

Regulating Misleading Comparative Lawyer Advertising: Proposed Changes to the American Bar Association Model Rules of Professional Conduct

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INTRODUCTION

A. THE RISE OF COMPARATIVE LAWYER ADVERTISING

The United States Supreme Court, through its holdings in *Virginia State Board* and *Bates*, recognized lawyer advertising as commercial free speech and thus held that it is protected by the First Amendment.¹ Due to the competitive nature of the legal market, lawyer advertising has become increasingly more comparative in its message. The most prominent and frequently occurring comparative language often employs terms such as “best” or “super” to describe each attorney’s comparative excellence in their respective fields.² Because these terms are vague and unsubstantiated in its presentation to the public and the consumers of legal services, these advertisements often run into the issue of being deceptive in their core message.

In a specific case involving an attorney practicing in New Jersey, the use of comparative lawyer advertising came under scrutiny. When the matter was examined, the New Jersey Supreme Court’s Committee on Attorney Advertising published the following opinion: “The claim that an attorney is ‘super,’ ‘best,’ ‘elite,’ or in a top percentile of attorneys, cannot be factually substantiated . . . [and] such hyperbolic words and phrases are utterly and inherently misleading and may not be used in attorneys’ communications.”³

However, there is a general underlying tension in the regulation of comparative lawyer advertising. On one hand, there is a societal benefit attributed to commercial free speech, including comparative lawyer advertising, in that it allows and promotes informed decision making by prospective clients in the market for legal services. On the other, there is a compelling case to be made that, when untruthful or misleading, it clouds the judgment of the potential client and functions to

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1. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

2. See Charles Toutant, *Contours Sharpened for Super-Lawyer Advertisements*, 202 N.J.L.J. 13 (2010).

3. N.J. Supp. Ct. Advisory Comm. On Att’y Advert., Op. 42 (2010), at 1.

disrupt the efficient allocation of resources in the market. And, as seen in *Ohralik*, even when it is truthful and not misleading, there could be a legitimate state interest in limiting commercial free speech.⁴

This note will examine this exact tension between the positive role of attorney advertising in informing and its negative role in misleading consumers by examining a recent development of rules and litigation in the state of New Jersey. Drawing from the effectiveness and failures of the examined case, this note will then describe the possible next steps towards effectively regulating comparative lawyer advertising in the United States.

B. EXAMPLE OF COMPARATIVE LAWYER ADVERTISING: “SUPER LAWYERS”

Comparative rankings and titles are a popular means for attorneys to distinguish themselves from other practitioners. Often this requires increasing marketing budgets to buy and publish these recognitions.⁵ Many individuals in the industry call into question the methodology utilized in the selection and admission process for such professional groups and rankings. Moreover, despite the additional commitment of resources, “[t]here’s no real way to tell if they are generating leads” or increasing their actual marketability.⁶ An example of a published rating system for lawyers often utilized for comparative lawyer advertising is “Super Lawyers.”

“Super Lawyers” is a rating and listing system that publishes the “list and profiles of selected attorneys” and its intended audience includes “attorneys in the state or region and the ABA-accredited law school libraries.”⁷ Additionally, they boast a circulation of “all 50 states and Washington, D.C.”⁸ They claim to have a state-specific peer review survey system that identifies what they consider to be the “top 5 percent of lawyers in each practice area for each jurisdiction.”⁹ From their selection process description, they use a balloting, peer evaluation, and internal independent research to create the list of attorneys. These chosen attorneys can elect to purchase their title and other advertisements through numerous publications circulated in their applicable jurisdiction.¹⁰

With this established ranking system in mind, this note will examine the recognition of lawyer advertising as commercial free speech by the United States

4. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 (1978).

5. See Larry Bodine & Suzanne Lowe, *More Bang for the Buck: By Measuring Marketing Investments, Law Firms Can Generate Better Returns*, 25 LEGAL MGMT. 36, 36 (2006).

6. *Id.* at 38.

