locations were a conference room rented on a monthly basis and seven office buildings where the attorney rented conference rooms on an hourly basis. *Id.*

¹⁸⁶ *Id.* at 617. The court emphasized the word "material," suggesting its presence in Rule 7.1 may have been dispositive. *Id.* Indeed, the court indicated it did not condone "less than straightforward language" in advertisements. *Id.* The court had earlier addressed a case involving claims of office location. *In re Piper*, 452 N.W.2d 917 (Minn. 1990). In *Piper*, the attorney also advertised in the telephone directory; he claimed to have an office in the IDS Tower. *Id.* at 917-18. He did not, in fact, have an office there when he placed the advertisement, nor did he have any reasonable basis to believe he would have office space there when the advertisement appeared. *Id.* at 918. The main thrust of the disciplinary charges, however, was that Piper engaged in a pattern of dishonesty in financial transactions. *Id.* Piper was indefinitely suspended from the practice of law, with no right to apply for reinstatement for one year. *Id.*

¹⁸⁷ *In re 95-30*, 550 N.W.2d at 617 (Coyne, J., dissenting).

¹⁸⁸ See *supra* notes 173-181 and accompanying text (discussing the potential influence "Super Lawyers" advertising could have on a potential client).

discipline, attorneys may choose to, but are not required to, use a disclaimer addressing the statement.

III. ANALYSIS

Applying the Minnesota Rules of Professional Conduct to “Super Lawyers” indicates that Minnesota attorneys are not violating the jurisdiction’s ethical rules, because the advertisements are not false or misleading.¹⁸⁹ Even if Minnesota were to follow in New Jersey’s footsteps and choose to apply its rules to ban “Super Lawyers,” the U.S. Supreme Court’s attorney advertising precedents would restrain the state.¹⁹⁰ However, a short disclaimer requirement would survive constitutional review.¹⁹¹

A. “*Super Lawyers*” Advertising Serves a Valuable Purpose By Providing the Reputational Information Consumers Crave

Attorney advertising has been a matter of contention within the legal community for more than a century, if not to the beginnings of an identifiable legal community.¹⁹² As more lawyers, commentators, and even the U.S. Supreme Court have come to accept, attorneys are engaged in a business that shares common features with other businesses.¹⁹³ One of those features is the need for revenue to stay in business.¹⁹⁴ Unless an attorney is fortunate enough to have repeat clients with a few complex matters or a long series of smaller matters, the attorney is dependent on new clients for revenue.¹⁹⁵ Perhaps in some communities, in a bygone era, attorneys could rely solely on their reputation in the community to direct potential clients their way.¹⁹⁶ In more populated urban areas, however, it has long been the case that attorneys needed to advertise to make their presence known.¹⁹⁷ For John Bates and Van O’Steen, it was crucial they advertise so that Arizonans

¹⁸⁹ See *infra* notes 203-227 and accompanying text.

¹⁹⁰ See *infra* notes 228-250 and accompanying text.

¹⁹¹ See *infra* notes 251-259 and accompanying text.

¹⁹² See *supra* notes 52-68 and accompanying text (reviewing the history of attorney advertising and efforts to suppress it).

¹⁹³ Cf. *supra* note 81 and accompanying text (reflecting the U.S. Supreme Court’s acknowledgment of the fact that attorneys make money from the practice of law).

¹⁹⁴ See *supra* notes 5-6 and accompanying text (recounting the need of Bates and O’Steen to raise revenue from new clients to keep their clinic operating).

¹⁹⁵ See *supra* note 5 and accompanying text (discussing how without repeat client volume, attorneys are dependent on new clients).

¹⁹⁶ *Supra* note 54 (citing Marc Galanter as disputing the notion of a golden era of the profession when attorneys did not need to advertise); cf. *supra* notes 83-84 and accompanying text (discussing the modern trend against common knowledge of attorneys’ reputations).

