IN THE SUPREME COURT OF NEW JERSEY
Docket No. 60,003

In the Matter of the Petition for Review of Committee on Attorney Advertising Opinion 39	)	Civil Action
	)	On Petition For Review Of an Advisory Opinion of the Committee on Attorney Advertising

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* SUPPORTING ARGUMENTS TO VACATE OPINION 39 OF THE COMMITTEE ON ATTORNEY ADVERTISING APPOINTED BY THE SUPREME COURT OF NEW JERSEY

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INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") is pleased to submit this Brief *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey (the "Committee").[1] Further, the FTC recommends that the Court revise New Jersey Supreme Court Rules of Professional Conduct (RPC) 7.1 to prohibit only false and misleading attorney advertising.

THE FTC'S INTEREST IN THIS MATTER

The FTC enforces laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, with primary responsibility for stopping deceptive and misleading advertising practices.[2] Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the legal profession, through enforcement of the antitrust laws[3] and competition advocacy.[4] In particular, the FTC and its staff have had a

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[1] Opinion 39 is available at http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf#search=%22new%20jersey%20committee%20on%20attorney%20advertising%20opinion%2039%22.

[2] Federal Trade Commission Act, 15 U.S.C. § 45.

[3] *See California Dental Ass'n v. FTC,* 526 U.S. 756 (1999)*; FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *In re South Carolina State Board of Dentistry*, FTC Docket No. 9311 (2003); *In re Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

[4] *See*, *e.g.*, Letter from the FTC and the Department of Justice to the Kansas Bar Ass'n (Feb. 4, 2005), *available at* http://www.ftc.gov/be/v050002.pdf; Letter from the FTC and the Department of Justice to the Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Association (Dec. 16, 2004), *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; Letter from the FTC and the Department of Justice to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm; letter from the FTC to the Supreme Court of Alabama (Sept. 30, 2002), *at* http://www.ftc.gov/be/v020023.pdf; Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004),

long-standing interest in the regulation of lawyer advertising and the effects on consumers and competition arising from such regulations.[5]

Decisions regarding attorney advertising raise important policy concerns, such as preventing statements that would mislead lay people and potentially undermine public trust in lawyers and the legal system. While deceptive advertising by lawyers should be prohibited, Courts and other state policy makers should be careful not to restrict unnecessarily the dissemination of truthful and non-misleading advertising that may help consumers make more informed choices. Overly broad restrictions of truthful and non-deceptive information are likely to harm consumers of legal services by denying them useful information and impeding competition among attorneys. Accordingly, consumers are better off when policy makers address concerns about potentially deceptive advertising with narrowly tailored restrictions.

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available at http://www.usdoj.gov/atr/cases/f203700/203790.htm; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), *available at* http://www.usdoj.gov/atr/cases/f201100/201197.htm. The FTC also has studied the effects of restrictions on competition in the professions. *See* Bureaus of Consumer Protection and Economics, Federal Trade Commission, A COMPARATIVE ANALYSIS OF COSMETIC LENS FITTING BY OPHTHALMOLOGISTS, OPTOMETRISTS, AND OPTICIANS (1983); THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC Bureau of Economics Report (1980); *see also* C. Cox & S. Foster, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, FTC Bureau of Economics Staff Report (October 1990).

[5] *See, e.g.*, Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), *available at* *http://www.ftc.gov/be/ V070002.pdf;* Letter from FTC Staff to Louisiana State Bar Association (Mar. 16, 2007), *available at* *http://www.ftc.gov/be/V070001.pdf;* Letter from FTC Staff to Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), *available at* *http://www.ftc.gov/os/2006/09/V060020-image.pdf;* Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), *available at* http://www.ftc.gov/be/V060009.pdf; *see also, e.g.,* Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), *available at* http://www.ftc.gov/be/v020023.pdf. In addition, the staff has provided its comments on such proposals to, among other entities, the Supreme Court of Mississippi (Jan. 14, 1994); the State Bar of Arizona (Apr. 17, 1990); the Ohio State Bar Association (Nov. 3, 1989); the Florida Bar Board of Governors (July 17, 1989);New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987), and the State Bar of Georgia (Mar. 31, 1987). *See also* Submission of the Staff of the Federal Trade Commission to the American Bar Association Commission on Advertising (June 24, 1994) (available online as attachment to Sept. 30, 2002, Letter to Alabama Supreme Court, *supra*).

BACKGROUND FACTS AND ANALYSIS

There are a growing number and a wide variety of legal rating programs in the United States, each with its unique method for rating and scoring attorneys based on a variety of criteria.[6] The selection methodologies and limitations typically are disclosed and available to consumers in print and on web pages.[7] These ratings programs serve a consumer demand, and the merit, quality, and validity of them is best determined in the marketplace. *See generally Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91, 102 (1990) ("Much like a trademark, the strength of a certification is measured by the quality of the organization for which it stands.") New Jersey Court rules define as false or misleading any attorney advertisement if it "compares the lawyer's services with other lawyer's services," RPC 7.1(a)(3), or that "is likely to create an unjustified expectation about results the lawyer can achieve . . . ."