7. *About Super Lawyers*, SUPER LAWYERS, <https://www.superlawyers.com/about.html> [https://perma.cc/F2W3-DQBW] (last visited Nov. 22, 2018).

8. *Id.*

9. *Selection Process*, SUPER LAWYERS, https://www.superlawyers.com/about/selection_process.html [https://perma.cc/R9RD-5TBP] (last visited Nov. 22, 2018).

10. *Lawyer Login*, SUPER LAWYERS, <https://www.superlawyers.com/login.html> [https://perma.cc/J66X-JHTR] (last visited Nov. 22, 2018).

Supreme Court. And with that recognition, this note will examine how the First Amendment and regulation efforts geared towards limiting deceptive applications interact with each other.

I. HISTORICAL BACKGROUND: THE SUPREME COURT'S RECOGNITION OF COMMERCIAL FREE SPEECH AND LAWYER ADVERTISING

A. *VIRGINIA STATE BOARD TO OHRALIK*: FIRST AMENDMENT PROTECTION FOR COMMERCIAL FREE SPEECH AND LAWYER ADVERTISING

The acknowledgement of commercial free speech's constitutionality started in 1976, when the Supreme Court gave First Amendment protection to commercial free speech in a case concerning prescription drug price advertising. In *Virginia State Board*, the Court found a ban on price advertising of prescription drugs unconstitutional.¹¹ And through this action, it placed the regulation of commercial interest under the scrutiny of the First Amendment.¹² The Court weighed the two dangers between allowing and suppressing the information in question.¹³ And in its holding, it implied that this choice would be made by deferring to the original intent of the amendment.¹⁴ "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."¹⁵ After commercial free speech was acknowledged, the legal profession soon joined the rest of the commercial enterprises in the advertising realm with lawyer advertising. And as one might have expected, lawyer advertising was a question for the Supreme Court in the following year.

Following *Virginia State Board*, the State Bar of Arizona sought to generally ban lawyer advertising due to its possibly exploitative nature.¹⁶ This prompted the Supreme Court to clarify its position through subsequent litigation in 1977. The Court in *Bates* extended the First Amendment protection of truthful and non-deceptive commercial free speech to lawyers.¹⁷ The Court found this extension to be necessary by holding that it was unconstitutional for states to prophylactically ban all such communications to include those that were truthful and non-deceptive.¹⁸ Despite the State Bar of Arizona's arguments, the Court fixated on the possibility that there could be a positive public policy rationale of increasing the public's awareness.¹⁹ Through its holding, the Court acknowledged that lawyer advertising is not inherently misleading by nature, and it may play an essential

11. See *Virginia State Bd.*, 425 U.S. at 748.

12. See *id.*

13. See *id.* at 770.

14. See *id.*

15. *Id.*

16. See *Bates*, 433 U.S. at 350.

17. See *id.* at 351.

18. See *id.* at 390.

19. See *id.* at 358.

role in the individual being able to determine if they require legal services. And additionally, through legal advertising, they not only become aware of their need, but discover the method of finding the lawyer that can provide the specific type of service.

Although the *Bates* decision lifted the state ban on lawyer advertising, the Court took time to emphasize that the individual state bars have a special role to play in insuring that the lawyer advertising “flows both freely and cleanly.”²⁰ Although the vague terminology left ample room for interpretation, the Supreme Court acknowledged that, although a general ban is unconstitutional, there must be a narrowly tailored regulation of lawyer advertising that is not truthful and deceptive.

Not only did the Court leave room for more narrowly tailored restrictions of lawyer advertising, but also it set a precedent for restricting specific types of lawyer advertising for its exceptional possibility of abuse, specifically in in-person solicitation for the lawyer’s pecuniary gain.²¹ In *In re Primus* and *Ohralik*, the court held that in-person solicitation for pecuniary gain was subject to regulation, despite its capacity to be truthful and non-deceptive, due to an important state interest.²² The Court found that there was heightened “potential for overreaching . . . when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed person.”²³ Deviating from its decision in *Bates*, the Court found the state’s interest in protecting atypically vulnerable recipients of lawyer advertising justified a ban on truthful and non-deceptive information conveyed to a potential client by a lawyer.²⁴ This deviation is particularly of note, since it sets the precedent that allows for technically truthful lawyer advertising to be regulated, despite commercial free speech’s First Amendment protection, given that there exists a compelling state interest.