¹⁹⁷ See *supra* notes 55, 84 and accompanying text (recounting advertising in early city directories and discussing modern need for advertising as a substitute for reputation).

of moderate incomes could be aware of a relatively new law office providing select services at potentially affordable rates.¹⁹⁸

“Super Lawyers” advertising is one variety of the sort of commercial speech the U.S. Supreme Court has sought to protect since the 1970s.¹⁹⁹ In the context of attorney advertising, the Court has long recognized that the modern world does not afford potential clients with ready information about attorneys’ reputations.²⁰⁰ Many consumers do not encounter lawyers in social settings and will only think of needing to meet a lawyer when they need one.²⁰¹ The “Super Lawyers” concept is a modern response to a modern problem—it provides consumers with the names of attorneys, in several dozen fields of practice, who are highly regarded by the very people, other lawyers, who would know what makes a good attorney.²⁰²

B. The Minnesota Rules of Professional Conduct Do Not Prohibit Advertising an Attorney’s Recognition As a “Super Lawyer”

The central question in analyzing whether “Super Lawyers” advertisements run afoul of the provisions of the Minnesota Rules of Professional Conduct is whether the advertisements are false or misleading.²⁰³ “Super Lawyers” advertisements are not false; they convey verifiably true information—that an attorney has been selected through the process for recognition.²⁰⁴ An attorney’s advertisement of his or her selection as a “Super Lawyer” would only fall within the “false” statement category if he or she had *not* been selected, or had no reasonable basis to believe he or she would be selected.²⁰⁵ Thus, a challenge to “Super Lawyers” advertising would need to be grounded in the “misleading” statement category of prohibited information under Minnesota Rule 7.1. Application of the remainder of the rule and the official comments

¹⁹⁸ See *supra* notes 3-8 and accompanying text (discussing the Bates and O’Steen business model).

¹⁹⁹ See *supra* notes 70-71 and accompanying text (discussing the Supreme Court’s recognition of the value of commercial speech in *Virginia State Board of Pharmacy*).

²⁰⁰ See *supra* note 84 and accompanying text (discussing how urbanization reduces the prevalence of knowledge about attorney reputations).

²⁰¹ See *supra* note 83 and accompanying text (noting that few potential clients are found at attorneys’ country clubs or among their colleagues on community boards).

²⁰² See *supra* note 33 and accompanying text (indicating that the “Super Lawyers” supplement begins with an acknowledgment that the reader will someday need to find an attorney and that many readers might find it helpful to have recommendations from other attorneys).

²⁰³ See *supra* note 177 and accompanying text (setting forth the standard articulated in Minnesota Rule 7.1).

²⁰⁴ See *supra* note 127 (discussing the distinction between bare opinions and objective, verifiable facts in a case dealing with certification as specialist).

²⁰⁵ See *supra* note 186 (discussing the disciplinary matter where an attorney advertised he had an office in a prominent office tower, even though his office was not in the building and he had no reasonable basis to believe he would be moving into the building by the time the advertisement was published).

demonstrate that an outright ban on “Super Lawyers” advertising is untenable.²⁰⁶

1. “Super Lawyers” Advertisements Are Not Material Misrepresentations of Fact and Do Not Omit Necessary Facts

Though the initial standard for prohibited advertising is simply “false or misleading,” Rule 7.1 itself clarifies that the rule is directed against material misrepresentations or statements that are materially misleading because they omit necessary facts.²⁰⁷ In applying the rule, the Minnesota Supreme Court has emphasized the importance of the word “material.”²⁰⁸ For many of the same reasons that “Super Lawyers” advertisements are not false, they are also not material misrepresentations of fact.²⁰⁹ The advertisements honestly and forthrightly state that the attorneys have been recognized by their peers as leaders among the bar, as attorneys other lawyers would recommend.²¹⁰ Further, unlike William Peters, who claimed to be a “top” lawyer in his practice area even though he was under probationary status after a suspension, potential “Super Lawyers” are subject to a status check by the publisher with the Minnesota Lawyers Professional Responsibility Board and Office of Lawyers Professional Responsibility, preventing them from omitting the necessary fact that they are ethically suspect.²¹¹

Another arguably necessary fact is the process used to select attorneys for designation as “Super Lawyers.”²¹² This fact is not omitted, however, in the “Super Lawyers” advertising supplement; rather, the selection process is detailed both on the first substantive page of the

²⁰⁶ See *supra* notes 178-181 and accompanying text (setting out standards in the rule and comments for what is a misleading statement); see *infra* notes 207-227 and accompanying text (applying these standards).