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[6] In addition to Super Lawyers and Best Lawyers in America, other competing ratings and certification programs available to New Jersey attorneys include Chambers USA (*see* http://www.chambersandpartners.com/usa/search.aspx), LawDragon (*see* http://www.lawdragon.com); Martindale-Hubbell (*see* http://www.martindale.com); the New Jersey Board of Attorney Certification (see http://www.njbac.org/); LawyerRatingz (*see* http://www. lawyerratingz.com/index2.jsp), and many more.

[7] For example, Super Lawyers chooses candidates by conducting state and region-wide surveys of attorneys, asking them to nominate "the best attorneys they've personally observed in action." *See SuperLawyers Selection Process, available at* http://www.superlawyers.com/ (visited Feb. 14, 2007). Lawyers cannot vote for themselves, and in-firm nominations carry less weight than out-of-firm nominations. In addition, SuperLawyers evaluates evidence of peer recognition and achievement, and apparently takes many other steps to make its program noteworthy, unbiased and fair. *Id.* Best Lawyers states that "inclusion in *The Best Lawyers in America* is based entirely on peer review," polls lawyers to determine and nominate top lawyers in various fields, and then conducts follow-up interviews with voters to glean additional information on identified lawyers and then scores all nominees, after which Best Lawyers determines a score relative to all nominees required for inclusion on the Best Lawyers list. *See The Best Lawyers in America*, *Selection Process*, *available at* http://www.bestlawyers.com/aboutus/selprocess.asp (visited Feb. 14, 2007). Martindale-Hubbell performs an ethical review of candidates, then rates legal ability based on independent evaluation and on information from the bar and judiciary before providing a score. *See* Solomon Declaration at pp. 4 - 6 (filed with LexisNexis Motion to Intervene, Jan. 24, 2007). Chambers USA conducts more than 10,000 interviews via telephone to identify top practitioners in various fields, and engages in an internal scoring and evaluation of potential candidates, before ranking and including attorneys in its ratings program. *See* http://www.chambersandpartners.com. (visited Feb. 14, 2007). LawDragon provides a means by which consumers, rather than competitors, may provide their opinions of lawyers, and provides details and disclaimers as to the merits of their rating and selection process. *See* http://www.lawdragon.com/index.php/lawdragon/about/ (Visited Feb. 14, 2007).

RPC 7.1(a)(2). In formulating Opinion 39, the Committee applied RPC 7.1(a)(2) & (3), and concluded that the titles "Super Lawyer," "Best Lawyer in America," or "similar comparative titles" fit the forms of advertising covered by RPC 7.1(a)(2) & (3), and were thus prohibited. *Id.* at 3.[8] The Committee also prohibited New Jersey attorneys from participating in the Super Lawyers and Best Lawyers surveys, which are necessary to formulate their ratings. *Id.*

When it decided *In the Matter of Felmeister & Isaacs,* 104 N.J. 515 (1986), this Court ordered the Committee to prepare a report on ways to modify attorney advertising rules. *Id.* at 527-28. The Committee sought public comment regarding its proposed rules, and the FTC Staff filed a comment in 1987.[9] In its comment, the FTC Staff expressed concern that RPC 7.1(a)(2) & (3) could be applied broadly, chilling attorney advertising from which consumers would benefit.[10] The Committee ultimately recommended and the Court adopted RPC 7.1(a)(2) & (3) with the prohibition against comparative claims intact. *See* RPC 7.1 (notes). The FTC remains concerned that RPC 7.1(a)(2) & (3) and now Opinion 39 unnecessarily restrict truthful and non-misleading advertising and thus harm consumers. Accordingly, the FTC recommends that this Court vacate Opinion 39 and adopt a policy embraced by the overwhelming majority of states by revising RPC 7.1(a)(2) & (3) to allow comparative advertisements so long as they are not false

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[8] The Committee reasoned that advertising under such names is "inherently comparative in nature," and is "likely to create an unjustified expectation about results," rendering it "false and misleading" under RPC 7.1(a)(2) & (3). *Id.*

[9] *See* Letter from Federal Trade Commission to the New Jersey Supreme Court's Committee on Attorney Advertising (November 9, 1987), *available at* 1987 WL 874590.

[10] *Id.*

and misleading.[11] If the Court is nevertheless concerned that the types of advertisements considered in Opinion 39 are potentially misleading, the FTC recommends that the Court adopt a less restrictive remedy such as requiring disclosures.

ARGUMENT

Competition is the hallmark of America's free market economy. The United States Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economy long has been faith in the value of competition.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978). Consumers benefit from competition, including competition among members of the learned professions. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). These benefits accrue in both price and non-price dimensions: "[A]ll elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Prof'l Eng'rs*, 435 U.S. at 695.

As this Court has recognized, consumers of legal services benefit from information about the legal system that can help them choose a lawyer, and "attorney advertising is one of the best ways to foster price competition." *Felmeister & Isaacs,* 104 N.J. at 523-24 (1986). This holding harmonizes well with competition principles and First Amendment commercial speech doctrine, both of which encourage the free flow of truthful and non-misleading information to consumers. *See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765

[11] Indeed, New Jersey, Alabama, and Oregon are the only states with outright prohibitions against all comparative claims in attorney advertising. *See* Table 1, Appendix A.