B. *CENTRAL HUDSON TO BOARD OF TRUSTEES*: FOUR-PART ANALYSIS FOR COMMERCIAL FREE SPEECH AND LAWYER ADVERTISING

In *Virginia State Board* and *Bates*, the Supreme Court acknowledged that commercial free speech, when truthful and non-deceptive, receives the protection of the First Amendment.²⁵ And in 1980, in *Central Hudson*, the Court set out the standards that govern the constitutionality of commercial free speech.²⁶ And by extension, it also set out a four-part analysis of how it applies to lawyer advertising.²⁷ The holding states, “at the outset, we must determine whether the

20. *Id.* at 384.

21. See *In re Primus*, 436 U.S. 412 (1978); *Ohralik* 436 U.S. at 447.

22. See *In re Primus*, 436 U.S. at 422; *Ohralik*, 436 U.S. at 459.

23. *Ohralik*, 436 U.S. at 465.

24. See *id.*; *Bates*, 433 U.S. at 351.

25. See *Virginia State Bd.*, 425 U.S. at 748; *Bates*, 433 U.S. at 351.

26. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

27. See *id.*

expression is protected by the First Amendment. For commercial free speech to come within that provision, it at least must concern lawful activity and not be misleading.”²⁸ The first part of the analysis is to determine whether the speech in question is actually protected by the First Amendment and whether it is lawful and not misleading.

The second part of the analysis integrates the question raised by the Arizona State Bar in *Bates*, concerning the state interest in regulating a specific type of free speech. The Court writes, “next, we ask whether the asserted government interest is substantial.”²⁹ Although we see that in *Bates*, the Court did not find the state interest to be compelling enough to allow a general prophylactic ban on the speech in question, as was seen in *In re Primus* and *Ohralik*, there are cases in which the Court finds the state interest is substantial enough to limit First Amendment protections.

And if both the first and second inquires yield positive answers, the analysis moves onto to the third and fourth parts. The third inquiry aims to determine whether “the regulation directly advances the government interest asserted.”³⁰ And the fourth and last part is “whether [the regulation] is not more extensive than necessary to serve that interest.”³¹ The last two parts of the analysis function to ensure that the scope and severity of the restriction is specifically geared towards advancing the government interest asserted.³² As seen in the *Bates* holding, a general ban that is broader than necessary to advance the specifically asserted goal is unconstitutional.

Although the *Central Hudson* four-part analysis sets the standard that governs the constitutionality of commercial free speech and lawyer advertising, in 1989, the last prong of the test was slightly modified in *Board of Trustees*, where the Court found that the “not more extensive than necessary” was too restrictive, holding that one could always conceive of a measure that was less restrictive.³³ And the last prong was altered to call for a reasonable fit, where the regulations must be “narrowly tailored to achieve the desired objective.”³⁴

II. CASE STUDY: 2006–2010 NEW JERSEY SUPREME COURT ADVISORY COMMITTEE ON ATTORNEY ADVERTISING

A. NEW JERSEY RULE 7.1(A) AND OPINION 39

The state of New Jersey was not only a jurisdiction in which “Super Lawyers” conducted and published its surveyed list; it was also one of the most financially

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.*

33. *Id.*; *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989).