²⁰⁷ Compare *supra* note 177 and accompanying text (stating the standard as “false or misleading”) with *supra* note 178 and accompanying text (defining “false or misleading” by reference to materiality).

²⁰⁸ See *supra* note 186 (noting that the court emphasized the word “material” in declining to discipline a lawyer who advertised he had office locations when in fact he had only rented conference rooms).

²⁰⁹ See *supra* notes 203-205 and accompanying text (discussing how “Super Lawyers” advertisements are not false).

²¹⁰ See *supra* notes 33-34 and accompanying text (recounting the purpose of “Super Lawyers” as being to provide consumers with reputational information and detailing the selection process used to determine honorees).

²¹¹ Compare *supra* notes 183-184 and accompanying text (discussing the conduct of attorney William Peters that led to his disbarment) with *supra* notes 35-36 and accompanying text (noting that “Super Lawyers” candidates’ ethical standing is checked before they are named).

²¹² Cf. *supra* note 141 and accompanying text (reflecting the U.S. Supreme Court’s acknowledgment that states might be interested in how organizations certify attorneys).

supplement and on the “Super Lawyers” web site.²¹³ Consumers can thus rest easy that “Super Lawyers” are not practicing under a disciplinary cloud, and are able to inform themselves about how the attorneys in the listing are determined.

2. A Reasonable Person Would Not Formulate a Specific, Unfounded Conclusion About “Super Lawyers” or Their Services

A comment to Minnesota Rule 7.1 suggest that a statement that is truthful is nonetheless misleading if a reasonable person is substantially likely to formulate a specific conclusion, without reasonable factual foundation, about that lawyer or lawyer’s services.²¹⁴ One possible conclusion consumers might reach, as recognized by the New Jersey Advertising Committee, is that a “Super Lawyer” can achieve results superior to those within the reach or skill of an ordinary attorney.²¹⁵ However, this conclusion lacks factual foundation. A reader of *Mpls. St. Paul* magazine will note the sheer size of the supplement—over sixty pages—and the number of attorneys recognized as “Super Lawyers.”²¹⁶ It is unreasonable to believe the “Super Lawyers” in a given practice area have never worked opposite each other, or that lawyers who are not named to the list but are polled to help compile the annual roster can set aside their instincts to recommend the attorneys who do appear.²¹⁷ An alternate conclusion, one that has factual foundation, is precisely the conclusion the publishers want consumers to reach: that “Super Lawyers” are highly respected by their peers, even by their adversaries.²¹⁸

3. The “Super Lawyers” Designation May Be an Unsubstantiated Comparison of Attorneys’ Services; Use of the Disclaimer Provision Mitigates the Possibility of Unsubstantiated Comparisons

According to another comment to Minnesota Rule 7.1, statements comparing an attorney’s services to those of another attorney might be

²¹³ See *supra* note 34 and accompanying text (noting that selection process involves statewide poll of attorneys and screening by publisher’s research staff).

²¹⁴ See *supra* note 179 and accompanying text (discussing comment 2 to Minnesota Rule 7.1).

²¹⁵ See *supra* note 165 and accompanying text (discussing the committee’s concern that “Super Lawyers” advertising creates unjustified expectations about results).

²¹⁶ See *supra* note 32 and accompanying text (noting the length of “Super Lawyers” supplement).

²¹⁷ Cf. *supra* notes 33, 36 and accompanying text (describing the purpose of “Super Lawyers” as compiling a list of attorneys other lawyers recommend and noting that attorneys are listed by primary practice area).