(1976) (Holding that the free flow of commercial information is indispensable to preserve a predominantly free enterprise economy). First Amendment jurisprudence holds that restrictions limiting commercial speech must both advance a significant state interest and be carefully tailored to advance the state interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)*; see also Florida Bar v. Went for It,* 515 U.S. 618, 632 (1995) (Restrictions on commercial speech must be reasonable and narrowly tailored to achieve the desired objective).

In addition, empirical evidence overwhelmingly demonstrates that consumers benefit in the form of lower prices and higher quality from increased marketplace information.[12] Empirical evidence has also demonstrated that attorney rating programs that evaluate and certify attorneys in an objective and transparent manner provide consumers added benefits.[13] By contrast, studies suggest that regulations prohibiting truthful attorney advertisement may harm consumers through higher prices and reduced quality.

We respectfully submit that the restrictions in RPC 7.1(a)(2) & (3), both as expressed in the rule and as applied in Opinion 39, are not in the interest of New Jersey consumers because they prevent consumers from receiving truthful information and are likely to reduce competition among attorneys without providing any countervailing benefits. If this Court is concerned that consumers may be deceived or misled by the type of advertising Opinion 39 prohibits, there are far less restrictive ways to ameliorate consumer harm than a complete ban on such advertising.

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[12] *See infra.* note 16.

[13] *See infra.* note 19.

I. The Prohibition on Truthful, Non-Misleading Attorney Advertising Is Likely to Harm New Jersey Consumers

Advertising "performs an indispensable role in the allocation of resources in a free enterprise system" because it makes it easier for consumers to compare the price and quality offered by competing suppliers. *Bates v. Arizona State Bar*, 433 U.S. 350, 364 (1977); *see also Virginia Bd. of Pharmacy* 425 U.S. at 765 ("It is a matter of public interest that [private] economic decisions, in the aggregate be intelligent and well informed. To this end, the free flow of commercial information is indispensable."). Advertising is "an immensely powerful instrument for the elimination of ignorance" and from which consumers derive substantial benefits.[14] When consumers face large costs to obtain information about prices and quality, businesses have less incentive to compete.[15] Advertising helps consumers of legal services identify preferences, which gives sellers (including attorneys) the incentive to compete on quality and price. *Felmeister & Isaacs,* 104 N.J. at 524, *citing* Report of the Staff of the Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984) (FTC Report). FTC policy states that truthful and

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[14] G. Stigler, *The Economics of Information*, 64 J. Pol. Econ. 213, 220 (1961).

[15] Several economists have developed models that predict firms that will be able to charge higher prices when consumers face high costs of obtaining marketplace information. *See*, *e.g.*, Dale O. Stahl, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989); Kenneth Burdett & Kenneth L. Judd, *Equilibrium Price Dispersion*, 51 ECONOMETRICA 955 (1983); John Carlson & R. Preston McAfee, *Discrete Equilibrium Price Dispersion*, 91 J. POL. ECON. 480 (1983); Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDIES 293 (1977). Using these models as a theoretical framework, several authors have found evidence that the Internet has led to lower prices by reducing consumers' costs of comparing prices. *See* also, Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCIENCE 563 (2000); James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), *available at* http://www.ftc.gov/be/workpapers/wp283.pdf.

non-deceptive comparative advertising "is a source of important information to consumers[,] assists them in making rational purchase decisions[,] encourages product improvement and innovation, and can lead to lower prices in the marketplace." 16 C.F.R. § 14.15(c). When the state prohibits the free flow of commercial information, the incentive to compete will be weakened, and consumer welfare will be reduced.[16]

Empirical research has found that restrictions on advertising in professions – including the legal profession – lead to higher prices and have either a negative or no effect on quality.[17] The FTC Report, cited by this Court in *Felmeister & Isaacs, supra,* considered the effects of different commercial speech restrictions on attorneys and concluded that "greater flexibility to engage in non-deceptive advertising will be associated with lower prices for consumers of legal services. . . . [T]here appears to be a continuous relationship between prices and regulations, with

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[16] *See* H. Beales, *et al., The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 492 (1981); *see also* R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 661, 670 (1977).

[17] *See* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17,* 8 Sup. Ct. Econ. Rev. 265, 293-304 (2000) (discussing the empirical literature on the effect of advertising restrictions in the professions and citing, among others: James H Love and Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 Intl. J. Econ. Bus. 227 (1996); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National* Advertising 8-9 (1993); R.S. Bond, J.J. Kwoka, J.J. Phelan, and I.T. Witten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980); J.F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 Econ Inq 490, 504 (1976); James H. Love, et al, *Spatial Aspects of Competition in the Market for Legal Services*, 26 Reg Stud 137 (1992); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market,* 26 Applied Econ 1177 (1994)); In *the Matter of Polygram Holdings, Inc.*; FTC Docket No. 9298, at 38 n.52 (F.T.C. 2003), *aff'd* 416 F.3d. 29 (D.C. Cir 2005)(same). *See also* Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 American Bar Found. Res. J. 179, 184 (1979) (discussing that attorney advertising results in the phenomena of increased consumer requests for legal services coupled with lower prices and higher quality of services, particularly in specialized areas of the law); *see* Frank H. Stephen & James H. Love, *Regulation of the Legal Professions,* 5860 Encyclopedia of L. & Econ. 987, 997 (1999), *available at* http://encyclo.findlaw.com/5860book.pdf (empirical studies demonstrate that restrictions on attorney advertising have the effect of raising fees).