34. *Bd. of Trustees*, 492 U.S. at 480.

significant jurisdictions in terms of revenue for Super Lawyers.³⁵ Super Lawyers, which started recognizing New Jersey attorneys in 2005, made over \$1.3 million or over 10% of its national revenue in the state.³⁶ And in this significant market, the New Jersey Supreme Court Advisory Committee on Attorney Advertising issued Opinion 39 and promulgated New Jersey Rule 7.1(a) of the New Jersey Rules of Professional Conduct.³⁷ This rule stated that “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.”³⁸ And the rule defined a communication as false or misleading if it “compares the lawyer’s services with other lawyers’ services.”³⁹

Opinion 39 went on to find that the designation of “Super Lawyer” violated the rule stated above because it was “inherently comparative” and lacking “objective verification.”⁴⁰ The committee found that the comparative language might foster undue expectations in clients, that the results would be “super” or superior than the results attainable by other attorneys without the same designation. The opinion stated that “the use of superlative designations by lawyers is inherently comparative.”⁴¹ The same opinion also noted that reasonable readers would associate the accompanying advertisements for legal services within their publications, even though not directly depicted as part of the “super lawyer” designation, as being comparatively superior to other services.⁴² Essentially, the mere presence in proximity of the inherently superlative list was imbuing the other advertisements as being comparatively superior.

Although New Jersey Rule 7.1(a) essentially banned comparative advertising, Opinion 39 distinguished ratings systems such as the Martindale-Hubbell from the arbitrary selection and rankings process used by “Super Lawyers.”⁴³ The distinction was drawn from the fact that the Martindale-Hubbell model compared attorneys by using well-known and widely accepted methods in the field and were directed not at consumers but at fellow lawyers.⁴⁴

With the state of New Jersey accounting for such a larger portion of “Super Lawyers’,” revenue, litigation and challenges to the rule was soon to follow.

35. See Henry Gottlieb, ‘Super Lawyers’ Edict Stayed by Supreme Court, LAW.COM (Aug 21, 2006), <https://www.law.com/almID/900005460956> [<https://perma.cc/XVK9-TS3P>].

36. See *id.*

37. See N.J. Supp. Ct. Advisory Comm. On Att’y Advert., Op. 39 (2006), at 1.

38. N.J. RULES PROF’L CONDUCT r.7.1(a).

39. Bd. of Trustees of State Univ. of New York v. Fox, *supra* note 33.

40. *Id.* at 2.

41. *Id.* at 3.

42. See *id.* at 2.

43. See *id.* at 3.

44. See *id.*

B. CHALLENGE TO OPINION 39 AND REVISION OF RULE 7.1(A)

The challenge cited the *Bates* decision and suggested that a general ban on comparative lawyer advertising violated “Super Lawyer’s” First Amendment rights because what they were communicating was protected commercial free speech.⁴⁵ The plaintiff also argued that the use of “Super Lawyer” distinction did not create an unjustified expectation so as to be false and misleading to customers.⁴⁶ And in response, the Supreme Court of New Jersey agreed to hear the appeal and appointed a retired Appellate Division Judge as special master, who published a report in 2008. The report found that the ban on comparative advertising was more than necessary to serve the stated interest.⁴⁷ And it recommended that “the ban on comparative advertising be replaced by a system of caveats and disclaimers similar to those in other states.”⁴⁸

Following that report, a new version of the rule was adopted to regulate comparative lawyer advertisements.⁴⁹ Moving away from the general ban and towards a system of caveats and disclaimers, the rule prohibited comparative lawyer advertising “unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner; ‘No aspect of this advertisement has been approved by the Supreme Court of New Jersey.’”⁵⁰ This lifted the general ban, but effectively prohibited comparative lawyer advertisements that cannot be substantiated. Additionally, it required the advertisement to name the organization which is conducting the comparison, so that the consumer has the ability to research and validate the organization’s methodology. Lastly, it requires an explicit disclaimer that states that the state body governing the practice is in no way approving of the inherently comparative message.⁵¹ These measures are specifically tailored for the stated purpose of protecting consumers from misleading and deceptive comparative lawyer advertising.