²¹⁸ See *supra* notes 33-34 and accompanying text (describing the purpose of “Super Lawyers” as providing an attorney-recommended list of lawyers and indicating that “Super Lawyers” selection process is designed to avoid back scratching by attorneys in the same firm).

misleading if the statements are unsubstantiated but would lead a reasonable person to believe that the statements could be substantiated.²¹⁹ To the extent that any use of a superlative term, such as “super” or “best,” is comparative, the “Super Lawyers” designation falls within the ambit of the rule.²²⁰

However, the nature of the comparison is important. If the comparison is understood as suggesting that to be named a “Super Lawyer,” an attorney must provide better services than her peers; the comparative statement falls into the same territory as an unfounded expectation of results and is unsubstantiated.²²¹ On the other hand, if the comparison is understood as indicating that a “Super Lawyer” is more highly regarded by her peers, or highly regarded by more of her peers, than other attorneys, the statement is substantiated because this is exactly what the data behind the designation reflects.²²² The easiest way to resolve what comparison, if any, “Super Lawyers” status represents is to state it forthrightly through a disclaimer.

The same commentary that restricts the ability of an attorney to make comparative statements also offers a possible protective device for “Super Lawyers” wishing to advertise their recognition: a disclaimer.²²³ An appropriate and effective disclaimer could be as simple and direct as stating that being named a “Super Lawyer” is not a comparison to other lawyers and is not an implication that the honored lawyer can deliver superior or satisfactory results.²²⁴ Such a disclaimer could be placed either on individual lawyers’ or firms’ advertisements throughout the supplement or on the introductory page setting forth the selection process.²²⁵

Application of the Minnesota provisions, and comparison to earlier “live” application in disciplinary cases, indicates that “Super Lawyers” advertising is not clearly within the prohibited conduct targeted by Rule 7.1.²²⁶ Whether the comparison potentially suggested by the “Super Lawyers” designation is prohibited is less clear; problems on this front are

²¹⁹ See *supra* note 180 and accompanying text (discussing comment 3 to Minnesota Rule 7.1).

²²⁰ See *supra* note 167 and accompanying text (discussing the New Jersey Advertising Committee’s treatment of superlative designations as inherently comparative).

²²¹ See *supra* notes 215-217 and accompanying text (discussing a possible conclusion that “Super Lawyers” provide better services or results).

²²² See *supra* notes 33-34 and accompanying text (describing the purpose in and process of selecting “Super Lawyers” as creating a list of lawyers recommended by their peers).

²²³ See *supra* note 181 and accompanying text (noting the presence of permissive disclaimer provision in comment 3).

²²⁴ See *supra* note 42 (observing that one prominent Minneapolis attorney’s official biography includes his “Super Lawyer” recognition and a disclaimer).

²²⁵ Cf. *supra* note 36 and accompanying text (noting that page discussion selection process also reflects screening of attorneys for negative ethical standing).

²²⁶ See *supra* notes 207-218 and accompanying text (arguing that “Super Lawyers” advertisements are not material misrepresentations of fact and that reasonable persons would not formulate unfounded conclusions based on the advertisements).

readily resolved by resort to a disclaimer.²²⁷ Nonetheless, ethics officials may interpret the provisions differently and seek to ban “Super Lawyers” advertising or require attorneys to include some form of disclaimer.