the lowest prices associated with the fewest restrictions."[18]

Recently, the United Kingdom's Department of Constitutional Affairs ("DCA") found that professional quality marks – which provide a rating and assessment of lawyers to aid consumers in assessing the quality of attorneys – clearly aided consumer decision-making.[19] In the United Kingdom, quality marks are awarded by each of several law society panels.[20] The panels objectively examine an attorney's relevant knowledge, minimum experience, and competency level as discerned from relevant legal work, cases, interviews, and references.[21] Law society panels are similar to specialty or geographic bars in the United States, membership to which may be attained after a minimal number of years practice.[22] There are specialty panels that require higher levels of experience and competency (such as in family law and immigration specialities, as well as selection to Queen's Counsel, which is the highest standard), but the standards for achieving any society's mark are transparent and objective.[23] DCA found that quality marks based on objective testing resulted in attorneys seeking to improve the quality of their services, thereby promoting competition, and though acquiring such a mark might require lawyers to incur costs, the increased competition among mark-holders reduced the premium

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[18] William W. Jacobs, Brenda W. Doubrava, Robert P. Weaver, Douglas O. Stewart & Eric L. Prahl, IMPROVING CUSTOMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING, FTC Staff Report, 126-27 (1984).

[19] Department of Constitutional Affairs, United Kingdom, Quality in the Legal Service Industry: A Scoping Study, Aug. 2005, p. 38, *available at* http://www.dca.gov.uk/pubs/reports/legalservicesmarketstudy.pdf.

[20] *Id.* at 39.

[21] *Id.*

[22] *Id.*

[23] *Id.*

element in attorney fees.[24] The DCA study also found that consumers benefitted most from advertisements that contained information about an attorney's quality (such as quality mark achievement), especially when such information was coupled with pricing terms.[25]

By limiting the ability of attorneys to use these services, RPC 7.1(a)(2) & (3) and Opinion 39 reduce the amount of information available to New Jersey consumers seeking legal representation. This restriction on otherwise truthful and non-misleading advertising is likely to reduce competition among attorneys to the detriment of New Jersey consumers.

II. First Amendment Commercial Speech Doctrine Requires that Restrictions be Narrowly Tailored to Further a Substantial Government Interest.

The competition principles discussed above also complement the First Amendment commercial speech doctrine. In *Central Hudson*, 447 U.S. at 566, the U.S. Supreme Court held that a regulation prohibiting commercial speech must be supported by a substantial government interest, advance that government interest, and be carefully tailored to serve that interest. *Id.*

Following *Central Hudson,* the Court struck down state prohibitions on truthful attorney advertising, holding, "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel Of the Supreme Court of Ohio*, 471 U.S. 628, 638 (1985). The Court held that restrictions on attorney advertising based on "unsupported assertions" that the advertising in

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[24] *Id.* at 25.

[25] *Id.* at 28.

question is likely to mislead consumers should be struck down. *Id.* Similarly, in *Peel,* the U.S. Supreme Court rejected a state's argument that advertising a certificate in "Civil Trial Advocacy" from the National Board of Trial Advocacy was misleading because the state's case had a "complete absence of any evidence of deception." *Peel,* 496 U.S. at 106 (1990); s*ee also Bates*, 433 U.S. at 372-74 (unsupported assertions of uniqueness of legal services are insufficient to render attorney advertising inherently misleading); *Mason v. Florida Bar*, 208 F.3d 952, 956 (11th Cir. 2000) ("A state cannot satisfy its burden to demonstrate that the harms it recites are real and that its restrictions will alleviate the identified harm by rote invocation of the words 'potentially misleading.'").

To the extent potentially misleading statements could confuse consumers, a state may consider requiring a disclosure explaining the rating systems and organizations. *Peel*, 496 U.S. at 100, citing *In re R.M.J.*, 455 U.S. 191, 201-03 (1982). Here, RPC 7.2(a)(2) & (3) fail to meet the standards set forth in *Central Hudson* and its progeny: While there is an interest in prohibiting deceptive claims, the prophylactic ban at issue here is more restrictive than requiring a disclosure to inform consumers about the nature of the claim. Thus, even if the Committee could demonstrate that the advertising at issue in Opinion 39 is likely to mislead consumers, which it has not, there are substantially less restrictive alternatives than the prohibitions imposed under the Opinion and the Rule.