C. RESIDUAL CONFUSION AND OPINION 42

Following Opinion 39, its appeal, and the revision of Rule 7.1(a), attorneys in New Jersey were not exactly sure how they were able to comparatively advertise under the new system. To clarify the situation, the committee in Opinion 42 incorporated more of the special master’s report. This report stated that “[w]here superlatives are contained in the title of the list itself, . . . the advertising must state and emphasize only one’s inclusion in the Super Lawyers . . . list, and must

45. See *Bates*, 433 U.S. at 351.

46. Petition for Review of Committee on Attorney Advertising Opinion 39, No. 60,003 (N.J. Aug. 14, 2006) at 16.

47. See *In re* Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66 at 4 (2008).

48. See Toutant, *Contours Sharpened*, supra note 2, at 1.

49. See *id.*

50. See *id.*

51. See *id.*

not describe the attorney as being a ‘super lawyer.’”⁵² This opinion noted that there is a clear and crucial difference between being a “super lawyer” and stating that one received an honor by an organization called Super Lawyers.⁵³

In 2010, an attorney in New Jersey stated that he was “named as a Super Lawyer,” rather than saying he was on the Super Lawyer list, “due to [his] dedication to our clients and success in the courtroom.”⁵⁴ Accordingly, his comparative lawyer advertising was characterized as “grossly [violating] the rules governing attorney advertising and . . . cannot be factually substantiated.”⁵⁵

Clearly, the protection of consumers of legal services requires a narrowly tailored restriction on comparative lawyer advertising. And the eventual New Jersey model accomplishes the goal of advancing the state interest in protecting the consumers. And as the *Bates* court stated, they “expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly,” and there is no reason one must be content with a state-by-state solution.⁵⁶ The American Bar Association’s Model Rules of Professional Conduct are the best way to set a national standard that both respects the First Amendment protections of commercial free speech and protects consumers from deceptive comparative lawyer advertising.

III. SOLUTION: 2018 PROPOSED CHANGES TO THE AMERICAN BAR ASSOCIATION (ABA) MODEL RULES OF PROFESSIONAL CONDUCT (MODEL RULES)

The proposed revision 101 by the Standing Committee on Ethics and Professional Responsibility (SCEPR) of the ABA makes three distinct changes that work towards a narrowly tailored regulation that meets the Supreme Court’s four-part standard outlined in *Central Hudson*.⁵⁷ First, the language in the Model Rule is changed from “advertisements” to “communications.”⁵⁸ Second, in rule 7.2(c)(1), the SCEPR adds a requirement that for an organization to “certify” a specialist, the organization must be “approved by an appropriate authority of the state or the District of Columbia or a U.S. territory or that has been accredited by the [ABA].”⁵⁹ And lastly, rule 7.2(c)(2) requires that the “name of the certifying organization is clearly identified in the communication.”⁶⁰ These three changes made by the SCEPR help to protect consumers of legal services from misleading

52. N.J. Supp. Ct. Advisory Comm. On Att’y Advert., Op. 42 (2010), at 2.

53. *See id.*

54. *Id.*

55. *Id.*

56. *Bates*, 433 U.S. at 384.

57. *See Cent. Hudson*, 447 U.S. at 566.

58. MODEL RULES OF PROF’L CONDUCT R.7.1 cmt.3 (AM BAR ASS’N 2018).

59. MODEL RULES OF PROF’L CONDUCT R.7.2(c)(1) (AM BAR ASS’N 2018).

60. *Id.* at 7.2(c)(2).

and deceptive applications of comparative lawyer advertising based on questionable methodology.

A. BROADENING OF ITS SCOPE: CHANGE FROM ADVERTISEMENTS TO ALL COMMUNICATIONS

Consistently throughout the text of both the rules and comments of the ABA's Model Rules, the language concerning lawyer advertising is changed from "advertisement" to "communication."⁶¹ This broadens the scope of the applicable exchange, between an attorney and a potential client, to which the rules apply. An advertisement specifically refers to a "commercial solicitation" in the applied context, but a communication has a broader definition of any "messages or ideas expressed or exchanged."⁶² This change is a thoughtful measure to allow for the rule to function in the modern context.