C. A Ban on “Super Lawyers” Advertising Does Not Survive Scrutiny Under the Principles of Bates, Central Hudson and Their Progeny

Attorney advertising is protected commercial speech.²²⁸ As such, any attempt by the state to ban or restrict attorney advertising, such as “Super Lawyers,” is subject to scrutiny using the four-prong test first articulated in *Central Hudson*: whether the speech misleads or promotes illegal activity, whether the asserted governmental interest is substantial, whether the regulation directly advances the asserted governmental interest, and whether the regulation is no more extensive than necessary to serve the asserted governmental interest.²²⁹ Under this test, a ban on “Super Lawyers” advertising does not survive scrutiny.²³⁰

1. “Super Lawyers” Advertisements Are Not Inherently Misleading and Do Not Promote Illegal Activity

For commercial speech to be protected, it must not be inherently misleading and cannot promote illegal activity.²³¹ The underlying transactions in “Super Lawyers” advertisements, as in all attorney advertising, are perfectly legal: the retention of attorneys by clients; “Super Lawyers” advertisements are not in the same category as promotional material for drug paraphernalia or sex toys.²³² “Super Lawyers” advertisements are also not inherently misleading, just as statements of an attorney’s certification as a specialist by a private organization are verifiable facts.²³³ The process and criteria used to determine the annual roster of

²²⁷ See *supra* notes 219-225 and accompanying text (discussing the possibility that the use of any superlative is inherently comparative and the ability to use a disclaimer to mitigate problems)

²²⁸ See *supra* notes 76-91 and accompanying text (discussing the U.S. Supreme Court’s extension of First Amendment protection to attorney advertising in *Bates v. State Bar of Arizona*).

²²⁹ See *supra* note 94 and accompanying text (setting forth the *Central Hudson* test).

²³⁰ See *infra* notes 232-250 and accompanying text (applying the *Central Hudson* test to “Super Lawyers”).

²³¹ See *supra* notes 73, 106 and accompanying text (discussing the U.S. Supreme Court’s continuing support for state prohibitions on inherently misleading speech and speech promoting illegal transactions).

²³² See *supra* note 73 (collecting cases regarding common bans on speech promoting illegal activity).

²³³ See *supra* notes 126-127 and accompanying text (discussing the U.S. Supreme Court’s treatment of specialist certification as a verifiable fact).

“Super Lawyers” are readily available in the advertising supplement.²³⁴ That the evaluation is not based on objective criteria is of no moment; no body with regulatory authority over attorneys has advanced a reason to disfavor subjective criteria.²³⁵

2. The Governmental Interests Underlying a Ban on “Super Lawyers” Advertising Are Substantial

At the second prong of *Central Hudson* analysis, the state must show that its asserted interests are substantial.²³⁶ There are three interests that are likely to be asserted and found substantial, in part because they have been accepted as substantial by previous courts. One interest is to protect consumers from potentially misleading advertisements and false claims of expertise.²³⁷ Another interest likely to be asserted and upheld is preventing public confusion.²³⁸ The third interest is in ensuring the public has access to relevant information in comparing and selecting legal counsel.²³⁹ A potential fourth asserted interest, however, is unlikely to be accepted: encouraging services that evaluate attorneys and rate them to use objective criteria.²⁴⁰ The asserted interest has been rejected by at least one court for lack of any reason motivating it.²⁴¹

3. A Ban Does Not Directly Advance the Asserted Interests Because No Actual Harm Has Been Shown

To satisfy the third prong, the state must demonstrate that its regulation directly advances the state’s substantial interests.²⁴² To do so, the state must show that the public has actually been harmed, or is in actual danger of being harmed by the speech.²⁴³ Similarly, the state must show that

²³⁴ See *supra* notes 33-36 and accompanying text (discussing the “Super Lawyers” selection process).

²³⁵ See *supra* note 135 and accompanying text (discussing the Eleventh Circuit’s rejection of value in distinction between objective and subjective criteria).

²³⁶ See *supra* note 94 and accompanying text (discussing the *Central Hudson* test).

²³⁷ See *supra* note 145 and accompanying text (defining the state’s interest as protecting the public from deception and recognizing the potential danger of false claims of expertise).

²³⁸ See *supra* note 124 and accompanying text (indicating the asserted interest in Peel was public confusion over distinction between state-granted licensure and privately created certification).

²³⁹ See *supra* note 135 and accompanying text (listing the availability of information as one of three asserted interests in *Mason*).

²⁴⁰ See *supra* note 135 and accompanying text (listing the preference for objective criteria as third asserted interests in *Mason*).