A. The Committee Does Not Provide any Evidence That Consumers Are Likely to Be Deceived by the Prohibited Advertising.

Truthful and verifiable statements that certain attorneys have been designated by their

peers as meeting certain requirements are likely to help New Jersey consumers seeking legal services to evaluate the quality of attorneys they are considering.[26] As discussed above, when consumers can shop more easily among competing alternative service providers, competition becomes more intense, leading to lower prices and better quality. Absent a showing that such a sweeping restriction is needed to protect consumers from being misled, Opinion 39 is likely to harm New Jersey consumers by limiting their ability to choose among competing New Jersey attorneys.

In *Zauderer,* 471 U.S. at 648-49, the state argued that the use of illustrations in attorney advertising created a risk that the public would be misled, which justified the prophylactic ban on that form of advertising. However, applying the substantial-state-interest prong of the *Central Hudson* test, the Court held:

> The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. Moreover, none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. . . . But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically

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[26] The FTC staff has identified many organizations in addition to those discussed in Opinion 39 that designate, distinguish, or award New Jersey attorneys with prominent achievements. These include, but are not limited to, Chambers USA Awards of Excellence, the New Jersey Board of Attorney Certification, the International Academy of Trial Lawyers, the American College of Trial Lawyers, the American Bar Association and the New Jersey State Bar Association. In addition, Opinion 39 does not discuss how lawyers and law firms should handle designations like the "Best Law Office in South Jersey" which is awarded by the Courier Post newspaper. Similarly, Opinion 39 does not discuss how attorneys may disclose distinctions such as the "Professional Lawyer of the Year" awards that are designated every year by the county Bar Associations in Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Sussex, and Union counties. Lastly, it is unclear if Opinion 39 would include all of the other achievements, ratings, or awards promulgated by the several specialty, minority, and otherwise designated bar associations.

> burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.

Id. Like the state in *Zauderer*, the Committee here – both in formulating the Rule and in its application in Opinion 39 – did not demonstrate that there are "particular evils" associated with comparative forms of advertising that cannot be combated by any means short of a blanket ban.[27] Rather, the Committee simply concluded that comparative claims are inherently misleading and thus should be prohibited.

Of course, there are instances where such forms of advertising *could be* misleading. For example, if such a designation were available to any attorney who paid a fee, without regard to that attorney's qualifications, it likely would be misleading. *See Peel*, 496 U.S. at 102 (a statement touting a certification issued by an organization "that had made no inquiry into the petitioner's fitness" or "issued certificates indiscriminately for a price" could be misleading). But RPC 7.1(a)(2) & (3), both in their terms and as applied through Opinion 39 prohibit all such designations without any factual analysis, regardless of how carefully the comparisons are crafted.

B. The Advertising at Issue Here Contains Verifiable Facts That Are Unlikely to Mislead Consumers.

Claims that an attorney has been designated a "Super Lawyer," "Best Lawyer," or other similar title are objectively verifiable statements of fact, and consumers can verify the bases for

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[27] The burden the government faces when fashioning a prophylactic rule that restricts commercial speech differs from the government's burden when challenging misleading commercial speech on a case-by-case basis. In *Zauderer*, for example, the Court noted that the FTC has policed the use of visually deceptive advertising on a case-by-case basis. 471 U.S. at 649. Although it acknowledged the difficulty of that task, the Court found that, in the face of the possibility of individual case enforcement, the state's blanket ban approach could not stand. *Id.*

such designations. *See Peel*, 496 U.S. at 101. ("A lawyer's certification by [National Board of Trial Advocacy] is a verifiable fact, as are the predicate requirements for that certification"); *see also Az. Ethics Op. 05-03* at 2 (Jul. 2005) ("[T]he factual statement that a lawyer is listed in *The Best Lawyers in America* is an implied comparison with a subjective basis that can be verified."). Indeed, as Respondent noted in its brief, Best Lawyers' and Super Lawyers' selection methodologies were "readily and publicly accessible both in printed publications (i.e., in 'Super Lawyers' magazines and in 'The Best Lawyers in America' annual publication) and on websites maintained by both publishers." Resp. Br. at 4. *See also Az. Ethics Op. 05-03* at 2 (Jul. 2005) ("a consumer who wishes to investigate the underlying basis for a lawyer's listing in The Best Lawyers in America can simply read the introduction to the publication.")

As the Supreme Court observed in *Peel* with respect to advertising of credentials, whether an attorney has been selected a Super Lawyer or a Best Lawyer "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work." *Peel*, 496 U.S. at 101. Although the Committee may not find such designations (by Super Lawyers, Best Lawyers, Martindale, and others) as meaningful indicators of quality for consumers, consumers should be free to make that decision themselves. Indeed, regarding the same programs at issue here, the Supreme Court of Arizona found that consumers can easily review the publications' means for selecting attorneys for their respective designations and determine "how much value, if any, to afford the advertised listings." *Az. Ethics Op. 05-03* at 2. Even though consumers may not be familiar with the Best Lawyers or Super Lawyers publications, "[u]nfamiliarity is not synonymous with misinformation." *Mason*,

208 F.3d at 957. Consumers are not necessarily misled when they fail to inform themselves of the precise standards under which certification is granted. *See Peel*, 496 U.S. at 102-03.