Looking at the Supreme Court precedent and the older regulatory language as it pertains to lawyer advertising, it becomes increasingly clear that current regulations do not necessarily correspond to the new modes of communication.⁶³ "For the most part, rule makers have mechanically followed the path of analogizing to traditional print advertising and oral solicitation."⁶⁴ And in doing so, the regulators failed to effectively target the new and increasingly more urgent concerns that are raised. No longer does the brunt of the legal advertising take place through print media, but the internet has given rise to forms of communication that do not conform to the old model of advertisements.

Most if not all large firms have websites that are framed as biographical rather than a straight forward commercial solicitation. And because this system has grown essentially ubiquitous, regulators must look to the effect of lawyer biographies that contain comparative attorney distinctions and consider their effect on the prospective consumer. Because the consumer of the legal services can be significantly misled by comparative lawyer distinctions in the biographical information of lawyers, these must be incorporated into the paradigm that regulates comparative lawyer advertising. And because these new forms of communication, that can still mislead consumers, do not fall under the original idea of advertisements, the language in the ABA's Model Rule must be updated to be more inclusive.

61. See MODEL RULES OF PROF'L CONDUCT R.7.1 cmt.3 (AM BAR ASS'N 2018).

62. BLACK'S LAW DICTIONARY (10th ed. 2014).

63. See Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?* PROF. LAW, 2005, at 14.

64. *Id.*

B. SUBSTANTIATION OF DISTINCTION: REQUIREMENT FOR THE ORGANIZATION TO BE APPROVED BY AN APPROPRIATE AUTHORITY

As outlined in the third part of the *Central Hudson* four-part analysis, a regulation that restricts commercial free speech must be directly advancing the asserted state interest.⁶⁵ The problematic aspect of comparative lawyer advertising, like those utilizing distinctions conferred by “Super Lawyers,” is that their methodology is unsubstantiated. And it is essential to note that the regulation must not be on all comparative lawyer advertising, but rather just narrowly tailored to regulate specific instances where there is a lack of substantiation. As mentioned above, rankings methodology utilized by reputable and substantiated groups such as the Martindale-Hubbell system may be approved by the appropriate authority. And rule 7.2(c)(1) allows for the state level or the national ABA to be the appropriate authority on which organizations can certify an attorney as a “specialist.”⁶⁶ Although this rule only explicitly outlines the specialist certification process for a specific practice area of law, this language can undergo minor changes to encompass honorary distinctions and be effective in regulating problematic comparative lawyer advertising.

This principle of allowing comparative lawyer advertising when using truthful and substantiated credentials was recognized by the Supreme Court in 1994. In *Ibanez*, the Court upheld the right of a lawyer who was a Certified Public Accountant (CPA) and Certified Financial Planner (CFP) to communicate the credentials truthfully to potential clients and practice comparative lawyer advertising.⁶⁷ As is clear from the holding in *Central Hudson*, the Court values the “free flow of commercial information.”⁶⁸ And because the CPA and CFP credentials could be substantiated and their methodologies clear, the Court found that it is justifiable to “[impose] on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”⁶⁹ And the would-be regulators in this case would be equivalent to the “appropriate authority” outlined by the Model Rule.

C. NAMING THE AWARDED ORGANIZATION: THE ORGANIZATION MUST BE NAMED IN CONJUNCTION WITH THE DISTINCTION

ABA’s Model Rule 7.2(c)(2) requires that for a specialist certification to be used in comparative lawyer advertising, “the name of the certifying organization [must be] clearly identified in the communication.”⁷⁰ This provides clear notice to the potential consumer as to the conferrer of the honor that is being

65. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

66. MODEL RULES OF PROF’L CONDUCT R.7.2(c)(1) (AM BAR ASS’N 2018).

67. See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation Bd. of Accountancy*, 512 U.S. 136, 142 (1994).

68. *Id.* at 143.