²⁴¹ See *supra* note 135 and accompanying text (describing the *Mason* court’s rejection of state interest in encouraging attorney rating systems to use objective criteria).

²⁴² See *supra* text accompanying note 94 (discussing the *Central Hudson* test).

²⁴³ See *supra* note 121 (discussing requirement to show actual harm).

its regulation actually alleviates the asserted harm or danger to a material degree.²⁴⁴ The New Jersey Advertising Committee did not indicate that anyone had actually been harmed by “Super Lawyers” advertising before the committee decided to ban the commercial speech.²⁴⁵ In *Mason*, the Florida Bar was unable to come forward with any evidence that any consumers had been harmed by the use of Martindale’s attorney rating system.²⁴⁶ Without any harm to alleviate, the ban cannot survive analysis under the third prong.

4. A Ban Is Far More Extensive Than Necessary to Serve the State’s Interests

The final question under *Central Hudson* relates to the “fit” between the regulation and the state’s asserted substantial interest: the regulation cannot be more extensive than necessary to serve the interest of the state.²⁴⁷ The U.S. Supreme Court has looked with special scrutiny at total bans on forms of commercial speech. In *Peel*, the Court rejected a ban on using specialty certifications, because the ban was too extensive.²⁴⁸ The Court also suggested in *R.M.J. I* that when alternate, non-deceptive ways of presenting information are available, that information cannot be banned and must be permitted.²⁴⁹ Minnesota Rule 7.1 permits the use of disclaimers to alleviate the potentially misleading or confusing effects of attorney advertising involving comparative statements.²⁵⁰ Because the Court has consistently urged the use of disclaimers rather than total bans whenever possible, a complete prohibition on “Super Lawyer” advertising will be found to be more extensive than necessary to address the state’s asserted interests.

Since “Super Lawyers” advertising is protected commercial speech and a complete ban on its expression would be struck down at the final two prongs of the *Central Hudson* analysis, ethics officials seeking to regulate this form of reputational advertising will need to find some other route.

²⁴⁴ See *supra* note 121 (discussing requirement to show actual, material alleviation).

²⁴⁵ See *supra* notes 163-170 and accompanying text (outlining the committee’s reasons for banning “Super Lawyers” advertising in New Jersey). It is possible the only recorded harm was to the sensibilities of an attorney who did not appreciate the effrontery of being solicited for an advertisement. See *supra* notes 14-15 and accompanying text (discussing the complaining attorney’s reaction to being named a “Super Lawyer” and being asked if he or his firm wanted to advertise it).

²⁴⁶ See *supra* notes 136-138 and accompanying text (indicating the state bar’s failure to present evidence of actual harm and court’s rejection of unfamiliarity with a system as equating to the system’s misinforming the public).

²⁴⁷ See *supra* note 94 and accompanying text (discussing the *Central Hudson* test).

²⁴⁸ See *supra* note 129 and accompanying text (discussing the Court’s view of ban as overkill).

²⁴⁹ See *supra* note 106 (quoting the Court as saying that absolute prohibitions are not permitted when alternate ways of presenting the speech are possible).

²⁵⁰ See *supra* notes 181, 223-225 and accompanying text (discussing the permissive use of disclaimers under the Minnesota rule).

D. A Disclaimer Requirement Does Survive Constitutional Scrutiny, So Long As the Required Language Is Not Itself Excessive

Since Minnesota Rule 7.1 itself provides for the use of disclaimers and the courts will view the option of using disclaimers as undercutting a total ban, Minnesota ethics officials might choose to regulate “Super Lawyers” advertising by requiring disclaimers.²⁵¹ A disclaimer requirement, like any other regulation of commercial speech, is subject to scrutiny under *Central Hudson*.²⁵²