Because "the strength of a certification is measured by the quality of the organization for which it stands," *Peel,* 496 U.S. at 102, the various rating programs each have an interest in assuring that their respective designations signal some quality to consumers.[28] If consumers do not believe their selection criteria are meaningful, there will be little value in being deemed "AV Rated," a "Super Lawyer," a "Best Lawyer" or similar distinction, thereby threatening the programs' existence.

C. There Are Substantially Less Restrictive Alternatives Than Banning Comparative Ratings Programs.

Limitations on attorney advertising should be narrowly drawn to address demonstrated consumer harm. As discussed above, the Committee has made no showing of actual or likely consumer harm. If this Court is aware of evidence that the advertising prohibited by RPC 7.1(a)(2) & (3) and Opinion 39 misleads consumers, it should restrict consumers' access to truthful advertising in a manner carefully tailored to addressing the perceived harm. *See In re R.M.J.*, 455 U.S. at 203 (1982) ("States may not place an absolute prohibition on certain types of *potentially* misleading information . . . if the information may be presented in a way that is not deceptive."); *see also Peel*, 496 U.S. at 110 ("A State may not . . . completely ban statements that are not actually or inherently misleading."); *Central Hudson,* 447 U.S. at 566 (commercial speech restrictions "may be no broader than reasonably necessary to prevent deception.")

[28] Competition among ratings programs for importance as a reliable source of information, moreover, is likely to elevate both the manner in which attorneys are evaluated and the caliber of the information reported. A professional designation that provides consumers with no information will have little marketplace value.

Concerns about deceptive advertising are better addressed through requiring more information in the form of disclosures rather than through restrictions on the flow of truthful information to consumers. *See Peel*, 496 U.S. at 108 ("disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information.") In *Peel*, the Court noted that to the extent that statements of private certification or specialization "could confuse consumers, a state might consider screening certifying organizations or requiring a disclaimer about the certifying organizations or the standards of a specialty." *Id*. at 110.

Almost all states permit truthful, non-deceptive comparative attorney advertising, and many have adopted narrow disclosure requirements to address concerns that consumers may be misled. Every state prohibits false and misleading advertising but, with the exception of New Jersey, Alabama and Oregon, every state either expressly allows comparative advertising that may be substantiated or evaluates comparative advertising on a case-by-case basis to determine if it is misleading or deceptive.[29]

Some states have addressed concerns about advertising comparative titles that may create an unjustified expectation of results. However, they undertake an analysis of pertinent facts before rendering an opinion that such advertising is indeed misleading. For example, the Virginia and Tennessee Bars have both issued ethics opinions allowing attorneys to advertise that they have been chosen as Best Lawyers or Super Lawyers, but limiting the claims attorneys can make based on their designations. *See Va. Legal Ethics Op. N. 1750* at 7 (Apr. 4, 2006) ("a lawyer may advertise the fact that he/she is listed in a publication such as *The Best Lawyers in*

[29] *See* Appendix A, Table 1.

America, or similar publications and include additional statements, claims, or characterizations based upon the lawyer's inclusion in such publication, provided such statements, claims or characterizations do not violate Rule 7.1."); *Tenn. Advisory Ethics Opinion* 2006-A-841 (Sept. 21, 2006) (advertising that attorneys have been selected as "Super Lawyer" or "Best Lawyer" is permitted "as long as the lawyers do not go further and refer to themselves subjectively as 'super' or 'the best' on the basis of such designations contained within these publications.").

Further, Virginia and Tennessee prohibit communicating to the public credentials that are bestowed indiscriminately or to any attorney willing to pay a fee. *See Va. LEO 1750* at 7-8 (attorneys may not communicate credentials that are not "based upon objective criteria or a legitimate peer review process but [are] available to any lawyer who is willing to pay a fee"); *see also Tenn. AEO 2006-A-841* at 1 ("[t]he use of subjective characterizations or descriptions conferred by organizations may be permissible if the organization has made inquiry into the lawyer's fitness and does not issue or confer such characterization indiscriminately or for a price.").

Commentary regarding the American Bar Association's Model Rules of Professional Conduct states that any misleading effect of "unsubstantiated comparisons of lawyer's services or fees with services or fees of other lawyers" that are presented in such a way as to "lead a reasonable person to conclude that the comparison can be substantiated" may be cured by the "inclusion of an appropriate disclaimer or qualifying language." MRPC 7.1 comment [3]. Following this approach, the Arizona Bar determined that attorneys can advertise their inclusion in *The Best Lawyers in America* as long as they disclose "the year in which and the specialty for which the lawyer was listed in the publication." *Az. Ethics. Op. 05-03* at 3.

In June, 2006, the New York Unified Court System promulgated draft rules that, like the New Jersey rules, prohibited comparative claims. The FTC Staff submitted comments to New York in September, 2006, and recommended eliminating or modifying, among other things, rules prohibiting comparative advertising.[30] On January 4, 2007, the New York Unified Court system promulgated revised rules incorporating nearly all of the FTC Staff's recommendations.[31] The revised New York rules specifically permit comparative claims that may be factually supported, though they require a disclosure that prior results do not guarantee a similar outcome.