69. *Id.*

70. MODEL RULES OF PROF’L CONDUCT R.7.2(c)(2) (AM BAR ASS’N 2018).

communicated. As seen in the New Jersey case, there is a crucial difference between being a super lawyer and receiving an accolade from an organization named “Super Lawyers.”⁷¹ And many names of these organizations are not only comparative in nature, but also formed in a colloquially confusing manner. This is even more clearly observable in the example of a group called “Best Lawyers.”⁷² Without the notice and the knowledge that that is the name of the organization, it is quite easy to mislead consumers that it is an actual descriptor rather than a mere company moniker.

Conforming to the requirements set out by Rule 7.2(c)(2), an example of a proper use of comparative lawyer advertising would be the following: “Jane Doe was selected to the 2016 Super Lawyers list. The Super Lawyers list is issued by Thompson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selectionprocess.html.”⁷³ This explicitly notifies the consumer as to the conferrer of the distinction and allows for the potential client to conduct a personal substantiation process which serves the state interest of minimizing misleading commercial free speech.

CONCLUSION

A. THE NOTE’S PROPOSED CHANGE TO THE 2018 REVISION’S ABA’S MODEL RULE 7.2(C)

“On Monday, August 6, the ABA House of Delegates passed Resolution 101, adopting amendments to the lawyer advertising rules.”⁷⁴ And as mentioned above, it broadens the language from “advertisement” to “communication” to regulate the emerging moderns means through which comparative lawyer advertising is conducted. Additionally, Rule 7.2(c) requires the substantiation and the naming of the organization certifying specializations in the specific practice area of law. However, this rule does not explicitly include the comparative distinctions and the organizations who provide such accolades.

Rule 7.2(c) is the most effective and opportune vehicle through which misleading comparative lawyer advertising can be regulated. This is because the same concern exists between comparative advertising through unsubstantiated specialization and those conducted through unsubstantiated comparative distinctions. They are both likely to mislead potential consumers and instill undue expectations of a likely outcome. Therefore, this note proposes the following addition to

71. N.J. Supp. Ct. Advisory Comm. On Att’y Advert., Op. 42 (2010), at 2.

72. *Methodology*, BEST LAWYERS, <https://www.bestlawyers.com/methodology.html> [<https://perma.cc/LH72-3NCP>] (last visited Nov. 29, 2018).

73. Debra C. Weiss, ‘*Super Lawyers*’ and ‘*Rising Stars*’ Are Warned About Accolade Advertising, ABA J. (May 23, 2016), http://www.abajournal.com/news/article/super_lawyers_and_rising_stars_are_warned_about_accolade_advertising [<https://perma.cc/GP46-TUA3>].

74. *Model Rules of Professional Conduct 7.1, 7.2, 7.3, 7.4 & 7.5*, ABA J. (Oct. 12, 2018) https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75 [<https://perma.cc/DSY4-R6E9>].

the Model Rule 7.2(c) to read “A lawyer shall not state or imply that a lawyer is certified as a specialist [or have received a distinction] in a particular field of law, unless: . . .”.

B. EFFECT OF THE CHANGES OF THE ABA’S MODEL RULE

The new Model Rule along with the proposed change shown above effectively accomplishes three objectives. First, the broadening of the scope of the regulation allows for the effective restriction of new methods of comparative lawyer advertising by becoming more inclusive of new modes of communication. No longer is the regulation specially geared towards print media and in-person solicitations, but it is adjusted to account for the rise of the internet. Second, the requirement for substantiation by the appropriate authority allows for the individual states and the national ABA to verify the validity of comparative lawyer distinctions. As the Supreme Court has held, there is value to a “free flow of commercial information,” and that value can be preserved, and deception mitigated, through the substantiation process.⁷⁵ Lastly, the requirement to name the organization conferring the comparative distinction gives the potential consumer notice and the ability to conduct a personal substantiation process.

These changes allow for the lawyers to use comparative advertising only in a truthful and non-deceptive way to promote a free flow of information that allows the consumer to make an educated decision on their legal representation.

75. See *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation Bd. of Accountancy*, 512 U.S. 136, 143 (1994).