The first step, whether the speech is misleading or promotes illegal activity, is the same as in the total-ban analysis, since the underlying speech regarding the “Super Lawyers” designation is the same.²⁵³ The analysis at the second prong is also the same, since the state will assert the same substantial interests in a mere regulatory situation as it would in a total ban: protecting the public from half truths and confusion and ensuring the public access to relevant information for making its decisions.²⁵⁴

The analysis diverges from the examination of the total ban at the third and fourth steps of the *Central Hudson* framework. A disclaimer stating that the “Super Lawyers” designation is not a prediction of future results or a comparison of the attorney’s skills with peers directly targets the very harm the state seeks to avoid: confused, misled consumers.²⁵⁵ However, the state may be required to show that this harm is more than just conjecture but that potential clients have actually been harmed by such advertising.²⁵⁶ Additionally, the required disclaimer will provide the public with more guidance as to how the “Super Lawyers” listings should not be used, which would directly advance the state’s interest in ensuring public availability of information when selecting and comparing attorneys.²⁵⁷ However, the state must be careful in how much information it requires attorneys to include in

²⁵¹ See *supra* notes 181, 223-225, 247-250 and accompanying text (discussing the presence of disclaimer option in Minnesota Rules of Professional Conduct, describing how the disclaimer provision might be used by an attorney advertising a “Super Lawyers” designation, and arguing that option to use disclaimer prevents state from banning “Super Lawyers” advertising).

²⁵² See *supra* notes 140-146 and accompanying text (noting the court’s application of *Central Hudson* analysis to disclaimer requirement).

²⁵³ See *supra* notes 231-235 and accompanying text (concluding that “Super Lawyers” advertisements are not inherently misleading and do not promote illegal transactions).

²⁵⁴ See *supra* notes 236-241 (concluding that the asserted government interests are substantial).

²⁵⁵ See *supra* note 141 and accompanying text (indicating the U.S. Supreme Court has acknowledged the targeted nature and utility of disclaimers).

²⁵⁶ See *supra* note 139 and accompanying text (noting that the *Mason* court refused to enforce a disclosure requirement without an identified, actual harm).

²⁵⁷ See *supra* note 239 and accompanying text (identifying information access as a substantial state interest).

the disclaimer in order to avoid the requirement from being over extensive, resulting in the court striking it down.²⁵⁸ A one-sentence disclaimer, such as one already used by at least one Minnesota lawyer, should both accomplish the state's goals and survive constitutional scrutiny.²⁵⁹

IV. CONCLUSION

For the past thirty years, attorneys and bar ethics authorities have struggled with what is permissible advertising of legal services. The latest front has addressed advertising that seeks to solve a problem the U.S. Supreme Court recognized when it first ventured into the topic: how to provide consumers in a modern, urban environment with information about attorneys' reputations. While the opinion of the New Jersey Advertising Committee banning "Super Lawyers" advertising appears solidly grounded in that state's Rules of Professional Conduct, a prohibition on the use of "Super Lawyers" advertising is an untenable restriction on commercial speech under U.S. Supreme Court precedent. Minnesota's Rules of Professional Conduct differ from New Jersey's rules in significant ways. The Minnesota provisions permit the sort of truthful advertising "Super Lawyers" represents. Although the advertising concept of "Super Lawyers" comes perilously close to making unsubstantiated comparisons between attorneys, this danger can easily be mitigated by requiring disclaimers on such advertisements. Unlike a total ban, a disclaimer requirement will be treated favorably by the courts. While New Jersey lawyers may have put their blue tights and red capes in mothballs, Minnesota lawyers can remain confident that they will be "Super" for years to come.

²⁵⁸ See *supra* note 146 (noting the U.S. Supreme Court dicta that overly wordy disclaimer requirements may amount to effective bans). *But see supra* note 146 (observing that a sixty-plus word required disclaimer was upheld by a state supreme court).

²⁵⁹ Compare *supra* note 42 (noting the use of a one-sentence disclaimer by prominent Minneapolis "Super Lawyer") with *supra* note 146 (citing the Tennessee Supreme Court decision calling a one-sentence disclaimer "scarcely burdensome at all").