The Committee's concern that certain comparative claims could mislead consumers about the results lawyers can achieve can be better addressed by a narrower rule than by a prophylactic rule banning all comparative titles. For example, the Court could require that attorneys may advertise only those professional credentials that are not bestowed indiscriminately without any inquiry into the attorney's fitness or those available for a fee.[32] Further, the Court could require attorneys advertising their credentials to disclose the year and specialty for which they have been listed and prohibit misleading claims based upon receiving the credential. There is no indication that the burden of distinguishing bona fide from bogus professional designations would be significant, but the benefits consumers derive from the free flow of commercial information should more than "justify imposing on would-be regulators the costs of distinguishing the

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[30] FTC Staff comments may be accessed at http://www.ftc.gov/os/2006/09/V060020-image.pdf.

[31] The revised Rules of the Unified Court System of New York (with red-lined changes comparing the initial draft) are available at http://www.nycourts.gov/rules/attorney_ads_amendments.shtml.

[32] RPC 7.1(a)(3) prohibits all advertisements that are comparative in nature as being inherently "false or misleading." Thus, a finding that advertising a professional designation conveys an implicit comparison may necessitate a finding that such an advertisement is prohibited even if truthful. To the extent that Opinion 39's restrictions are mandated by RPC 7.1(a)(3), we recommend revising the Rule so as not to bar all comparative advertising.

truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

CONCLUSION

Because the New Jersey policy in RPC 7.1 prohibits the free-flow of truthful and non-deceptive information from consumers, the FTC recommends that the Court revise the rule to allow truthful, non-misleading comparative advertising. Thus, the FTC suggests that the Court revise RPC 7.1 as described herein and vacate Opinion 39 accordingly.

Respectfully Submitted,

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APPENDIX A

TABLE 1

STATE	*RULE*	*COMMENT*
Alabama	Alabama Rules of Professional Conduct, Rule 7.1(c).	Besides New Jersey and Oregon, Alabama is the only state with an outright prohibition on comparative claims in attorney advertising, though exception is granted with respect to Court and Bar approved certification programs.
Alaska	Alaska Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Arizona	Arizona Rules of Professional Conduct, ER 7.1, Comments [2] and [3].	The comments expressly allow for comparative claims even if they can not be substantiated, so long as there is no "substantial likelihood to mislead."
Arkansas	Arkansas Disciplinary Rules of Professional Conduct. Rule 7.1(C).	The Rule allows for comparative advertisements that can be substantiated.
California	State Bar of California Rules of Professional Conduct, §1-400(D).	California rules prohibit misleading advertising, but do not include comparative claims when defining such advertisements.
Colorado	Colorado Disciplinary Rules of Professional Conduct, Rule 7.1.	Colorado rules prohibit misleading advertising, but do not define comparative claims as misleading.
Connecticut	Connecticut Rules of Professional Conduct, Rule 7.1(3).	The Rule allows for comparative advertisements that can be substantiated.
Delaware	Delaware Lawyers' Rules of Professional Conduct, Rule 7.1 and Comment.	Comment allows for comparative claims, and explains that an unsubstantiated claim "may" be misleading if presented in such a way to lead a reasonable person to conclude it could be substantiated.

STATE	*RULE*	*COMMENT*
District of Columbia	District of Columbia Rules of Professional Conduct, Rule 7.1, Comment [1].	While the rules are silent on comparative advertising, the Comments explain that comparative advertisements that can not be substantiated are misleading.
Florida	Florida Rules of Professional Conduct § 4-7.2(b)(1)(D), and Comment [3].	The Rule allows for comparative advertisements that can be substantiated.
Georgia	Georgia Rules of Professional Conduct, Rule 7.1(a)(3).	The Rule allows for comparative advertisements that can be substantiated.
Hawaii	Hawaii Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Idaho	Idaho Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Illinois	Illinois Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Indiana	Indiana Rules of Court: Rules of Professional Conduct, Rule 7.2	Indiana rules do not include comparative claims as inherently misleading advertising. The Indiana Supreme Court is presently reviewing proposed changes to their rules, and have proposed allowing for comparative advertisement that can be substantiated. (Proposed Indiana rules are available at http://www.in.gov/judiciary/ rules/ proposed/2007/pcr-isba(jan).pdf).
Iowa	Iowa Rules of Professional Conduct; § 32:7.1	Iowa rules only prohibit unverifiable factual claims in attorney advertising.
Kansas	Kansas Rules of Professional Conduct, Rule 7.2(c).	The Rule allows for comparative advertisements that can be substantiated.

STATE	*RULE*	*COMMENT*
Kentucky	Kentucky Supreme Court Rules; § SCR 3.130(7.15)(c); *See also* Kentucky Rules of Professional Conduct, Rule 7.15(c)	Kentucky rules allow for comparative advertisements that can be substantiated.
Louisiana	Louisiana Rules of Professional Conduct, Rule 7.1(a)(v)	Presently, Louisiana rules allow for comparative advertisements that can be substantiated. The Rules of Professional Conduct Committee of the Louisiana State Bar has proposed new attorney advertising rules, which (as presently drafted) would also allow for substantiated comparative advertising.
Maine	Maine Code of Professional Responsibility, § 3.9.	Maine Code of Professional Responsibility is silent on the use of comparative claims in advertising, though all misleading advertisements are prohibited.
Maryland	Maryland Lawyers' Rules of Professional Conduct, § 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Massachusetts	Massachusetts Rules of Professional Conduct, Rule 7.1.	Massachusetts rule is silent relative to comparative claims in advertising.
Michigan	Michigan Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Minnesota	Minnesota Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Mississippi	Mississippi Rules of Professional Conduct, Rule 7.1(d).	The Rule allows for comparative advertisements that can be substantiated.
Missouri	Missouri Rules of Professional Conduct, § 7.1(d).	The Rule allows for comparative advertisements that can be substantiated.

STATE	*RULE*	*COMMENT*
Montana	Montana Rules of Professional Conduct, Rule 7.1.	Montana rules are silent as to comparative advertising, but prohibit false or misleading claims.
Nebraska	Nebraska Supreme Court Code of Professional Responsibility, DR 2-101(A)(3).	The Rule allows for comparative advertisements that can be substantiated.
Nevada	Supreme Court of Nevada Supreme Court Rules, Rule 195(3)	The Rule allows for comparative advertisements that can be substantiated.
New Hampshire	New Hampshire Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
New Jersey	New Jersey Disciplinary Rules of Professional Conduct, RPC 7.1(a)(3)	Besides Alabama and Oregon, is the only state with an outright prohibition on comparative claims in all attorney advertising.
New Mexico	New Mexico Rules of Professional Conduct, § 16-701.	Rules forbid misleading advertising, but do not include comparative advertising in the definition of misleading advertising.
New York	New York Unified Court System Rules Governing Lawyer Advertising (Effective February 1, 2007), § 1200.6(d) & (e).	Recently enacted rules expressly allow for attorney advertising to contain comparative claims so long as advertising complies with other rules and contains disclaimers that prior results do not guarantee similar outcomes.
North Carolina	North Carolina Rules of Professional Conduct, Rule 7.1(3)	The Rule allows for comparative advertisements that can be substantiated.
North Dakota	North Dakota Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.

STATE	*RULE*	*COMMENT*
Ohio	Ohio Rules of Professional Conduct, Rule 7.1(c) and Comment [3].	Effective February 1, 2007, Ohio converted to a system that is adopted similar to the ABA Model Rules, and accordingly does not define comparative advertising as misleading, but states that unsubstantiated comparison "may" be misleading.
Oklahoma	Oklahoma Rules of Professional Conduct, Rule 7.1(a)(4).	The Rule allows for comparative advertisements that can be substantiated.
Oregon	Oregon Rules of Professional Conduct, Rule 7.1(a)(3)	Besides Alabama and New Jersey, Oregon is the only state that expressly prohibits all comparative advertising. We observe that while the State Ethics Committee has been silent as to the use of Best Lawyers and Super Lawyers, according to each entity's web site, several members of the Board of Governors are listed as Best Lawyers in America and two are listed among Super Lawyers.
Pennsylvania	Pennsylvania Disciplinary Rules of Professional Conduct, Rule 7. & Comment [3].	The Rule does not define comparative advertising as misleading, and the Comment states that unsubstantiated comparison "may" be misleading.
Rhode Island	Rhode Island Disciplinary Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
South Carolina	South Carolina Rules of Professional Responsibility, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
South Dakota	South Dakota Rules of Professional Responsibility, Rule 7.1(c)(5).	The Rule allows for comparative advertisements that can be substantiated.

STATE	*RULE*	*COMMENT*
Tennessee	Tennessee Rules of Professional Conduct, Rule 7.1(C).	The Rule allows for comparative advertisements that can be substantiated.
Texas	Texas Disciplinary Rules of Professional Conduct, Rule 7.02(a)(4)	The Rule allows for comparative advertisements that can be substantiated by reference to verifiable, objective data.
Utah	Utah Rules of Professional Conduct, Rule 7.1, Comment [3].	The Rule does not define comparative advertising as misleading, and the Comment states that unsubstantiated comparison "may" be misleading.
Vermont	Vermont Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Virginia	Virginia State Bar Rules of Professional Conduct, Rule 7.1(a)(3).	The Rule allows for comparative advertisements that can be substantiated.
Washington	Washington Rules of Professional Conduct, Rule 7.1	The Rule allows for comparative advertisements that can be substantiated.
West Virginia	West Virginia Rules of Professional Conduct, Rule 7.1(c).	The Rule allows for comparative advertisements that can be substantiated.
Wisconsin	Wisconsin Supreme Court Rules, SCR Chapter 20, 20:7.1(a)(3).	The Rule allows for comparative advertisements that can be substantiated.
Wyoming	Wyoming Supreme Court Rules of Professional Conduct for Attorneys at Law, Rule 7.1(c) & Comment [3].	The Rule allows for comparative advertisements that can be substantiated.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of the Federal Trade Commission as Amicus Curiae Supporting Arguments to Vacate Opinion 39 of the Committee On Attorney Advertising Appointed By the Supreme Court of New Jersey was sent by regular, U.S. Mail, this 8th day of May, 2007 to the following counsel:

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